

Withstanding The Tide Of History: The *Yorta Yorta* Case And Indigenous Sovereignty

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1. In December 1998, Justice Olney (Olney J, *Yorta Yorta* 1998)* in the Federal Court of Australia found against 'Members of the Yorta Yorta Aboriginal Community' in their application for lands under the Native Title Act. This paper is not about Native Title or its determination, rather, in the wake of the High Court's dismissal of the Yorta Yorta people's appeal against that decision (on December 13, 2002), I will seek to reconsider some of the implications of the 1998 decision. In particular, the paper aims to examine Justice Olney's reliance upon a particular interpretation of Indigenous 'tradition', 'custom', and its continuity. What the case represents is an illustration of a number of assumptions about the nature of the collective life of Australia's Indigenous inhabitants, and the authority of the observations made of them by outsiders, specifically European colonists. In essence, these assumptions reveal the prevalence of the view that the Indigenous people of Australia lived in tribes that were bound by a kind of 'invisible power' of custom and tradition that they were unable to change or develop themselves. In his finding, Justice Olney explicitly relied on such assumptions in finding that Indigenous oral testimony – no matter how reliable and 'credible' – simply could not be accepted without European documentation. Though not itself concerned with the question of sovereignty, the case is not without important implications for the continuing debate in Australia on the nature and content of an Indigenous sovereignty.

2. Previous campaigns for Indigenous sovereignty in Australia, such as the Federal (Labor) government's sponsorship of a Treaty or *Makarrata* in the 1980's (Rowse 1999), had foundered (in part) for want of an appropriate and shared conceptual language in which Indigenous aspirations could be conveyed and non-Indigenous anxieties resolved. Many of these anxieties and aspirations related to the nature and extent of Indigenous rights to land, which remained a subject of considerable contention. It was in this context that in 1992, the High Court of Australia in *Mabo and Others versus Queensland* (no. 2) found that the legal doctrine of *terra nullius* must be overturned. *Mabo no. 2*, which led to the passing of the Native Title Act (1993), reversed over 100 years of legal reasoning based on the idea that at the time of settlement the Indigenous people did not own but merely resided or wandered upon the land. Although finally recognising the existence and survival of distinct Indigenous societies with their own native title (in some circumstances), the High Court in *Mabo no. 2* did not rule on the question of Indigenous sovereignty. The Court was solely concerned with the question of the existence of Indigenous societies and the rights the members of those societies had to their lands at the time that sovereignty was asserted over them and their lands by the British Crown. The Court expressly avoided the question of whether those societies possessed or exercised a sovereignty of their own, and whether that sovereignty was wrongfully denied, or voluntarily subjected to the Crown or later Australian governments.

3. Aside from its overdue recognition of native title, *Mabo no 2* also helped set the tone for a national movement for reconciliation between Indigenous and non-Indigenous Australians. With the support of the Federal (Labor) government and wide-spread community enthusiasm, the movement for reconciliation was given added impetus by the

public enquiry into the policies and practices of Indigenous child removal in the nineteenth and twentieth centuries, culminating in the *Bringing Them Home* report (1997). The report fuelled calls for a Federal government 'apology' to the many Indigenous people, collectively known as the 'stolen generations', who had been separated as children from their families. The issue of an apology became a kind of touchstone of the movement for reconciliation. Evident Federal (Liberal) government opposition to an 'apology' however, was matched by their concerted efforts to wind back Native Title following the *Wik* case (1996). Over the next few years, the optimism and hope generated within the movement for reconciliation dissipated as the Federal government continued to stonewall on the 'apology' question (Manne 2001). This context of disappointment, almost ten years after *Mabo no. 2*, helps to explain the revival of the treaty debate and renewed interest in the concept of Indigenous sovereignty in Australia.

4. Some Indigenous writers (Alfred 1999: 56) have raised doubts as to whether the Western concept of sovereignty is an appropriate concept for Indigenous communities seeking their own path to self-determination. Within Western discourse, sovereignty has been closely associated with the state, and has been invoked as a quality of states in their dealings with other (sovereign) states. As Quentin Skinner has observed (Skinner 1999: 2), modern political thought sees "the state as the holder of sovereignty", and its sovereignty consists in its right to use the ultimate sanction of violence to enforce the laws within its territory (Weber 1947: 78). There is thus a tendency to regard statehood as the precondition of sovereignty, that to speak of sovereignty is to speak of states as sovereign entities who interact with one another, fight wars against one another, make alliances and sign treaties with one another. The concept of sovereignty developed in the context of European imperial and colonial expansion, and as I have argued elsewhere (Buchan forthcoming 2003; also Strang 1996), was deployed by colonial authorities to subject Indigenous peoples to European rule. By invoking an *Indigenous* sovereignty, Indigenous peoples seek (in part) to redress this legacy of subjection to a sovereignty that in many cases was forced upon them, to which they did not freely and fairly consent, and to them effectively remained 'foreign'. To claim Indigenous sovereignty is thus not simply to claim an independent political existence (though it could mean that), rather it is to claim a sovereignty that encompasses the claims of Indigenous people to a substantive recognition of their collective identities (Strelein 2001; Dodson and Strelein 2001).

