CASE NOTES

MEMBERS OF THE YORTA YORTA ABORIGINAL COMMUNITY v VICTORIA*

INDIGENOUS AND COLONIAL TRADITIONS IN NATIVE TITLE

CONTENTS

I INTRODUCTION

In *Yorta Yorta*, the Full Federal Court, handing down its decision in an appeal of an earlier decision by Olney J,[1] continues the development of native title in Australia. *Yorta Yorta* provides a number of important insights into the trends of that development. In this case note, I want to focus on those insights which relate to the role of 'tradition' in native title.[2] *Yorta Yorta* provides two very different approaches to the concept of tradition: one is based on an understanding of traditions as discrete, historical practices, the other on treating traditions as socio-legal orders.[3] These approaches offer two very different possibilities for the development of native title: one, along a colonial path, and the other, on a more reconciliatory path. I suggest that the latter path is both legally and socially preferable, and that the High Court should be guided by it in its upcoming

* (2001) 180 ALR 655 ('*Yorta Yorta*').

1 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) ('*Yorta Yorta (First Instance)*').

2 *Yorta Yorta* (2001) 180 ALR 655 offers insights into a number of other crucial areas of native title jurisprudence, notably the treatment of oral histories, questions of the burden of proof (see especially Branson and Katz JJ at 693–5) and the issue of how native title burdens the Crown's radical title. While some of these issues are touched on in this discussion, they deserve a more detailed investigation than space will allow here. My summary of the judgments consequently focuses on those aspects which impact on the interpretation of the term 'traditional'.

3 The idea that native title may recognise indigenous 'legal orders' is drawn from Jeremy Webber, 'Native Title As Self-Government' (1999) 22 *University of New South Wales Law Journal* 600, 602.

judgment in *Western Australia v Ward*.[4] Only by adopting an understanding of indigenous traditions as socio-legal orders can we transform native title from a colonial tradition into a vehicle for reconciliation.

II THE CASE

A *Background*

From the outset, a number of aspects of the claim by the group calling themselves the Yorta Yorta indicated that this case would play an important part in the development of native title. The claim, over a large area of land and waters in northern Victoria and southern New South Wales,[5] was the first native title application to come on for trial after the enactment of the *Native Title Act 1993* (Cth) ('*NTA*').[6] More than 500 respondents were joined to the claim, including three States.[7] It raised central questions about the impact of European settlement on native title rights and interests, indigenous dispossession and the consequent abandonment of traditional indigenous lifestyles, as well as evidentiary issues in cases where it is claimed that the foundation for native title disappeared long ago.[8]

The matter was originally referred by the National Native Title Tribunal to the Federal Court for determination in 1995. The trial commenced in 1996 and concluded in May 1998. The hearing lasted 114 days, 201 witnesses were heard, 48 witness statements were admitted into evidence, and the transcript comprised 11 664 pages.[9] Judgment was given in December 1998.

B *At Trial*

Olney J found against the claimants. His decision was based on a finding of fact that, by the end of the 19th century, the impact of European settlement in the

[4] *Western Australia v Ward* (P59/2000), heard together with *Ward v Crosswalk Pty Ltd* (P67/2000), *A-G (NT) v Ward* (P62/2000) and *Ningarmara v Northern Territory* (P63/2000) from 6 to 16 March 2001. The High Court handed down its decision in *Commonwealth v Yarmirr* [2001] HCA 56 (Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 11 October 2001) ('*Yarmirr*') during the editing of this case note. Where possible, references to relevant discussions in the High Court's decision have been included. It has not, however, been possible to undertake a full review of that decision to determine whether it reflects the 'colonial' tradition of native title discussed in this case note or the more reconciliatory path proposed.

[5] The land claimed included vacant and reserved Crown lands, state forest and parkland, various kinds of reserves, Aboriginal freehold land under the *Aboriginal Land Rights Act 1983* (NSW), and a mine located on a 42 000 acre 'grazing occupation permit'.

[6] It should also be noted that the hearing was completed before the 1998 amendments to the *NTA* came into force. The colonial characteristics of native title discussed in this case note have been exacerbated by many of those changes, particularly those relating to extinguishment.

