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The Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors (2002) HCA

[1]	Word Count: 7569 (does not include footnotes)
[2]	Date: 17 April 2020

Introduction

[1] According to First Peoples protocols, it is incumbent on me to introduce myself and my cultural affiliations. I am a Gomeroi-Kamilaroi woman. My family connections are to Bingara on the Gwydir River in north-west New South Wales. My great-grandmother was a member of the stolen generations. My great grandmother's removal from country meant that we were denied the opportunity of learning language and culture, however as the following discussion of First Peoples philosophical worldviews explains, this does not necessarily mean that our connection to country is 'lost'.

[2] It is also incumbent on me to state that under First Peoples laws I have no authority whatsoever to sit in judgement of another First Peoples group. This is a fundamental recognition of the inherent sovereignty of First Peoples. The questions before this court however, go to the relationship between the Yorta Yorta peoples and various governments and agencies of the Australian nation state. They come before the court rather belatedly, and regrettably in the absence of any formal treaty between the British colonial government (or its successors), and the Yorta Yorta peoples. These proceedings however present an opportunity to set the relationship between the various parties on a new footing, one based on equality and mutual respect. The inherent sovereignty of First Peoples must be the starting point for re-setting this relationship, and for consideration of the issues before this court.

The application

[3] The Yorta Yorta peoples have brought a claim for native title under the *Native Title Act* 1993 (Cth) (*NTA*), as amended, over their traditional country. The claimant groups is represented by a group of eight applicants namely: Ella Anselmi, Wayne Atkinson, Geraldine Briggs, Kenneth Briggs, Elizabeth Hoffman, Desmond Morgan, Colin Walker and Margaret Wirrpunda. Broadly speaking the claim encompasses all 'public lands' within an oval shaped area of some 5,000 square kilometres which straddles what is now known as the border between Victoria and New South Wales. The details of the claim are set out in the majority judgement at [XX].[1]

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[1] Yorta Yorta FC, [11]. The native title rights and interests claimed are: Rights to possession, occupation, use and enjoyment of the lands, waters and natural resources, to the exclusion of all others; (a) Interests of ownership, including of water and natural resources according to traditional law and custom and the right to be recognised as the owners of the lands, waters and natural resources, according to traditional law and custom; (b) Rights to possession, occupation, use and enjoyment of the lands, waters and natural resources, according to traditional law and custom; (c) The right to participate to the fullest extent practicable in the making of decisions by non-native title holders, including the government or its agencies about access to, occupation, use and enjoyment of the lands, waters, and natural resources, including the right to be consulted about such decisions; (d) The right to access and occupy the lands and waters; (e) Rights to use and enjoy the land, waters and natural resources, to hunt, fish, forage for traditional foods and medicines and camp; for burial, ceremonial and educational purposes, and for any other purposed deemed appropriate by the native title holders; (f) The right to protect places and areas of importance in and on the determination area and the waters. (FC-11)

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While the state boundaries were immaterial to the Yorta Yorta peoples pre-1788, they are significant in this case because they determine the different colonial statutory regimes applied in this case, and the consequences of such regimes for the continuing enjoyment of native rights and interests. Within the scheme of the *NTA*, the various statutory regimes and the rights and interests they grant to other parties, may have the effect of 'extinguishing' the Yorta Yorta peoples native title.

[4] The Yorta Yorta peoples' native title claim was made on the basis that their current beliefs and practices were an expression of their 'traditional' laws and customs in an 'adapted form'. In short these beliefs and practices go to the exercise of the Yorta Yorta peoples' custodial responsibilities to country.[2] The Yorta Yorta peoples also argued that since colonisation of their country in the 1840's, they have made numerous attempts to assert their custodial responsibilities towards country, which they argued is evidence of the continuation of their laws and customs.[3]

[5] It must be noted that the Yorta Yorta peoples native title claim was strongly contested. There were over 500 non-claimant parties to the proceedings.[4] The main respondents, the NSW and Victorian state governments, both denied the existence of the Yorta Yorta peoples native title in their jurisdictions.[5] Other respondents, but not all, also denied the existence of native title.[6] The respondents primarily asserted that their interests were likely to be affected by a positive determination of native title.[7]

[6] In my view the Yorta Yorta peoples have made out their native title claim. This is because. Yorta Yorta peoples present observance of their laws and customs are an incident of their inherent sovereignty as *peoples*. The Yorta Yorta peoples present acknowledgement and observance of their laws and customs also reflects their custodial responsibilities to care for country. Despite the ravages of colonisation and the concerted efforts of colonial governments to disrupt their laws and culture, the Yorta Yorta peoples have maintained their identity as *peoples,* through their connection to their ancestral lands. In my opinion these are the critical factors that must be demonstrated in the matter before this court.

