The Yorta Yorta Case

Next time someone tells you native title has not lived up to expectations, tell them about its 'foster' family

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December 2002

Native title has been called many names, but High Court Justice Ian Callinan has found the perfect metaphor for it: the badly treated, culturally misunderstood, 'foster child'.

Like his mainly brother judges, Justice Callinan couldn't possibly admit that the High Court fathered native title in 1992 and has been intermittently co-parenting it since, along with the federal Parliament. The idea that judges produce new law is always potentially illegitimate in a democracy, although the 'common' (judge-made) legal tradition is our English inheritance. In decisions from *Mabo* to *Yorta Yorta*, the judges insist on the fiction that native title was born in 1788 - all the Court did in 1992 was 'recognise' it by 'protecting' the Aboriginal traditions defining it. This makes native title, like history's 'half-caste' children, the progeny of Aboriginal society and law - not the offspring of Anglo-Australian law, whose only role lies in its salvation. The salvation offered is like that extended to 'stolen' children: sometimes it's better than what they had before, but it's always much less than you'd give your own.

The fiction that native title has always existed, like much inadequate parenting, allows the Court the luxury of controlling native title if it feels like doing so, while avoiding being blamed for its significant behavioural problems. If things get rough, the Court can say the other parent, the child - or both - is responsible. The federal Parliament is easy to blame: everyone knows Parliament has discriminated against native title by allowing other people to walk all over it and use it up. Geoff Clark can be relied on to get out the axe labelled 'Howard's 10-point plan' whenever a court makes a bad native title decision, even if the 1998 *Native Title Act* amendments played no role in it. They played no role in *Yorta Yorta*.

Aboriginal land traditions are also a soft target for the judges. In 1992, it was discovered that, like 'delinquent' children, they had failed to grow into the adults they were suddenly expected to be. A history of legislative and governmental abuse and judicial denial had made them quiver and shrink instead of standing up for their right to exist in all their distinctiveness as systems of governance. This is what went wrong for the Yorta Yorta, but it can't be blamed on John Howard or Paul Keating.

Had the Yorta Yorta made their claim under *Mabo*, without the *Native Title Act*, it would have been decided the same way by this High Court, although it's possible it could have been decided differently by a different one. The majority *Yorta Yorta* judges insist that it is the language of the *Native Title Act*, not the common law, which requires claimants to prove the uninterrupted vitality of pre-colonial legal systems, not just revived or significantly adapted versions of them. But the judges have defined Parliament's word 'traditional' to refer only to traditions which began before British sovereignty, when there is really nothing about that word which requires such a timeframe. The idea that tradition must be *pre-colonial* comes from the judges' themselves. *Mabo* can be read in this way, but this is not an inescapable reading, nor is it an inescapable reading of the Act. Insisting that it is helps keep Geoff Clark's axe aimed away from the Court.

Sometimes the High Court's perfect parental irresponsibility allows it to do native title a minor favour, like taking it to Disneyland. There, it can run around a pastoral lease (*Wik*), wander offshore (*Croker Island*), kill a bit of wildlife (*Yanner*), catch a fish on a mining lease (*Miriuwung-*

Gadjerrong), or (for a bit of nostalgia) overturn a Crown land dealing made during The Great Interregnum in Australian political life - the approximately 20 years (from 1975) during which the Commonwealth *Racial Discrimination Act* protected native title as it does other property rights. Or (for a real lark) obtain compensation for this historical discrimination (*Miriuwung-Gadjerrong*). However, most of these treats are reserved for the favoured 'foster' child: the robust one above the Tropic of Capricorn, not its 'pale' southern cousin. Native title law reinforces the north-south inequalities of past Aboriginal land policies.

Usually the High Court comes bearing no presents. It commences most access visits by loudly drawing attention to one of native title's many 'congenital defects' - defects for which it, of course, can accept no responsibility. Native title, it says, is a hopeless case not only because many Aboriginal land traditions have been beaten into ghostly submission by colonial processes (*Yorta Yorta*). It is also 'vulnerable' - 'inherently fragile' - because the *Mabo* judges decided that they would not protect it from interference by parliaments or governments acting under land legislation. Or, in the language of the distant parent, the *Mabo* judges 'recognised' that native title walked with a limp, but were afraid to give it crutches in case it used them to hit someone more important.

For the parent who doesn't care, the world is full of other people who are better with, and more interested in, the child. Optimistic commentators had hoped the High Court in *Yorta Yorta* would give the lower courts sensitive guidance on how to handle cross-cultural evidence about history in native title cases. After all, no other cases require the courts to consider 200-year-old evidence (other than the occasional official publication). Evidence of oral traditions is also rarely required. But why would the High Court take such a leadership role? The trial judge is closer to the action - let him do what he thinks best, so long as he avoids obvious gaffes like 'I never believe Aboriginal versions of history because they're not Written Down'.