5. As a consequence, the understanding of Indigenous sovereignty must have recourse to its emergence from the history of Indigenous 'subjection' to a foreign sovereignty, a sovereignty imposed upon them by force or by subterfuge. The understanding of Indigenous sovereignty must also have recourse to the substantive claim of Indigenous people to recognition that their collective identities have survived contact and colonisation, and whose future development should lie in their own hands. Acknowledging Indigenous sovereignty thus means recognising more than the political motivation of Indigenous people for greater control over their own affairs, it means that an acceptance needs to be made by the 'sovereign' authority and its society of the collective identity of Indigenous peoples. Indigenous sovereignty thus resides in peoples whose histories have been permanently marked by the legacies of colonialism, whose own traditions and beliefs have undergone dramatic change due to the intervention of colonial authorities. But to claim an Indigenous sovereignty is also to announce one's survival as a people, and a wish to reclaim the right (and be accorded the respect) of a people in command of the future development of those traditions and beliefs. Such a claim to Indigenous sovereignty is never more vital than at those times when the very identity of an Indigenous people is defined in the terms, and in the very words of the colonists.

Justice Olney on Testimony and Knowledge

6. In describing the nature of the evidence tendered to the court, Justice Olney (Olney J, *Yorta Yorta*: §21) claimed that the "oral testimony" of many witnesses was "both credible and compelling", but not consistently candid. The problem, he claimed, was that "two senior members of the claimant group" were found to have told "deliberate lies" about a "relatively minor matter" before the court, but which nonetheless "cast a shadow over the other evidence of those witnesses." More generally, Justice Olney found other problems with the oral testimony, notably the "embellishment" by "younger members of the claimant group" of "oral traditions" handed down to them, and the "frequent... outbursts of...

righteous indignation" at the legacies of Aboriginal policy. In Justice Olney's words however, the court was not concerned with "righting the wrongs of the past" but with the 'narrower' aim of "determining whether native title rights and interests... to the land enjoyed by the original inhabitants... have survived to be recognised and enforced under the contemporary law of Australia." This specification of the focus of the case, and the reasoning on which it rests, is significant, but I want first to concentrate on what Justice Olney had to say about the verification of evidence.

7. After admitting that much of the oral testimony he had received was 'credible', Justice Olney went on to acknowledge (Olney J, *Yorta Yorta*: §22) that particular senior witnesses had an "impressive" and "accurate" knowledge of their traditions. Having said that, he then claimed,

The cogency of such evidence does not necessarily depend upon the credibility of the individual witnesses but must be assessed in the whole context of the case including, where it exists, evidence derived from historical records and the recorded observations of people who witnessed activities and events about which the members of the claimant group know only what has been passed down to them by their forebears.

8. Now, a number of claims are being advanced in this passage, and it would be well to spend some time clarifying them. What did the Judge mean by saying that testimony must be evaluated 'in the whole context of the case'? In speaking of 'context' he appeared to refer to the problem of 'verification', that is, that Indigenous oral testimony had to be assessed in light of surviving documentation to verify its accuracy. The assumption behind this stipulation is that Aboriginal oral testimony can only be judged alongside documentation. What is not acknowledged here is that that documentation is, by its very nature, partial. In other words, most if not all documentary evidence of the period in question was left by European observers who, at best, were only ever 'outsiders', if not actively hostile to the Indigenous inhabitants. What is at least implied in the judge's wording however, is that documentary evidence records accurate 'witness' to activities and events, whereas the claimants 'know only' what was told to them by forebears. The implication here is not simply that (European) documentation can help to corroborate oral testimony, but that knowledge derived from documentation is more complete and hence accurate than that based on oral traditions. There are good reasons for questioning this assumption on the grounds that documentary evidence needs to be understood in light of the writer's partial view and knowledge (and interests). Those who 'observed' and left a documentary 'record', did not occupy an Archimedian Point; their testimony represents a form of objectifying knowledge of Indigenous peoples developed from the stand-point of the colonial authority (Smallacombe 2000). The connection between the formation of knowledge and the colonial outlook is clear in the lengthy observations of Indigenous people in the journals of men like Edward John Eyre and George Grey. Both of these men became relatively high-ranking colonial administrators, both of them posited the absolute sway of immemorial custom over the minds of Aborigines, and both were cited as authorities on Aborigines by early anthropologists (Spriggs 1997; Murray 1992).

9. Justice Olney however, did not greatly concern himself over the reliability of the 'evidence' provided by colonial writers. Instead he claimed that the chief problem was not its partiality, but its incompleteness in the crucial years between 1788 and the 1830's. Here, the Judge's earlier comments on the 'survival' of authentic land claims comes into high relief, for the Judge was concerned, he claimed, not in 'righting the wrongs' committed by previous generations, but solely in determining whether the rights held by traditional owners of the land before British annexation (1788), 'survived' and could legitimately be claimed by the current Indigenous inhabitants. Olney J presented the problem in terms of the *Mabo No 2* case (Olney J, *Yorta Yorta*: §24), in which the historical conditions of the Merriam people of Murray Island was rather different. On Murray Island, British sovereignty had not been asserted until the 1880's, and by that time "there had been significant involvement of the colonial authorities and others in the affairs of the indigenous people...". In other words there was a substantial "body of evidence" to support the Indigenous people's claims, whereas for the Yorta Yorta people, "European contact... did not occur..." until the 1830's, "...nearly 50 years after sovereignty was asserted..." in 1788. The question then, was how to determine what had happened in those intervening years to the Indigenous inhabitants, and how to verify that the inhabitants in the 1830's and 1840's were actually the descendants of the 'original' inhabitants before 1788,

because,

It is the descendants of the people who occupied the area in 1788, and whose traditional laws and customs in relation to the land became, at the time of sovereignty, a burden on the radical title acquired by the Crown who are entitled, in appropriate circumstances, to recognition as the native title holders. (Olney J, *Yorta Yorta*: §25)