Findings of the Trial Judge

[7] The key finding of the trial judge, Olney J, was that by the end of the 19th century, the claimant's ancestors had:

> …. ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real acknowledge of their traditional customs.9

Based on this finding, the trial judge concluded that the foundation of the Yorta Yorta peoples' claim had 'disappeared', and therefore any native title rights and interests they might have previously held had suffered a similar fate. The trial judge also found that once native title is 'lost', it is not capable of revival.[10] In making this assessment the trial judge regarded the writing of an early settler, Edward Curr, who lived in Yorta Yorta country for ten years, as the

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[1] [2] Yorta Yorta FC, [122]-[125].
[2] [3] Yorta Yorta FC, [
[3] [4] Yorta Yourta FC, [7].
[4] [5] Yorta Yorta FC, [18].
[5] [6] Yorta Yorta FC, [18].
[6] [7] Yorta Yorta FC, [18].
[7] [9] Yorta Yorta FC, 129.
[8] [10] Yorta Yorta FC, 129.

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most credible source of evidence for the 'traditional' laws and customs of the group.[11] This evidence was afforded considerable weight, in comparison to the testimony of the Yorta Yorta peoples, which was based on 'oral traditions passed down through *many generations extending over a period in excess of two hundred years*'.[12] In addition the trial judge found that the Yorta Yorta peoples' petition to the Governor of New South Wales in 1881, provided 'positive evidence' of the discontinuation of their laws and customs.[13] The details of this petition, and its interpretation by the courts will be discussed further below.

Appeals

[8] The Yorta Yorta peoples appealed the decision of the trial judge in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FC 45.[14] The primary grounds for the appeal was that the trial judge adopted a 'frozen in time' approach to determining the existence of traditional laws and custom, by wrongly equating the existence of native title with the existence of a 'traditional society', or a 'traditional lifestyle'.[15] The appellants contended that the *NTA* directs attention to laws and customs presently acknowledged and observed. Further it was contended that the trial judge had failed to give consideration to the capacity of traditional laws and customs to adapt to changed circumstances.[16] A further issue on appeal was the trial judge had ignored historical evidence of the Yorta Yorta peoples continuing connection with country, and the evidence of living witnesses about circumstances in which the Yorta Yorta peoples found themselves by the end of the nineteenth century.[17] The findings of the trial judge were not disturbed on appeal to the Federal Court, which was dismissed by the majority judges, Branson and Katz JJ (Black CJ dissenting).

[9] The matter is now the subject of appeal before this court. The grounds for the appeal include, inter-alia, that both the trial judge and the Full Court of the Federal Court took an overly restrictive approach to questions of proof, requiring the claimants to provide positive evidence of the continued observance of traditional laws and customs from the time of British colonisation to the present.[18] It was also argued by the claimants that s223(1) of the *NTA* directed attention to the rights and interests '*presently* possessed under traditional laws *presently* acknowledged and customs *presently* observed', and also to the present connection by those laws and customs.[19] That appeal has been dismissed by the majority judges in this court. This dissenting judgement will set out the reasons for finding in favour of the Yorta Yorta peoples' native title claim. Importantly it also outlines brings and understanding of First Peoples legal philosophy to inform this judgement. Given the protracted history leading to the recognition of native title in this country (and other issues which I will address in this judgement), the inclusion of First Peoples legal philosophy provides a welcome and necessary addition to the deliberations of this court. Before doing that I will make some brief observations about the role of the courts in the deliberation of native title claims, and also some of the problems with the approach taken by the majority judges in this case.

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[9] [11] Yorta Yorta FC [105]. See Edward M Curr, Recollections of Squatting in Victoria: Then Called the Port Phillip District (From 1841-1851) published 1883; and The Australian Race: Its Origins, Language, Customs Place of Land in Australia and the Routes by which it Spread itself over that Continent, published 1886.

[10] [12] Yorta Yorta FC [106] – emphasis added.

[11] [13] Yorta Yorta FC [120] CHECK THIS REFERENCE!

[12] [14] Yorta Yorta FCFC.

[13] [15] Yorta Yorta, FCFC, [11].

[14] [16] Yorta Yorta, FCFC, [11].

[15] [17] Yorta Yorta, FCFC, [11].

[16] [18] Yorta Yorta HC, [26]-[28].