[7] The States were New South Wales, Victoria and South Australia. Other respondents included the Murray Darling Basin Commission, Telstra Corporation Limited, the New South Wales Aboriginal Land Council, the Greater Shepparton City Council, a number of shire councils, various sporting and recreational clubs, and persons holding wood, grazing, tourism and water interests in the claimed area.

[8] *Yorta Yorta* (2001) 180 ALR 655, 664 (Black CJ).

[9] Ibid 682 (Branson and Katz JJ).

claim area was such that the claimants' forebears had lost their traditional connection with the land.[10]

Olney J held that, of all the evidence, the most credible source of information about traditional laws and customs was the amateur anthropological observations of the pastoralist Edward Curr from the 1840s, and not the contemporary accounts of the claimants.[11] Olney J compared the evidence of the lifestyle of the claimant group's ancestors at various times with the evidence of traditional practices contained in extracts of Curr's work.[12] In his opinion, the evidence was silent as to the continued observance, in the late 19th century, of the 'aspects of traditional lifestyle' observed by Curr.[13] In contrast, a copy of an 1881 petition to the Governor of New South Wales calling for a land grant, signed by 42 local Aborigines, provided 'positive evidence emanating from the Aboriginals themselves' of the abandonment of this 'traditional lifestyle'.[14]

Olney J held that, by abandoning their traditional lifestyle, the claimant group's ancestors had severed the observance and acknowledgment of traditional laws and customs necessary to found native title rights and interests, and native title had, as a result, been extinguished. Once expired, the native title could not be revived, notwithstanding the genuine efforts of the claimants to revive the lost culture.[15] Recalling the words of Brennan J in *Mabo v Queensland [No 2]*,[16] Olney J held that '[t]he tide of history [had] indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs.'[17] Since this conclusion was determinative of the whole matter, it was not necessary for him to deal with arguments raised by some of the respondents that native title had in any event been extinguished, nor to make comprehensive findings about the current beliefs and practices of the claimant group.[18] He dismissed the application.

C *On Appeal to the Full Federal Court*

On appeal, the appellants argued primarily that the trial judge erroneously adopted a 'frozen in time' approach.[19] They contended that Olney J failed to give sufficient recognition to the capacity of traditional laws and customs to adapt to

[10] *Yorta Yorta (First Instance)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [129].
[11] Ibid [106].
[12] Ibid [109]–[121], especially [118].
[13] Ibid [118].
[14] Ibid [118]–[119].
[15] Ibid [121].
[16] (1992) 175 CLR 1, 43 ('*Mabo*'): 'when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.'
[17] *Yorta Yorta (First Instance)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [129].
[18] Ibid [121]–[134].
[19] The phrase is taken from the judgment of Lee J in *Ward v Western Australia* (1998) 159 ALR 483, 502 ('*Ward (First Instance)*'):

> If native title has continued since the assertion of sovereignty the rights available under that title, and the persons who may exercise those rights, will be ascertained by reference to practices that are based on traditional laws and customs, not by inquiring whether the traditional practices observed today are in the same form as before as if frozen in time.

changed circumstances in his interpretation of 'traditional laws acknowledged and the traditional customs observed' under s 223 of the *NTA*.[20] As a result, he had 'wrongly equated the existence of native title with the existence of a "traditional society" or a "traditional lifestyle"'.[21]

The appellants' second argument was that Olney J had failed to take significant and important evidence into account — in particular, the evidence of living witnesses bearing upon the situation in the late 19th century.[22] They argued that the learned trial judge approached the matter from the wrong point in time, commencing with the past rather than, as he should, with the present.[23] A process of inquiry which commenced with an analysis of the situation at the time of annexation and traced traditional laws and customs forward to the present was itself, in the submission of the appellants, likely to result in an erroneous 'frozen in time' approach being adopted.[24] According to the appellants, the focus should not be on whether laws and customs within the historical tradition of the group had survived through to the present day, but whether the group's present day laws and customs could be traced back to the former inhabitants.