Occupation, Tradition, Title

10. Justice Olney's delineation of 'oral' and 'documentary' evidence lies at the core of this decision. His claim was not simply that documentary evidence was more credible than oral testimony, but that only documentary evidence of those crucial years between 1788 and the 1830-40's can establish the substance of the claimant's case – that they are the descendants of the 'original occupiers' and have sustained their 'traditions'. Justice Olney's reasoning here is based on the earlier High Court decision in *Mabo No 2*, and it is worth looking at his account of the basis for that decision. In *Mabo No 2*, Chief Justice Brennan found that the test for effective native title was whether an Indigenous community

has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion [sic] with the land has been substantially maintained... (Brennan CJ, *Mabo*: §66)

11. Where however, the "tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared" and "cannot be revived" (Brennan CJ, *Mabo*: §66). Brennan's rhetorical reference to the 'tide of history' can be read as an observation of the fact that traditions change and develop, wax and wane with the years, and communities move or merge with other communities for a range of possible reasons. But the 'tide of history' may also be read as a euphemism for the active removal of Indigenous inhabitants from their lands, and the severance of traditional observances by colonial (and post-colonial) administrators. The general point however, was that for a native title claim to be successful, the claimants must demonstrate some degree of continuity in traditional observances.

12. But what exactly is meant by the term 'traditional', and how strictly 'traditional' must contemporary observances be, given that Justice Brennan referred to the 'real acknowledgement' or 'real observance' "*so far as practicable*"? An answer to this question is by no means entirely clear in *Mabo*, but in the *Yorta Yorta* case the answer would appear to be that contemporary observances must match the accounts we have of them in nineteenth-century European documents. Here it is necessary to examine the use Olney J makes of Justice Toohey's observation in *Mabo* that to prove native title it is solely necessary to establish Indigenous presence on lands amounting to *occupation*. In order to establish occupation it was necessary to determine the "rights and duties" relating to land use sustained by the Indigenous "society" in question, but not to prove that those 'rights and duties' were proprietary or corresponded to a particular kind of society. In Justice Toohey's words, Traditional title arises from the fact of occupancy, not the occupation of a particular *kind* of society or way of life. So long as occupancy by a traditional society is established now and at the time of annexation, traditional rights exist. (Toohey J, *Mabo*: §51)

13. In other words, the kind of Indigenous 'society', be it a 'tribe', a nomadic or semi-nomadic group for instance, is not at issue (Toohey J, *Mabo*: §18, 37, 39). What is at issue are four interrelated criteria, first, that the community has continued to observe the 'traditional' laws and customs of that community, and second, that its members today are descended from those who inhabited the land in 1788 and before (Webber 2000). It must also be established, thirdly, that there is a "traditional connexion" with the land that has been "substantially maintained", and that fourthly, the "claimed rights" must be recognised by the common law (Olney J, *Yorta Yorta*: §4). In what remains of this paper, I want to address only the consideration given to the first two of these criteria and the 'evidence' accepted to verify them by Justice Olney.

14. It would appear then, following the precedent set by *Mabo*, that ownership rights rest on occupancy. The test for occupancy furthermore, did not require proving that a particular

kind of society existed, only that the Indigenous society or community occupied the territory their forebears had and maintained their traditional observances. Everything hinges here on the stipulation that the society or community in question be 'traditional'. There are good grounds for considering Justice Olney to have taken an overly rigid view of 'tradition' (Bartlett 2000: 106-107, 111, 121), that is, that he set an impossible standard for any existing community to qualify as 'traditional'. The relevant criteria used by the Court, were that the claimant community inhabit lands occupied by their ancestors at or before 1788, and that the claimant's community 'acknowledge' and 'observe' traditional customs. But this test is one that many Indigenous communities, especially those in areas now most heavily settled by Europeans, would fail for the simple reason that most of those communities have suffered extensive European intervention throughout the history of white settlement and administration.

15. The Court was not blind to such facts (Olney J, *Yorta Yorta*: §24-26), noting the severe disruption of the Indigenous communities in the claim area due to disease, conflict and re-location to missions. As becomes clear however, it is precisely these disruptions of the Indigenous communities occupying the claim area that constitute the problem. The Court pays particular attention here (Olney J, *Yorta Yorta*: §31) to the evident signs that between 1788 and the initial white exploration of the area, the local inhabitants had been much affected and their population reduced by small pox. Later in the century, the re-location of Indigenous people to the missions, notably Coranderrk in Victoria, and Maloga and Cummeragunja in New South Wales caused further dislocation and disruption of traditional communities, and this was exacerbated by subsequent mobility of the inhabitants in the twentieth-century (Olney J, *Yorta Yorta*: §37-47). Consequently, as Justice Olney defined it, the need to establish a definite 1788 connection with the current inhabitants (and claimants) was a central problem:

What ultimately must concern the Court is whether members of the claimant group can trace descent from those inhabitants who at or before the earliest contact with Europeans occupied the claim area, or part of it, and in relation to that area or part possessed what is now known as "native title" in the sense described by Brennan J in *Mabo...* (Olney J, *Yorta Yorta*: §59)

16. In ascertaining whether there was a demonstrable '1788 connection', and then further showing contemporary 'acknowledgement' and 'observance' of 'traditional' customs, the Court expressly relied on European documentation. The problem here, as already adverted, is that those who provided the documentation were in many cases the same people – pastoralists and missionaries – who were actively involved in disrupting if not destroying Indigenous traditions and communities.

17. Interestingly, the Court was not unaware of this difficulty and attempted to deal with the issue directly. Justice Olney claimed (Olney J, *Yorta Yorta*: §62) that at many points the Court was forced to decide difficult "questions of anthropological interpretation" on which there were no "objective facts" provided by "scholars learned in the relevant discipline". Consequently, the Court had no option but to rely on the records left by original observers in the nineteenth-century. Here, Justice Olney made a remarkable claim on how the veracity of such observations was to be determined:

None of the persons whose original observations and records are relied upon could be called to give evidence and accordingly no assessment can be made of the credibility of the primary material. ... That being so... [and in the absence of 'learned'] authoritative answer[s], the Court must have resort to such credible primary evidence as is available and apply the normal processes of analysis and reason.