[17] [19] Yorta Yorta HC, [28] – emphasis in original.

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The role of the courts

[10] This case is of great significance because it is the first case before this court to consider the requirements for proof of native title under *NTA*, and as amended by the *Native Title Amendment Act 1998* (Cth).[20] It is also the first case to consider the potential for native title to be enjoyed in the areas most extensively affected by British colonisation, the south eastern parts of what is now known as Australia. Therefore the case is of great importance because it will set the scope for the potential for native title into the future, with significant consequences for the legal, political, cultural, social and economic status of First Peoples in this country. The role of the courts in adjudicating cases of such import cannot be understated.

[11] The case of *Mabo v State of Queensland* [No.2][21] recognised a fundamental injustice. That is that the various British colonies now constituting the Australian nation state came into being by virtue of a 'legal fiction',' the doctrine of terra nullius.[22] *Mabo* found that as a consequence of the application of terra nullius to the various colonies, First Peoples had been denied their rights and interests in land.[23] The belated recognition of First Peoples rights and interests in land, however was subjected to a limitation. It was said to be 'precluded if such recognition would fracture a skeletal principle of the Australian nation state'.[24] Precisely what was meant by the term 'skeletal principle' however was not made entirely clear.

[12] While the High Court's decision in *Mabo* has been celebrated by many as recognising a fundamental injustice by rejecting the doctrine of terra nullius, the truth is the High Court shied away from any consideration of the legitimacy of the British assertion of sovereignty in Australia, declaring that such a matter was an 'act of state' that could not be challenged in the municipal courts. This view has been strongly criticised, and for good reasons.[25] It is entirely contradictory for the court to reject terra nullius on one hand - to give belated recognition to First Peoples rights and interests in land – while on the other hand leaving terra nullius intact for all other purposes. There is a strange and irreconcilable incoherence between the High Court's recognition of 'native title', based on First Peoples laws and customs, and the denial of the inherent sovereignty of First Peoples, from which those laws and customs are derived.

[13] The opinion of the trial judge was that the *NTA* did not provide a warrant for the 'court to play the role of social engineer, righting the wrongs of the past centuries and dispensing justice according to contemporary notions of political correctness rather than according to law.[28] Similar statements were also made by the majority judges in the Federal Court on appeal.[29] This contention however is problematic for a number of reasons.

As was observed by Merkel J in *Shaw v Wolf*[30], a case where the Aboriginality of several persons was contested for the purpose of their eligibility to stand for election to the former Aboriginal and Torres Strait Islander Commission, that:

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[18] [20] Yorta Yorta HC, [4].
[19] [21] Mabo v State of Queensland [No.2] (1992) 175 CLR 1 (Mabo)
[20] [22] *Mabo*, [42].
[21] [23] *Mabo*, [42]
[22] [24] *Mabo*, [43].
[25] Michael Mansell, 'The Court Gives an Inch but Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin* 4, 4-5; Irene Watson, 'Indigenous Peoples' Law-ways: Survival against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 48.
[23] [28] Yorta Yorta FC, [17].
[24] [29] REF HERE
[25] [30] *Edwina Shaw & Anor v Charles Wolf & Ors* (1998) 389 FCA, available at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1998/389.html

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> … it is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a Parliament that is not representative of Aboriginal people to be determined by a Court which is also not representative of Aboriginal people. Whilst many would say that this is an inevitable incident of political and legal life in Australia, I do not accept that that must always be necessarily so. It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people.[31]

[14] The same caution must be exercised – *a fortiori* - with respect to claims brought under the *NTA* generally, and specifically to the case before the court. There is an inherent danger in colonial courts adjudicating matters pertaining to First Peoples identity and rights through a process of what could be crudely termed 'translation'. Such a process inevitably involves an exercise of judicial power to determine whether the obligations and rights arising under First Peoples laws, can be translated to a form which is acceptable to the colonial legal system. As the passage of this case before the courts has shown, and has been admitted by the majority judges in this court, such a process is 'fraught with evident difficulty'.[32] This is especially so, because the rights and obligations arising from First Peoples law are issues pertaining to the inherent sovereignty of First Peoples. It is no longer acceptable to maintain that the current circumstances First Nations find themselves in is 'an inevitable incident of political and legal life in Australia'. It must also be acknowledged that First Nations laws and customs with respect to country (or in fact any other matters those laws address) are an incident of the inherent sovereignty of First Peoples. To deny this fundamental truth would maintain the legal fiction of terra nullius, both in theory and substance. Acknowledging the inherent sovereignty of First Nations as the starting point for interpreting the *NTA* can be achieved without 'fracturing a skeletal principle' of the Australian legal system. LINKING STATEMENT?