The respondents contested the 'frozen in time' argument, submitting that Olney J gave proper recognition to the capacity of traditional laws and customs to adapt to changed circumstances.[25] They argued that Olney J's finding of expiry of native title was correctly made, that it was a finding that was open on the evidence, that it had not been shown to be wrong and that it resolved the whole case.[26]

III THE JUDGMENTS

The Full Court delivered two judgments. The majority, Branson and Katz JJ, held that Olney J had not adopted a 'frozen in time' approach, but that if he had it would have been wrong.[27] His failure to refer expressly to, or evaluate, particular aspects of the evidence did not indicate that those aspects had not been taken into account.[28] Since the finding of fact that the tide of history had washed

[20] *Yorta Yorta* (2001) 180 ALR 655, 659–60 (Black CJ). Section 223 of the *NTA 1993* (Cth) creates a statutory regime protecting native title rights and interests based in part on those native title rights recognised by the common law. Section 223 provides (emphasis in original):

> (1) The *expression native title* or *native title rights and interests* means 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.

[21] *Yorta Yorta* (2001) 180 ALR 655, 659 (Black CJ).

[22] Ibid.

[23] Ibid 660.

[24] Ibid.

[25] Ibid 659.

[26] Ibid.

[27] Ibid 698–9.

[28] Ibid 703.

away any basis for native title by the late 19th century was open to Olney J, and as he had not erred in the process of making this finding, the appeal should be dismissed.

Black CJ dissented, finding that Olney J had erred by applying too restrictive an approach to the concept of what is 'traditional',[29] and by failing to make findings on various aspects of the evidence.[30] Black CJ would have allowed the appeal and remitted the matter to the trial judge for further hearing.[31]

The appeal was, accordingly, dismissed.[32] The reasons for judgment reveal a consensus on two central points: first, that the traditional laws and customs that form the foundation for native title may adapt and change without native title being lost;[33] and, second, that a 'frozen in time' approach to the determination of native title would be incorrect.[34] In the remainder of this Part, I will attempt to draw out how this apparent consensus conceals two very different approaches to native title. To do this, I will focus on the role 'tradition' plays in each of the judgments.

A *The Reasons for Judgment of the Majority*

Branson and Katz JJ upheld Olney J's approach to the concept of 'tradition' and determined that no case had been made out for overturning the decision which flowed from it.[35] It was, in their opinion, open to Olney J to find that the Yorta Yorta community had 'lost its character as a traditional community.'[36]

For the majority, the case turned on the correct interpretation of s 223 of the *NTA*, and in particular the meaning of the term 'traditional'.[37] In their opinion, the correct conclusion to be drawn from the legislative history[38] and prior judicial interpretation[39] was that, while 'traditionally-based' laws and customs are maintained, native title survives.[40] 'Traditional' practices need not be 'frozen' at any point in the past, and can retain their 'traditional' characteristics

29 Ibid 677, 681.
30 Ibid 679, 681.
31 Ibid 681.
32 At the time of writing, preliminary materials have been filed with the High Court, but no application book has yet been filed, nor any date for special leave to appeal scheduled. The case is No M19/2001 in the High Court.
33 *Yorta Yorta* (2001) 180 ALR 655, 664–5 (Black CJ), 686–7 (Branson and Katz JJ). See also below Part III(A).
34 Ibid 674–7 (Black CJ), 692 (Branson and Katz JJ).
35 Ibid 689–92.
36 Ibid 701.
37 Ibid 682–9.
38 Ibid 685–6, 688.
39 Ibid 683–9; see especially at 686–7. See, eg, *Mabo* (1992) 175 CLR 1, 61, 70 (Brennan J), 110 (Deane and Gaudron JJ), 192 (Toohey J); *Ward (First Instance)* (1998) 159 ALR 483, 502; *Commonwealth v Yarmirr* (1999) 101 FCR 171, 194 (Beaumont and von Doussa JJ) ('*Yarmirr (FFC)*').
40 See *Yorta Yorta* (2001) 180 ALR 655, 686, 689, 692–3 (Branson and Katz JJ). See also *Mabo* (1992) 175 CLR 1, 70 (Brennan J); cf at 110 where Deane and Gaudron JJ contemplated the possible survival of native title after the abandonment of traditional laws and customs.