18. It is important to be clear on what is being claimed here – that no judgement can be made of the 'credibility' of the early observations (because the observers are unable to give evidence before the court), but their observations ('primary evidence') are then deemed 'credible', though subject to 'normal processes of analysis'. In making this claim, major problems of textual interpretation are glossed over by the Court which expresses its intention to rely on 'credible' early observations, though much of it was tendered by observers with material interests in the dispossession and dislocation of the Indigenous inhabitants. Nowhere is this connection more evident than in Justice Olney's express and repeated reliance on the documentation provided by Edward Micklethwaite Curr.

19. In determining the content of Indigenous 'traditions' (customs, laws, and observances), in order that some judgement could be made of the extent to which they are still acknowledged and observed, the Court relied most heavily on the writings of Edward Micklethwaite Curr. In making a case for the credibility of Curr's 'evidence', Justice Olney claimed (Olney J, *Yorta Yorta*: §106), that Curr "at least observed an Aboriginal society that had not yet disintegrated". As Keen points out (Keen 1999:2), such comments reveal the Judge's acceptance of a 'culture loss' model of the effects of colonisation upon the Indigenous people, a theory that Curr seems himself to have employed in his observations of a people he called the 'Kabi' (Curr 1886 III: 120). But Justice Olney also claimed (Olney J, *Yorta Yorta*: §106) that Curr had established "a degree of rapport" with the Indigenous inhabitants, and that consequently, his writings must be "accorded considerable weight". Olney J however, went much further with this claim. Curr's writings should in fact be accorded 'more weight' than the "oral testimony of the witnesses" because the latter was "passed down through many generations extending over... two hundred years." Furthermore, unlike later writers whose observations were not "original" and tainted by "mere speculation", Curr, though "not averse to a degree of speculation" accurately recorded "his own observations and what he was told by his Aboriginal informants". To the degree that he did indulge in speculation, Justice Olney claimed, Curr's 'opinion' would "not be accorded any weight". One immediately wonders here about how the Court was to distinguish the purely speculative from the non-speculative in the writings of a non-Aboriginal pastoralist whose herds were already grazing on the lands of his 'informants'?

20. Let us leave this question aside for the moment and concentrate briefly on the figure of E.M. Curr and his writings, before returning to the use the Court made of him and his writings. Born in Tasmania and educated in Europe, Curr managed his father's sheep runs along the Murray between 1841 and 1850, and later managed his own flocks in Queensland from 1856-1861, before becoming chief inspector of sheep in Victoria in the 1870's (*A.D.B.* 1969 III: 508). During his time as a pastoralist on the Murray, he made extensive contact with local Indigenous communities. His extensive writings show him to have been a rather remarkable, resilient, self-reliant and determined character; if perceptive and intelligent, he was also extremely self-assured, and often dismissive of the observations of others. Of the Indigenous people with whom he made contact, observed and enquired into their customs, he was consistently disparaging. The works upon which his reputation is based, and those on which the Federal Court relied, are the lively and revealing *Recollections of Squatting in Victoria... from 1841 to 1851* (1883), and the detailed if acerbic four volume study, *The Australian Race...* (1886).

21. In his *Recollections*, Curr relates the many stories of his days as a pioneer pastoralist, and reflected, not without some "regret", that after 35 years of white settlement in a district "known to the Blacks by the name of Moira", "scarce one" of the Aboriginal people remained (Curr 1883: 166, 179). In describing some of the beliefs of those inhabitants however, a people he referred to as "the Bangerang", Curr wrote (Curr 1883: 243) that particular pieces of land "were owned by individuals" within the "sub-tribes" and passed down through the generations. Nothing Curr wrote was more revealing of his own material interests in obviating genuine recognition of the rights of these land owners than his recollection of once being shown the estate belonging to an Aboriginal boy:

As the announcement was made to me with some little pride and ceremony by the boy's elder brother... I not only complimented the proprietor on his estate, on which my sheep were daily feeding, but, as I was always prone to fall in with the views of my sable neighbours when possible, I offered him on the spot, with the most serious face, a stick of tobacco for the fee-simple of his patrimonial property, which, after a short consultation with his elders, was accepted and paid. (Curr 1883: 243-4)

22. Curr is here sharing a joke with his educated white readers – imagine a stick of tobacco as fee simple for grazing lands that the 'owner' was in no position (had he even been made aware of it) to demand. Curr's further observations on the customs of the Indigenous people conform to the spirit in which he 'paid' this 'fee simple'. In other words, he writes of a people he regarded as 'interesting' but fast disappearing affording him the pleasure of "rambles in unoccupied country" (Curr 1883: 418).