The majority judgement

[15] In my view the majority judgement produced an unnecessarily restrictive construction of native title which is completely unwarranted by the text of the *NTA*. The problems stems from what the majority judges regarded as a 'fundamental principle' which should inform the interpretation of the *NTA* - that after the British assertion of sovereignty - there could be 'no parallel law-making system'. This 'fundamental principle' infected all other aspects of the majority judgement. It informed the majority's view that the *NTA* requires proof of the continuation of traditional laws and customs *from the time of the British assertion of sovereignty to present*. In effect it introduces a *presumption of terra nullius*, with First Peoples required to show that they had a system of law and custom when the British arrived. This approach also fails to regard the law and customs of First Peoples as living systems of law, and indeed treats First Peoples laws as if they are 'frozen in time'.

[16] This 'fundamental principles' also informed the majority view that First Peoples must prove that they constitute a 'society' – which they defined as 'a body of persons united in and by its acknowledgement and observance of a body of laws and customs',[1] which has a continuing vitality since the British assertion of sovereignty. This requirement disingenuously re-introduces the common law 'scale of organisation test'[33] into the interpretation of the NTA - a

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[26] [31] Shaw v Wolf (PINPOINT) – CHECK AGAINST HARDCOPY

[27] [32] Yorta Yorta HC, [55].

[33] *In Re Southern Rhodesia [1919] AC 211, 233-234; Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 – emphasis added.

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test which was firmly rejected in *Mabo (No.2).*[34] This test would inevitably require a process of 'translation' to determine if First Peoples laws constitute a system that is capable of sustaining rights and interests in land.[35] As the following discussion of First Peoples legal philosophy will show, this approach is entirely antithetical to First Peoples concepts of law, and should also be rejected.

First Peoples Philosophy and Law

[17] First Nations and Peoples are diverse. [36] From First Peoples' perspectives, this land now known as Australia, is a 'continent', and not a country.[37] This understanding reflects the diversity of First Peoples and the inter-national relationships between different First Peoples. It is an acknowledgement of the inherent sovereignty of each First Peoples group, and a philosophical worldview based on inclusivity and respect for difference, co-existence and co-operation. [38] The diversity of First Peoples means that it is not possible to articulate a 'universal' concept of First Peoples law, or more correctly laws. Indeed to attempt to do so would be antithetical to First Peoples respect for diversity and difference. For the purposes of the present case however, it is helpful to identify some shared philosophical features of First Peoples laws and worldviews, which will inform my judgement.

[18] First Peoples laws are sourced in our creation ancestors, who travelled across the landscape, putting people on country and giving us laws to live by. Being descended from the creation ancestors, First Peoples are born from country. Our ancestral lines connect us to country. Our embodiment is the physical manifestation of our connection to country.[39] Our identification with country and kin is the basis of our law and culture. This connection to country has been described as an 'ontological relationship to land.'[40]

[19] First Peoples worldviews emphasise the 'inter-connectedness' of all living things.[41] This inter-connectedness has also been expressed as 'relationality',[42] and 'relatedness'.[43] Relationality means First Peoples identity is understood in the context of our relationships to our ancestral

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Mabo v Queensland (No.2) 1992, 40.

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[35] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

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[36] Irene Watson, previously cited: remove this citation and make cross-reference, Settled and Unsettled Spaces 20-21.

[37] Ambellin Kwaymullina, 'Aboriginal Nations, the Australian nation-state and Indigenous international legal traditions' in Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge, 2018), 5.

[38] Irene Watson, 'Settled and Unsettled Spaces: Are We Free To Roam?' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen and Unwin, 2007), 20-21.

[30] [39] Aileen Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty: The High Court and the Yorta Yorta decision' (2004), Borderlands e-journal, 3(2), [24].

[40] Aileen Moreton-Robinson, 'I Still Call Australia Home: Indigenous Belonging and Place in a White Postcolonizing Society', in Sara Ahmed, Claudia Castenada, Anne-Marie Fortier, Mimi Sheller (eds), *Uprootings/Regroundings: Questions of Home and Migration* (Berg Press, 2003), 33.

[41] Irene Watson, 'Kaldowinyeri-Munaintya: In The Beginning' (2000), *Flinders Journal of Law Reform* 4(1), 6.

[42] Moreton-Robinson, I Still call Australia Home, 34.