The *Yorta Yorta* trial judge, Justice Olney, is very experienced in Aboriginal land claims, but his decisions reveal some idiosyncracies. He has decided in several cases that Aboriginal land traditions allow the exclusion of Aborigines, but not non-Aborigines, from claimed areas. These decisions are based on claimants' evidence but pay no attention to possible *reasons* why outsiders aren't excluded (any more). The likely explanations include: (a) guns, (b) the invaders' numerical superiority, (c) tradition's inability to articulate (rather than imply) rapidly enough new rules addressing the tidal wave of invasion and (d) centuries of being told that your traditions are worthless and having them ignored. But as Justice Kirby remarked in the *Croker Island case*, just because laws can't be enforced doesn't mean they don't exist.

Justice Olney's decisions that Aboriginal traditions do not exclude outsiders have been upheld by High Court majorities - in earlier cases because he was the one at the evidentiary coalface, and in *Yorta Yorta* because the judges made clear *they don't care* ***why*** Aborigines give up particular land traditions or entire systems of them - they only care *whether* Aborigines have done so. (Like uninterested parents, they prefer categorical answers to black-and-white questions, not complex excuses.) The High Court *has* warned trial judges there might be cases where claimants should be given the benefit of the doubt on *whether* tradition has gone. Perhaps they had in mind the recent *De Rose Hill* case, in which Justice O'Loughlin ruled that traditions relating to particular land could be lost in the space of just 20 years, even by a group which apparently maintains them to nearby land.

Children with bad parents tend to expect little of themselves or the company they keep. The High Court judges are not the first to identify flaws in the way the *Yorta Yorta* trial was run. The area claimed was enormous, and the lengthy (and therefore expensive) evidence seems sometimes to have degenerated into a speakout about regional Aboriginal identity or land justice. These are of no interest to native title law, which only wants to know about *particular* rights and duties in relation to *particular* land and their historical origins. Some of the historical documents which Justice Olney relied on for his conclusion that pre-colonial land traditions had been

abandoned in the 19th century were tendered by the claimants' barrister, who did not counteract their negative implications. But native title *litigation* is adversarial in nature. Legal strategy can be crucial to the outcome - unlike in, say, the more free-ranging inquiries under some land rights legislation. 1

There are now at least four good reasons why nobody in southern Australia and virtually no-one in the north should bother making native title claims.

First, even people who can prove:
traditional rights to exclusive possession of
always-vacant Crown land, Aboriginal reserves (or repurchased pastoral leases) under
'legal systems' based in 'societies' which 'settlement' or Aboriginal policy has not interrupted
could find government or an adjacent landowner interfering with or ignoring their title in a manner not permitted for other private land but permitted under the 1998 *Native Title Act* amendments.

Secondly, many native titles have been diminished or extinguished by grants of inconsistent titles to the same land. (Most recently, for example, the High Court ruled that native title was extinguished in the Western Division of NSW by perpetual lease grants (*Wilson v Anderson*).)

Thirdly, many claimants will fail to prove that they are members of a 'society' which sustains the relic of a 'legal system' defining rights and obligations in relation to land. In the process, they may fall into irreconcilable disputes with family members and neighbours over intimate questions of shared identity. They may also spend a lot of public money which governments could choose to allow ATSIC or Attorney-generals' departments to spend on something else.

Finally, even the High Court judges who found 'in favour' of the Yorta Yorta are limited by earlier rulings (*Mabo*, *Miriuwung-Gadjerrong*) that Aboriginal legal systems are not to be recognised *as* legal systems. The courts deign only 'to recognise' the land rights and obligations which those legal systems define, and then only those which the claimants *prove*. Claimants who neglect to prove *particular* land traditions risk having them go 'unrecognised'. Even if they met the minority judges' standard of showing they were a self-identified community substantially observing traditions of some longevity, the Yorta Yorta may have found that their 'recognition' was merely symbolic and did not generate meaningful land rights.

Next time someone tells you how unfortunate it is that native title has not lived up to expectations, you might want to tell them about its treatment by its 'foster' family.

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1 The term 'land rights' applies to 1970s and 1980s legislation under which state or Commonwealth parliaments (other than the WA Parliament) provided for grants of land to indigenous groups. Thus 'land rights' is a creature of statute, not the 'common' (judge-made) law. Land rights legislation has distributed land very unevenly across different jurisdictions - most land has been transferred under Commonwealth legislation in the NT. Land rights titles are usually a modified version of freehold or leasehold title - they are not shaped by indigenous land traditions as native title is. This feature, along with the fact that governments can usually only extinguish them (as they extinguish other Crown-granted titles) by compulsory acquisition (sometimes states require special acquisition legislation for land rights land) makes them vastly superior titles to native title.