despite 'evolutionary or adaptive changes to the subject matter of a tradition.'[41] In the majority's opinion, the 'traditional' essence of practices is preserved if the change is itself 'according to the practices or customs' observed.[42] Native title will survive the modification of those 'traditionally-based' practices, but it will be lost when they cease to be 'properly characterised as traditional'[43] — when the modifications to the practice 'reflect a breaking with the past rather than the maintenance of the ways of the past in changed circumstances.'[44] The majority argued that the test of whether a law or custom is traditional is not subjective,[45] but objective: 'The primary issue is whether the law or custom has in substance been handed down from generation to generation; that is, whether it can be shown to have its roots in the tradition of the relevant community.'[46]

The majority rejected the appellants' argument that a number of statements in Olney J's judgment[47] indicated that he had adopted a 'frozen in time' approach, and held that, even if he had, it would not be determinative of the outcome of the appeal.[48] In their view, it was open to Olney J to find that the modifications the Yorta Yorta had made to their way of life amounted to an abandonment of their 'traditional way of life'.[49] By abandoning this way of life, they had 'ceased to exist as a traditional indigenous community',[50] they had lost their 'traditional character'.[51]

In characterising the Yorta Yorta in this way, the majority moved from their earlier test, in which the 'primary issue' was identified as the continued observance of discrete laws and customs that can be proven to have been handed down from generation to generation,[52] to a test based on *identity*. The claimants failed this test because they failed to establish the requisite continuity of community acknowledgment of traditional laws and customs.[53] By abandoning traditional laws and customs, the claimant group's ancestors had ceased to be an 'identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs'.[54]

41 *Yorta Yorta* (2001) 180 ALR 655, 688. See also *Mabo* (1992) 175 CLR 1, 110 (Deane and Gaudron JJ); *Ward (First Instance)* (1998) 159 ALR 483, 502. The examples Branson and Katz JJ provide of such evolution are the adaptation to accommodate female judges into the tradition of the public presentation by new judges of their commission, and the evolution of hunting traditions to permit the hunting of new forms of wildlife.

42 *Yorta Yorta* (2001) 180 ALR 655, 687, quoting *Ward (First Instance)* (1998) 159 ALR 483, 502 (Lee J).

43 *Yorta Yorta* (2001) 180 ALR 655, 687.

44 Ibid.

45 Ibid 688. The majority noted that, while such a subjective characterisation may not be a sufficient condition for a law or custom to be characterised as 'traditional', it may be a necessary one.

46 Ibid 688–9.

47 See *Yorta Yorta (First Instance)* [1998] FCA 1606 (Unreported, Olney J, 18 December 1998) [59], [105]–[106], [109].

48 *Yorta Yorta* (2001) 180 ALR 655, 698–9.

49 Ibid 700–1.

50 Ibid 701.

51 Ibid.

52 Ibid 688–9.

53 Ibid 700–1.

54 *Yorta Yorta* (2001) 180 ALR 655, 685, 700, quoting *Mabo* (1992) 175 CLR 1, 61 (Brennan J).

The Yorta Yorta's ancestors lost their traditional identity as a result of dispossession of their land, though dispossession need not lead to such a loss of traditional character.[55] The majority held that there was evidence from the appellants themselves which indicated that the laws and customs practised by earlier members of the claimant group relating to descent, language, initiation, protocol and ceremonies had been lost or had fallen into disuse,[56] that the claimants had lost their 'traditional means of support' and 'traditional ways',[57] and that they had not always identified themselves as 'Yorta Yorta'.[58] Because the community disappeared as a traditional indigenous community, the native title it may have possessed also disappeared.[59]

This conclusion sits uncomfortably with a number of the majority's conclusions relating to Olney J's approach to the evidence.