[43] Karin Martin, Please Knock Before You Enter: Aboriginal Regulation of Outsiders and the Implications for Researchers (Post Pressed, 2008), 66; Karin Martin and Booran Mirraboopa, 'Ways of knowing, being and doing: A theoretical framework and methods for Indigenous and Indigenist research' (2003), *Journal of Australian Studies* 27(76), 205.

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beings, kin, and to country.[44] From First Peoples perspectives, relatedness, is to 'know who you are, where you are from and how you are related.'[45] Relatedness also extend to other living entities including animals, plants, waterways, climate, skies and spirits.[46] First Peoples 'relationality' is also underpinned by both 'connections with one's country and the spirit world',[47] and a belief that the land is a living entity.[48] Our spiritual connection to country and kin provide the foundation for First Peoples identity, culture and law which do not fit neatly into positivistic legal doctrinal categories.[49] This understanding has particular significance for the case at hand.

[20] First Peoples relationality to land means that country forms part of our kinship systems. While this kinship may have been damaged by colonisation, the kinship system never changes because each individual and clan group is connected to country through their creation ancestors. [50] Maintaining relationships to country is so fundamental to First Peoples ways of knowing and being, that looking after country is an imperative under First Peoples laws.[51] The relationship with land is so central to First Peoples ontologies and ways of being that 'the land is the law'.[52] The kinship relation between people and country also instils a 'custodial ethic' towards land, which is fundamentally different to Western concepts of property ownership. [53] The depth of the kinship between people and country is frequently expressed as 'belonging to country'.[54]

[21] Relationality and relatedness are also reflected in the principle of reciprocity which is central to First Peoples understandings of law and sovereignty. Reciprocity is a major principle of Aboriginal law, and 'the highest level of reciprocity is to the land. We must care for the land (or place), because it cares for us and provides all of our needs.'[55] Reciprocity is also reflected in First Peoples concepts of sovereignty, which are fundamentally different to the Euro-centred construction of the sovereign nation state. For Irene Watson First Nations sovereignty is underpinned by the understanding that: '[o]ur obligations were to law and we were responsible for the maintenance of country for the benefit of future carers of law and country.'[56]

[22] Because First Peoples' law and relatedness to country is grounded in our creation ancestors, it is described by Graham as 'natural moral law', which unlike Western positivist concepts of

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[44] Martin, Please knock, 76; Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008), *Australian Humanities Review* 45, 182-3.
[45] Karin Martin, Please knock, 69-71.
[46] Martin and Mirraboopa, above nX, 207.
[47] Moreton-Robinson, I Still call Australia, 34.
[48] Central Land Council, The Land is Always Alive (Australian Print Group, 1994), 4.
[49] See also Marcelle Burns, 'Challenging the Assumptions of Positivism: An Analysis of the Concept of Society in *Sampi on Behalf of the Bardi and Jawi People v Western Australia* [2010] and *Bodney v Bennell* [2008]' (2011) 4 *Land, Rights, Laws: Issues of Native Title, Issues Paper No.7* , 2-6; Marcelle Burns and Jennifer Nielsen, 'Dealing with the "Wicked" Problem of Race and the Law: A Critical Journey for Students (and Academics)' (2018), *Legal Education Review* 28(2),18.
[50] Graham, above n X, 182-3.
[51] Martin and Mirraboopa, above nX, 211.
[52] Graham, above nX, 181-183.
[53] Graham, above nX, 181-183.
[54] Irene Watson, Kaldowinyeri, above nX, PINPOINT.
[55] Penny Tripcony, 'The Native Title mediation process in relation to Quandamooka: an overview' in R Ganter (ed), *Stradbroke Island: facilitating change* (Griffith University, Brisbane), 61, cited in Karin Martin (2008), above nx, 78.
[56] Irene Watson, 'Aboriginal Laws and the Sovereignty of Terra Nullius' (2002) 1(2) *Borderlands ejournal* 49, www.borderlandsejournal.adelaide.edu.auvol1/no2_2002/Watson_laws.html

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law, is not the product of human agency, nor can it be extinguished.[57] This concept of 'natural moral law' is not to be confused however with the Western canon of 'natural law', which is derived from 'divine law' or the precepts of Christianity.[58] It is a distinction that recognises the enduring nature of First Nations laws which are deeply embedded in country: they are omnipresent and eternal.

[23] While Australian courts have attempted to grapple with these differences to a degree,[59] the outcome for First Peoples have generally been that our connections to country are not equally valued or seen as commensurate with Western constructs of 'property rights'. As mentioned earlier this case presents an opportunity to correct this misconception – which has led to gross injustices for First Peoples. The interpretation of the *NTA* through the lens of First Peoples legal philosophy is a step towards bridging this gap.