23. Among his many observations of the customs and traditions of the Indigenous people,

Olney J placed particular emphasis on those which certainly established the existence of rights to (and inheritance of) land. But the image of Indigenous 'society' focussed on the absence of government, the unyielding observance of immemorial custom, the domination of women, and the general weakness of social union among and between the tribes (Olney J, *Yorta Yorta*: §111-116). The Indigenous people, Curr claimed (Curr 1883: 245, 252, 263), had "no government" but still observed "important practices... which deserve to be called laws", they practiced little discipline of children, women were subject to the tyranny of men, and they regularly practiced infanticide without any possible justification of scarcity of resources. His observations on the absence of government were accorded considerable prominence by the Court, for the simple reason that they were taken as proof of the centrality of customary and traditional observances. As Curr put it,

Among the Bangerang there was not, as far as could be observed, anything resembling government; nor was any authority, outside of the family circle, existent. Within the family the father was absolute. ... The adult male of Bangerang recognised no authority in anyone, under any circumstances, though he was thoroughly submissive to custom. (Curr 1883: 244)

24. In his later *The Australian Race*, Curr wrote expressly to correct (quite emphatically) what he took to be the errors of other European authorities on the Indigenous people. Here he provided more detail to the image of Indigenous life wrapped in the obscurity of immemorial custom in contrast to the freedom of European life,

The idea is a common one, that savage life is an existence akin in its unrestraint to that of the wild beast of the forest. ... The Englishman, noting in the savage the absence of the manacles which civilisation imposes, fancies that none other exist, and that the savage is a free man. Persons who have looked below the surface, however, are aware that the Australian savage, though absolutely untrammelled in some respects, is nevertheless, on the whole, much less free... than the Englishman or Frenchman. (Curr 1886 I: 51)

25. Bound by custom and tradition, the Indigenous people moreover were also held by their own sub-tribe or "section", each "thoroughly independent within the limits of its own territory" from the other sub-tribes, except in cases of inter-tribal war (Curr 1883: 246). Even here however, such unions were based only on common concern and mutual self-interest. As he put it in *The Australian Race* (Curr 1886 I: 192), there was no such thing as a 'national life' among Indigenous Australians, "...failing even to reach the earlier stage of clan life... [they] existed to the end in tribes... destitute of any formal governing principle." The tribes of the Aboriginal people he claimed (Curr 1886 I: 241, 52, 54), held "together in a way quite distinct from European society" by being maintained not through the rational deliberations of government, but the "impersonal", "hidden" and "constraining" power of "education" in the rigid customs and traditions of the tribe, to which the individual tribal member totally submitted.

26. Sentiments such as these have played a prominent part in the European, colonial discourse on Aboriginal people. The apparent 'absence' of Indigenous forms of government was taken to indicate a general lack of legislative capacity. More important though, was the supposed inability of Indigenous people to see beyond the 'customs' and 'traditions' that bound their own 'tribes'. Curr's contemporary, George Grey could write in almost identical terms that,

...to believe that man in a savage state is endowed with freedom either of thought or action is erroneous in the highest degree. He is in reality subjected to complex laws, which not only deprive him of all free agency of thought, but, at the same time by allowing no scope whatever for the development of intellect, benevolence, or any other great moral qualification, they necessarily bind him down in a hopeless state of barbarism, from which it is impossible for man to emerge, so long as he is enthralled by these customs... (Grey 1841: 217-218)

27. The white administration of Indigenous people was therefore often expressed in terms of 'civilisation', a process of re-shaping Indigenous social, family and personal life through a range of disciplinary techniques designed to destroy their 'customs' (Haebich 2000; Kidd 1997). Curr was quite clear that in civilising the Aborigines, it was their customs and traditions that had to change, and that this would be the work of generations,

In most respects it is clear that the savage *cannot be raised to the level of our civilisation in a single generation*; but there are no grounds for supposing that he would not continue to advance from generation to generation with continuous cultivation. (Curr 1886 I: 42)

28. Such were the contours of the image of Indigenous tribal life relied upon by the Court in determining whether customary and traditional observances were still in use among the claimant community. I have argued elsewhere (Buchan 2001; Buchan forthcoming 2003) that much of the early ethnographic literature derived from the work of Curr's contemporaries, reinforced powerful assumptions about the 'savagery' of Indigenous life. But even if we were to assume that Curr's depiction was correct, we must ask to what degree Justice Olney was prepared to accept Justice Brennan's proviso in the *Mabo* ruling that Indigenous traditions be 'acknowledged' and 'observed' "so far as practicable"? In subsequent remarks, the Federal Court's position seems to have been that 'traditional' observances of the kind described by Curr were *voluntarily* renounced by the claimant's forebears. Much of the evidence for this claim was derived from a document signed by a number of Indigenous inhabitants of the Maloga Mission in 1881 and addressed to the Governor of NSW. It was recognised by the Court that this document, the phrasing of which the Court considered particularly important, was probably drawn up under the direction of Maloga's manager, the Reverend Daniel Matthews, who, like Curr, was an active agent of Indigenous dislocation. Consequently, very little acknowledgement appears to have been made of Justice Brennan's proviso, and very little consideration was given to the fact that by the 1880's the Indigenous inhabitants were under severe restraint in the exercise and observance of their 'traditions' and 'customs'.

Daniel Matthews And The Petition

29. Justice Olney clearly recognised (Olney J, *Yorta Yorta*: §117) that as a missionary involved in "attracting" the members of various Indigenous communities to Maloga, and suppressing "traditional practices" on the Mission, that Daniel Matthews was an "architect of further disruption of traditional life". Having said that, the 'disruptions' that Matthews and others were responsible for is taken as evidence that the 'tide of history' had by that time swept away many of the traditions of the original occupiers of the land. What is more, the 'evidence' provided by Matthews' activities is taken to suggest that when he arrived in the area in 1864 he found "people of many different tribal groups" already living there, implying that the original owners had become hopelessly jumbled with the remnants of other tribes. Justice Olney then went on to claim (Olney J, *Yorta Yorta*: § 119) that "positive evidence" of the severance of traditional observances was provided by the Indigenous inhabitants of Maloga in their Petition to the Governor in 1881. This Petition had been used by counsel for the applicants as one prominent example of the many attempts by the local inhabitants to promote their claim to land over the years. Justice Olney however, took the wording of the Petition as positive proof that the 42 signatories had chosen to renounce their 'traditional' way of life, and acknowledge that they no longer had primary claim to the lands in question. He did so however, without any sustained consideration of who framed the Petition, the conditions under which it was drawn up, nor whether the signatories could possibly have been in a position to understand the full legal implications of the document they signed.