Proof of native title

[24] The primary issues on appeal go to the interpretation of s223(1) of the *NTA*, which defines native title rights and interests as:

> the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia.[60]

Interpretation of this provision must be informed by an understanding of First Peoples legal philosophy and from a First Peoples sovereignty perspective.

Meaning of 'traditional' law and customs

[25] The ordinary meaning of the word 'traditional', is continuity with the past.[61] First Peoples understanding of law as being birthed by the creation ancestors putting both people and law on country, give rise to a different understanding of traditional in this context. As human beings are the living embodiment of First Peoples laws, the identification of people with a particular tract of country is evidence itself that traditional law exists. It is therefore evidence of traditional law and customs in this context. What is important to establish proof of traditional laws and customs is that a group of people continue to identify themselves by their relationship to a particular tract of country. This 'belonging' to country is evidence of 'traditional' in the sense of continuity with the past.

[26] In this case the Yorta Yorta peoples have demonstrated that they are descended from human ancestors, Edward Walker and Kitty Atkinson/Cooper who were descended from persons who inhabited part of the claim area in the early 1800's.[62] From this it can be inferred that those same ancestors were descended from people in occupation of that same country in pre-colonial times. The Yorta Yorta people have shown that they have maintained their identity as

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[57] Graham, above nX, 190-1. Here legal positivism

[58] See for example, Hugo Grotius, The Law of War and Peace (Francis W Kelsey trans, Bobbs-Merrill, 1925), who regarded natural law as the precepts of divine or Christian law, as dictated by 'right' reason, at xl-xli.

[59] Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141; Western Australia v Ward [2002] HCA 28.

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[32] [61] Yorta Yorta HC, Gaudron and Kirby JJ, [101].

[62] Yorta Yorta FC, [104].

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a people through their relationship with country. The Yorta Yorta have survived as a people. Thus the Yorta Yorta people have proven the existence of 'traditional' laws and customs as required by s223.

Continuity of laws and customs

[27] The ongoing identification of a First Peoples to country is also strong evidence of continuity of laws and customs. There are also other factors that must also be taken into account from a First Peoples perspective.

[28] There is no doubt that the dramatic changes wrought upon First Peoples as a result of colonial government policies of relocation and the active suppression of Aboriginal languages and cultural practices have had a significant impact on the modes and practices of laws and customs. What is important however for the purpose of this inquiry is that the fundamental principles that underpin First Nations laws are still active and operative in the contemporary context. The 'custodial ethic' that is imperative to First Nations laws and customs, provides a strong indicia of the continuity of law and customs.

[29] In this case the Yorta Yorta peoples have demonstrated a long history of asserting custodial authority over their traditional lands. Throughout the period following the colonisation of the traditional lands of the Yorta Yorta peoples they have consistently used every means available to them to assert their obligations to country. In evidence it was shown that there were no less than twelve significant attempts by the Yorta Yorta peoples to assert their custodial responsibilities.[64] The evidence also demonstrated that the Yorta Yorta peoples continue to assert custodial responsibilities over country, particularly in relation to the protection of sacred sites, the conservation of food, timber and natural resources; and the 'proper management' of land.[65]

[30] Before the Federal Court much significance was accorded to a petition made by the Yorta Yorta peoples to the Governor of New South Wales in 1881, which was interpreted as positive evidence of the loss of traditional laws and customs. In my view this petition has been completely misconstrued and the interpretation given to it by the court to date fails to appreciate the extreme oppression and deprivation that Yorta Yorta peoples were living under at the time it was made. To put this petition into its proper context it is necessary to map out the evidence of the Yorta Yorta peoples experiences of colonisation and the profound changes to their material conditions and way of life in the period leading to the petition.

Yorta Yorta Peoples Experiences of Colonisation

[31] The First Europeans to enter the claim area were Hamilton Hume and William Hovell in 1824.[66] Major Thomas Mitchell closely followed in 1836, an encounter which included violent clashes with Aboriginal groups along the Murray 'downstream from the claim area.'[67] Charles Sturt first travelled in the vicinity of Yorta Yorta country in 1829. Upon returning to the claim area in 1838 he recorded that many Aboriginal people were infected with small pox and observed that: 'It must have committed dreadful havoc amongst them, since on this journey, I did not see hundreds to the thousands I saw on my former expedition.'[68] Between 1837and 1839 tens of thousands of stock was brought into the area, and by 1840 most land along the Murray and Goulburn rivers had been occupied by pastoralists.[69] The trial judge observed

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[64] Yorta Yorta FC, [119].
[33] [65] Yorta Yorta FC, [112]-[113].
[34] [66] Yorta Yorta FC, [27].
[35] [67] Yorta Yorta FC, [28].
[36] [68] Yorta Yorta FC, [31].
[37] [69] Yorta Yorta FC, [34].

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that: '[c]onflict occurred at numerous stations. In many cases large, organised groups of Aborigines were involved.'[70] Evidently, the Yorta Yorta peoples resistance to colonisation was strong. By the 1850's however, the Aboriginal population had been 'drastically reduced' by disease and conflict, and it was recorded that 'physical resistance to settlement had ceased'.[71] By 1857, just twenty years after the start of the colonial occupation of Victoria, that there were only 1,769 Aborigines left living in the whole of Victoria.[72]

[32] In 1858 a Select Committee was appointed to investigate the present condition of Aboriginal people and the 'best means of alleviating their absolute wants'.[73] Following this inquiry a number of government sponsored missions and reserves were established in Victoria, however in Yorta Yorta country only ration depots were created. Local squatters were appointed as 'guardians' of Aboriginal people, and children were removed from their families to be properly "educated" and to dissociate them from 'traditional distractions'.[74] In 1865 Daniel and Edward Matthews took up Moira Station, an area of 800 acres. After discovering that part of the station has been traditionally used as meeting place, they set aside 20 acres in 1874 to establish Maloga Mission.[75] By the 1880's serious problems emerged at Maloga because Aboriginal people resented moves by Daniel Mathews to 'limit traditional ceremonial activities and the sanctions imposed such as loss of rations, if people failed to attend Christian services'.[76] He had also taken to 'physically beat children and young women if they committed offences of a moral or religious nature.'[77] Aboriginal men at Maloga also 'resented the intrusions on their freedom and demanded greater autonomy'.[78] These events also coincided with proposals by the Victoria government to disperse 'half castes' from missions and stations which were enshrined in legislation in 1886.[79] Although the Aboriginal Protection Association installed a new mananger George Bellenger in 1887, he also proved to be extremely unpopular.[80] In 1888 a number of huts and houses were moved from Maloga to a new reserve established at Cummeragunja, across the NSW border.[81]

[33] This brief history of the Yorta Yorta peoples' experiences of dispossession and oppression under colonial rule provides an important context for interpreting the petition to the Governor of NSW in 1881. This petition has been cited by the trial judge as positive evidence of the Yorta Yorta peoples' loss of traditional laws and customs.[82] Such an interpretation however fails to appreciate the conditions Yorta Yorta peoples were living under at the time it was made. The text of the petition is reproduced here:

> To His Excellency Lord Augustus Loftus, G.C.B., Governor of the colony of New South Wales – The humble petition of the undersigned Aboriginal natives, residents on the Murray River in the colony of New South Wales, members of the Moira and Ulupna tribes, respectfully showeth:

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[38] [70] Yorta Yorta FC, [34].
[39] [71] Yorta Yorta FC, [35]/
[40] [72] Yorta Yorta FC, [36].
[41] [73] Yorta Yorta FC, [36].
[42] [74] Yorta Yorta FC, [36].
[43] [75] Yorta Yorta FC, [36]-[37].
[44] [76] Yorta Yorta FC, [40].
[45] [77] Yorta Yorta FC, [40].
[46] [78] Yorta Yorta FC, [40].
[47] [79] Yorta Yorta FC, [39].
[48] [80] Yorta Yorta FC, [41].
[49] [81] Yorta Yorta FC, [40].
[50] [82] Yorta Yorta FC, [121].

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> 1. That all the land within our tribal boundaries has been taken possession of by the Government and white settlers; our hunting grounds are used for sheep pasturage and the game reduced and in many places exterminated, rendering our means of subsistence extremely precarious, and often reducing us and our wives and children to beggary.
>
> 2. We, the men of our several tribes, are desirous of honestly maintaining our young and infirm, who are in many cases the subjects of extreme want and semi-starvation, and we believe we could, in a few years support ourselves by our own industry, were a sufficient area of land granted to us to cultivate and raise stock.
>
> 3. We have been under training for some years and feel that our old mode of life in not in keeping with the instructions we have received and we are earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families. We more confidently ask this favour of a grant of land as our fellow natives in other colonies have proven capable of supporting themselves, where suitable land has been reserved for them.
>
> We hopefully appeal to your Excellency, as we recognise you, The Protector specially appointed by Her Gracious Majesty the Queen "to promote religion and education among the Aboriginal natives of the colony", and to protect us in our persons and in the free enjoyment of our possessions, and to take such measures as may be necessary for our advancement in civilization.'