30. The 1881 Petition (Cato 1976: 385-386) contained three significant clauses, first that the signatories claimed that they had been reduced to "beggary" owing to the fact that "all the land within our tribal boundaries has been taken possession of by the Government and white settlers". Second, the signatories asserted that they wished for land to support themselves, especially their young people and the infirm. The signatories of the Petition then recognised, thirdly, that they "have been under training for some years" and felt "that our old mode of life is not in keeping with the instructions we have received", which had inclined them to "settling down to more orderly habits of industry, that we may form homes for our families." The signatories expressed their wish that the Governor make a grant of lands to them to support themselves, appealing to him as "The Protector specially appointed... to promote religion and education among the Aboriginal natives of the colony" and to protect us in our persons and ...possessions" as well as promoting 'our' "civilisation." In focussing on the wording of this Petition, Justice Olney (Olney J, *Yorta Yorta*: § 120) accords particular significance to the "frank acknowledgement" by the signatories that their lands had "been taken possession of". One wonders what meaning can be ascribed to this phrase in the context of its authorship? Was it a candid admission that the signatories realised that they no longer held any valid claim or title to the land, or was it merely a factual statement that their land had been occupied by others and that

their own rights had not been respected?

31. Justice Olney claimed (Olney J, *Yorta Yorta*: §121) that while the Rev Matthews probably "played a part" in the authorship of the Petition, there was no suggestion that the "general thrust" of the Petition was "factually inaccurate or in any way misrepresented" the signatories' views. It is not clear however, that the question of 'misrepresentation' should be the significant issue; after all, one wonders what avenues the members of the Mission, whose traditional lands had already been occupied as a matter of fact, would have had for voicing disagreement? We know that the Reverend Matthews acted as other missionaries did, with what are conventionally deemed to have been 'good intentions', but he (again like other missionaries) also knew precisely what he was doing. The Mission was intended in part to offer a refuge for Indigenous people who had been cast off their traditional lands, but the members of the Mission were also to be trained, educated, reformed and converted, in short, civilised (Cato 1976: 349). The Rev Matthews knew that imparting civilisation to the Indigenous people involved, indeed required, the breaking of traditional customs (such as marriage laws), and the disciplining of individual conduct to prevent 'relapses' into tribalism, or the waywardness of alcoholism or bad company (Matthews 1898-9/1900-1: 43-52). Consequently, the Indigenous inhabitants of Maloga, like those of other missions, lived in an environment in which their traditions and beliefs were actively discouraged, even by force. The whole purpose of the missions was to instill new personal habits and patterns of familial and social interaction, to instill more 'civilised' modes of conduct. But Justice Olney simply referred (Olney J, *Yorta Yorta*: §121) to the signatories as having found themselves "by force of the circumstances" dispossessed of their traditional lands and resident on a Mission where traditional observances were no longer practiced.

32. 'Force of circumstances' has more than a hint of the euphemistic about it, and indeed, Justice Olney later employs Justice Brennan's reference to the 'tide of history' washing away native title (Olney J, *Yorta Yorta*: §126, 129). By referring to 'force of circumstances', the Court merely signals that it has no intention to enquire too deeply into them, for that would necessitate the kind of enquiry Justice Olney wished to avoid, one focussed on 'righting the wrongs of the past'. The 'force' of the 'circumstances' that led the local Indigenous people to become inhabitants of the Mission is thus not addressed, but *the fact* of their inhabiting the Mission is taken as proof of the Indigenous people having renounced their traditional ways of life. The 1881 Petition was thus taken by the Court, as sufficient proof of a voluntary renunciation by the inhabitants of the Mission of their lands, traditions, and ways of life (Bartlett 2000: 117). It was interpreted as an authentic Indigenous recognition of the fact that their traditional practices as well as their descendants had both been swept away by the 'tide of history'. The survivors of many different Indigenous communities having become hopelessly jumbled on the missions, and having no claim on lands outside it, they 'chose' to adopt ('by force of circumstances' that were not themselves deemed relevant) non-traditional lifestyles. The Court was not concerned with the justice or injustice of these circumstances, but only with their supposed effect on the local Indigenous inhabitants, and materially with the irrevocable changes they are supposed to have wrought to Indigenous ways of life, rendering their descendants 'non-traditional'.

Justice Olney On Tradition

33. In determining whether the current claimants in this case maintained any real 'acknowledgement' or 'observance' of traditional customs, Justice Olney referred to a few examples in which current Indigenous practices and beliefs no longer conformed to the older 'traditional' ones. Of particular interest here is the belief of the current Indigenous inhabitants that shell middens, oven mounds, and trees from which the bark for canoes had been taken, were "sacred" (Olney J, *Yorta Yorta*: §122). While such physical remains certainly indicated the occupation of Indigenous people on the land at some point in the past, they did not, in the opinion of the Court, indicate the continuous occupation of the forebears of the present inhabitants. Indicative of this, the Court found, was that there was "no evidence to suggest" that such sites "were of any significance to the original inhabitants other than for their utilitarian value", and that no customary law required their preservation (Olney J, *Yorta Yorta*: §122). Justice Olney's words seem to scoff at the very idea of viewing as sacred, the locations and signs of previous habitation and land use,

especially middens that he dismissed as "nothing more than accumulations of the remains of shell fish..." (Olney J, *Yorta Yorta*: §122). One wonders what effect this reasoning would have on the modern penchant for heritage listing the decaying remains of colonial settlements? Be that as it may, the current Indigenous commitment to conservation was also deemed by the Court to be non-traditional insofar as Curr in particular, provided evidence of Indigenous profligacy and waste (Olney J, *Yorta Yorta*: §123). Furthermore, to the extent that the current inhabitants engage in 'traditional' practices of gathering 'bush tucker', it is more of a "recreational activity" (and therefore non-traditional), than a "means of sustaining life". In other words, if the Indigenous inhabitants still depended on bush tucker for their survival, this would be taken as evidence of their living a 'traditional' lifestyle.