[34] The trial judge's assessment of this petition is that it expressed a desire to change from the 'old mode of life' in favour of 'settling down to more orderly habits of industry'.[83] While it was acknowledged the Edward Mathews most likely played a part in composing the petition, it is concluded that the extent of his influence on the document is unknown. [85] But the conditions at Maloga at the time, and the language deployed, suggest that Mathews influence over the petitioners was strong. Other aspects of the evidence also provide important context for interpreting the petition in a different light. The petition highlights the fact that the totality of Yorta Yorta country had been occupied by the government and white settlers, that their traditional foods sources were severely depleted or exterminated. It also highlights their 'extreme want and semi-starvation' and a genuine desire to be able to provide for their families. These statements must also be understood in light of the circumstances at Maloga mission at the time – where Edwards was limiting traditional ceremonial activities and withholding rations from people who challenged his authority. Not surprisingly, Aboriginal men resented the restrictions on their autonomy and independence. There is no doubt from the evidence that the petitioners were operating under circumstances of extreme oppression and coercive control. Taken together, these factors put the petition in an entirely different light. By reading the petition with these factors in mind, it can be better understood as an assertion of Yorta Yorta peoples' inherent sovereignty, a plea to have greater control over their own affairs, and to regain a foothold in their country which had been unjustly usurped from them. What is most remarkable, is the Yorta Yorta peoples' resilience and steadfast determination to assert authority over country in the face of extreme adversity.

[35] The Yorta Yorta peoples have demonstrated a long history of asserting custodial authority over their ancestral lands. The trial judge noted that the evidence showed no less than twelve

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[51] [83] Yorta Yorta FC, [120].
[52] [85] Yorta Yorta FC, [121].

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significant attempts by the Yorta Yorta peoples to their custodianship.[86] The evidence also demonstrated that the Yorta Yorta peoples continue to assert their custodial responsibilities over country today, through their advocacy to ensure the protection of sacred sites, the conservation of food resources, and the 'proper management' of land[i] Clearly the evidence of Yorta Yorta peoples sustained and ongoing endeavours to exercise their custodial obligations over country are proof of the Yorta Yorta peoples' continuing acknowledgement and observance of law and customs. As Black CJ in the dissenting judgement of the Federal Court said: 'The law and custom at the heart of the application was that the claimants are the owners according to Aboriginal tradition … They had maintained their connection with the land: *they were, and remained, the indigenous people of the claimed land and waters*.'[87]

Connection to country

[36] The findings in relation to the traditional laws and customs of the Yorta Yorta peoples and their continuity through the ongoing assertion of their custodial responsibilities to country, equally apply to the issue of connection to country. However for sake of completion, this element will now addressed. First Peoples laws are sourced from the creation ancestors, who put people on country and gave them laws to live by. First Peoples relatedness to country and the laws flowing from that relationship reflect a custodial ethic towards country. The continuing and ongoing exercise of custodial responsibilities flowing from the laws and customs of the group provide strong evidence of connection to country. In this case the Yorta Yorta peoples have demonstrated their relatedness to country through their ongoing assertion of custodial responsibilities to look after country. Therefore the Yorta Yorta peoples have demonstrated their connection to country under their laws and customs.

Conclusion on Proof of Native Title

[37] The evidence in this case has demonstrated that the Yorta Yorta peoples, having descended from the creation ancestors, and by following the laws and customs given to them, have maintained their relatedness and connection to country. I must stress that what is of the utmost importance here is that the Yorta Yorta community have survived *as peoples*. Despite the ravages of colonisation and concerted efforts to undermine their culture and way of life, the Yorta Yorta peoples have shown extraordinary strength, determination, and resilience. They have maintained their relatedness to country against the odds. And they have consistently and persistently demonstrated their custodial ethic towards country. Although these efforts have been mostly met with bureaucratic ignorance and indifference, over the past 200 years they have continued to assert their custodial responsibilities for country at every available opportunity. I find that the Yorta Yorta peoples have proven their native title over their ancestral lands and waters. Yorta Yorta land needs it people, and the Yorta Yorta people have always been there for country.

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[53] [87] Yorta Yorta FCFC, [83], emphasis added.

[53] [87] Yorta Yorta FCFC, [83], emphasis added.

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