34. To put it mildly, there is something deeply troubling in this view. It is a view that can only be based on the most willful exclusion from consideration of the manifold ways in which European contact, colonisation, and control of Aboriginal communities were responsible for direct and indirect changes in the ways of life of Aboriginal people. In many cases, these changes were expected or required of Aboriginal people who faced a range of penalties under the sanction of law if they did not conform. But these considerations fall within the category of the 'wrongs of the past', and the Court in this case declared them irrelevant. In many cases, Aboriginal people adapted themselves and their traditions skillfully to the demands of colonial administration in order to preserve as much as they could from the past (Keen 1999). So far as the Court was concerned however, such adaptations amounted to a *loss of tradition*, as seen in the recent and ongoing efforts of the current inhabitants to revive their traditions or to exercise some influence on environmental issues. As an example of the former, the Court cited the modern practice of returning the bones of ancestors, taken for museum collections, for re-burial in the land they were taken from. The Court accepted the importance of this practice, but in doing so, highlighted the fact that "the modern practices associated with their reburial" were not "part of the traditional laws and customs handed down from the original inhabitants" (Olney J, *Yorta Yorta*: §124). One wonders how else the current Indigenous inhabitants could have shown their commitment to their traditions and forebears on the land? The collection, removal, and display of Aboriginal human remains was an activity that could not possibly have occurred before white settlement, and thus could not possibly have been encompassed by any Indigenous practices or observances before that time. For the efforts of current inhabitants to respond appropriately to this melancholy circumstance, to then be taken as evidence that they no longer pursue traditional customs, seems entirely untenable. How could burial practices in such circumstances ever be 'customary', when the entire circumstances of receiving human remains taken away by white people can not be considered an experience with which the original inhabitants were familiar, and about which they could not possibly have derived their own 'customs'? It thus appears that Justice Olney took a view that could not accommodate any development or alterations in 'tradition' or 'custom', even those arising from the most flagrant of European interventions. It is a concept of tradition completely at odds with that advanced by Keon-Cohen, who defined tradition as

highly flexible, with a perceived continuity from past to present. It comprises the beliefs which a people currently have about themselves. It is not something static or frozen in time as it existed in Australia before European contact. (Keon-Cohen 1993: 193)

35. Justice Olney's interpretation also flies in the face of the interpretation employed in *Mabo* by Justice Toohey, who stated that there

is no question that indigenous society can and will change on contact with European culture. ... modification of traditional society in itself does not mean traditional title no longer exists. (Toohey J, *Mabo*: §50-51)

36. The involvement of *Yorta Yorta* people in timber and water conservation, the Court also found, were the direct consequence of activities (logging and irrigation) associated with white settlement and thus

are issues of relatively recent origin about which the original inhabitants could have had no concern and which cannot be regarded as matters relating to the observance of traditional laws and customs. (Olney J, *Yorta Yorta*: §125)

37. What the Court appears to be saying here is that current Indigenous involvement in issues arising from European settlement does not indicate any traditional connection with the original inhabitants. Perhaps nowhere else in the finding of the Court do we have a clearer representation of the Indigenous people as passive and abject. The Court found against the claimants because it was concluded that Indigenous lifestyles had been irrevocably changed by white settlement. For the current Indigenous people to concern themselves with activities relating to or arising from that settlement was then deemed to have no relevance to their traditions, because the original inhabitants made no provision for them in their ('wasteful and profligate') customs. The fact that the original inhabitants could not possibly have envisaged commercial logging or large-scale irrigation is of no concern to the Court. What is of concern is the 'fact' that Indigenous lifestyles and traditions have changed, and that is held against the claimants, who, it would seem, have no other way of demonstrating their 'acknowledgement' or 'observance' of tradition than by living exactly in the manner described by Curr. In other words, the Indigenous inhabitants would have to manifest Curr's depiction of the wandering of savages along the banks of the Murray, forever held under the thrall of immemorial customs they were entirely unable to modify, change, or cast off. That of course, was a virtue that only European intervention could bring, and having availed themselves of it (even though 'by force of circumstances'), the Indigenous people renounced forever their once valid title.

Indigenous Sovereignty And The 'Tide Of History'

38. The issues at stake in the *Yorta Yorta* case were many and complex, and highlight the obvious dangers of representing Indigenous identity as bound by invariable 'custom' and 'tradition' (Keen 1999). The point the Court set out to determine was whether the current Indigenous inhabitants preserved and maintained a 'real acknowledgement' and 'observance' of 'traditions' or 'customs'. In doing so, the Court effectively tied itself into two problematic and determinative assumptions. First, that the crucial characteristic of Indigenous life consists in its 'customs' and 'traditions', and second, that they must be shown to have been maintained today in largely the same state they were in, when first observed by Europeans. I have already questioned the viability of the second of these two assumptions, and in the remainder of this conclusion I want to turn to the first assumption and its relationship to claims for Indigenous sovereignty.

39. The image of Indigenous life bound by custom and tradition is one of the most salient features of the colonial attitude to Indigenous people. Mahmood Mamdani has recently written (Mamdani 2001: 651-664), of the way that colonial authorities in Africa 'crafted' forms of 'traditional' and 'customary' law and institutions (such as chieftainship) that were imposed on Indigenous people under the rubric of 'native authority'. Mamdani's approach highlights the implication of colonial (and post-colonial) authorities in the creation of the 'customary' as the realm of the 'native'. Custom is expressive of the range of forces, beliefs, and superstitions that bind the 'native' in invisible chains of dependence, but 'custom' is also an object of outside, European observation, knowledge, and manipulation (Tully 1995: 60). To identify custom as the defining characteristic of the life of a people is thus to represent them as passive in a double sense, as subject to their own 'superstitions' and 'beliefs', and as subject to superior European knowledge and government. For the *Yorta Yorta* people in this case, their situation – as represented by Justice Olney – amounts to the most abject possible. They are cast as the descendants of a people either washed away by the 'tide of history' or hopelessly and impossibly jumbled together by 'force of circumstances'. Their current 'customs' and 'observances' are judged to be non-traditional, even though, in many cases, the Indigenous people have had to respond to circumstances beyond the experience of their forebears.

40. It is the European colonists who have acted here and shaped the Indigenous response, which, when it is judged, is found to have disadvantaged them in the eyes of the law because they did not respond in ways dictated by their 'custom' and 'tradition', (as described by colonial observers). It is the Indigenous people who are judged and their identity as inhabitants of the land found wanting on the grounds that they do not conform to the image derived of the 'original' inhabitants by white settlers and missionaries. In many cases it was these same settlers, pastoralists and missionaries that made it simply impossible and unacceptable for the Indigenous people to practice their 'customary'

observances or to lead their 'traditional' lifestyle. It is not they who are judged, they are the neutral 'witnesses'. How the activities of Europeans influenced the Indigenous people is not taken into consideration – their actions fall into the great neutral force blankly and nullifyingly described as the 'tide of history'.

41. If the concept of Indigenous sovereignty is to mean anything, it must be to embody a bulwark against that 'tide', an emphatic intention of Indigenous peoples to assert their identity in the face of those pressures that have sought to deny, change or remove it. To respect Indigenous sovereignty is to accord to Indigenous peoples the authority to determine for themselves the future development of their own identity in the wake of the legacies of colonial intervention. A large part of the appeal of Indigenous sovereignty is the enormous strategic and moral value that inheres in claiming a quality that has been so consistently denied to Indigenous people here and elsewhere. To claim Indigenous sovereignty and for it to be respected in those who claim it, is to challenge the fictive and racist basis of the sovereignty of the Australian state. The denial of a treaty to Indigenous Australians for example, has sometimes been based on the claim that a unitary, sovereign state cannot sign a treaty with its own people. The sovereignty of the state, on this view, is indivisible, and to sign a treaty with one's own subjects would be to establish 'a state within a state' (Grose 1996).

42. Recognising Indigenous sovereignty promises a fracturing of this unitary conception of sovereignty, insofar as it requires acknowledging the history of its denial in Australia. In continuing to deny Indigenous sovereignty, whether it takes the form of a treaty or some other agreement, we deny the fact that the Indigenous people never 'consented' to their subjection to it (Dodson and Strelein 2001: 830). In the history of Australia, no officially recognised treaty was ever signed, no war of conquest was ever declared, no Indigenous people signed a formal 'surrender', or freely and fairly placed themselves in subjection. Yet, the Indigenous people were regarded and have been treated by British and Australian governments as a subject people. The sovereignty of the Australian state thus still sits upon the forcible subjection of the Indigenous people, and until recognition of this situation is made, their subjection remains.

43. The call for Indigenous sovereignty in Australia is one part of the ongoing campaign for a substantive Indigenous self-determination. Indigenous self-determination may take many forms, but one could be the re-negotiation of the sovereignty of the Australian state to incorporate a recognition of the fact that the Indigenous peoples were denied their rights to their land, and to control over their families and communities. Their status as a people formerly subjected to all kinds of injustices with many enduring legacies, requires acceptance of their right to shape their own future and the terms of their relationship with white Australia. Indigenous sovereignty is not a clear concept, and there are many possible definitions, some of which may simply give voice to the multiple agreements already made by Indigenous communities for a range of services. But there is also room for a historic, national compact in which all Australians can share, embodying a broader notion of sovereignty, and a more complex appreciation of our histories and national identities.

44. At this juncture in our history it is incumbent on all Australian citizens to recognise that the Indigenous peoples of this land never consented to the sovereignty of the state established on these shores in 1788. Claiming Indigenous sovereignty is one way to redress the legacies of this subjection to a foreign sovereignty. Recognising Indigenous sovereignty involves recognising the authority of Indigenous people to determine how to develop themselves and their identity as a people into the future. This requires of the society that was built upon the denial of Indigenous sovereignty, that they respect the integrity of Indigenous identities based upon their own distinct and dynamic histories and traditions. Recognising Indigenous sovereignty thus means thinking of the sovereignty of the Australian state as more complex than the conventional 'unitary' conception. It would become a sovereignty based on the recognition of mutual partnership, the need to negotiate on an equal footing, rather than a sovereignty based on the amnesia induced by a belief in indivisibility (Tully 2000: 50-59; Tully 1998: 160-161). Australian sovereignty would then become a sovereignty based on a frank acknowledgement of the past, but expressive of the hope that it might amount to more than the imperial residue that washed ashore in 1788 on the blank and nullifying 'tide of history'.

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*References made in this paper to the findings of judges in specific cases refer to the name of the judge, a shortened name of the case, and to numbered paragraphs indicated by the symbol §. Subsequent quotations are taken from the same paragraph, unless otherwise indicated. The relevant sources of court findings referred to in this paper are listed in the Bibliography under the full name of the court case.

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