First, in the majority's opinion, since traditional laws and customs evolve, it is not fatal to a claim for native title that the claimant fails to establish the precise nature of the traditional indigenous laws and customs acknowledged and observed at the time of the acquisition of sovereignty by the Crown, 'if the traditional character of currently observed laws and customs can be established by other means.'[60] The majority did not explain what such 'other means' might entail. One method might be for contemporary witnesses to explain how their practices can be traced back to the customs and laws of the time of the Crown's acquisition of sovereignty; but that method was adopted by the claimants and rejected by both Olney J and the majority.[61]

Second, in relation to the 1881 petition, the majority noted that:

> The evidentiary weight to be given to the contents of a petition, almost certainly drawn with European help ... and not signed by all, or possibly even the majority, of the asserted Aboriginal community or group, will be limited. ... It may also, of course, reflect an appreciation that the Governor and his advisers might place little positive value on adherence to traditional Aboriginal laws and customs.[62]

The last comment, in particular, suggests that the majority was alive to the possibility that indigenous cultures might use tactics of resistance and subversion to ensure the survival of their cultures and traditions. Nevertheless, the majority concluded that such a petition did tend to suggest, or at least was consistent with Olney J's finding, 'that the petitioners had lost their traditional means of support and were turning away from traditional ways.'[63]

55 *Yorta Yorta* (2001) 180 ALR 655, 701–2.
56 Ibid 702.
57 Ibid 700.
58 Ibid 702.
59 Ibid 696.
60 Ibid 692.
61 The majority concluded that Olney J was probably in error to the extent that he acted on the basis that the claim must fail if the claimants could not prove the nature of the traditional laws and customs of their forebears in 1788, but that, even if he did make that mistake, it was not significant for the outcome of the appeal: ibid.
62 Ibid 700.
63 Ibid.

The majority provided no explanation why the petition was, on the balance of the evidence, properly regarded as an example of the abandonment of traditional ways, rather than a subversive act intended to better maintain, even if in a clandestine manner, those ways. Instead, the majority concluded that, given the complexity of the evidence, and the caution to be exercised before disturbing a finding of fact in such a complex case, the approach taken by Olney J was open to him.[64] His failure to refer expressly to, or to evaluate, particular aspects of the evidence, did not indicate that those aspects had not been taken into account.[65] The appeal should, the majority concluded, be dismissed.

B *The Reasons for Judgment of Black CJ in Dissent*

Black CJ adopted a subtly different approach to the concept of tradition and, as a result, reached a very different conclusion from the majority.[66] Black CJ would have allowed the appeal and remitted the matter to the trial judge for further hearing[67] since, in his opinion, while Olney J had not adopted a strict 'frozen in time' approach, he had nevertheless applied too restrictive an approach to the concept of 'traditional'[68] and had consequently failed to consider certain relevant aspects of the evidence.[69]

For the majority, traditional laws and customs remain traditional only so long as they maintain the ways of the past, rather than breaking with them.[70] Laws and customs maintain their traditional character through the dynamic of ritual, recalling the past and representing it in the present. As ritual practices, traditions attempt to retain an unchanging essence. What we see emerging in Black CJ's reasons for judgment is the germ of an approach which treats 'tradition' in an altogether different way, understanding the 'traditional laws and customs' contemplated by s 223 of the *NTA* not as traditions in themselves, but as laws and customs drawn from a particular indigenous tradition, a particular indigenous socio-legal order. These 'traditions' are fundamentally dynamic, normative frameworks, reaching across generations. Traditional laws and customs are not conceptualised as freestanding practices, but as interrelated elements within these normative frameworks.

Black CJ stated that, in relation to 'traditional' laws and customs, s 223 of the *NTA* is not concerned 'with what is dead, frozen or otherwise incapable of change.'[71] Rather,

> far from being concerned with what is static, the very notion of 'tradition' as involving the transmission from generation to generation of statements, beliefs,

64 Ibid 703–4.
65 Ibid 703.
66 Black CJ recognised the centrality of 'tradition' to the outcome of the case: ibid 664.
67 Ibid 681.
68 Ibid 677, 681.
69 Ibid 679, 681.
70 Ibid 687.
71 Ibid 666.

> legends and customs orally or by practice implies recognition of the possibility of change.[72]

While the majority focused on the unchanging, ritual aspects of tradition, Black CJ focused on its dynamic aspects. Whereas the 'primary issue' for the majority is whether today's laws and customs have their roots in earlier traditions,[73] maintaining an essential traditional character, for Black CJ the question is, conversely, whether today's tradition is a product of evolution from earlier laws and customs.[74] For the majority, traditional practices evolve along their own trajectories, while for Black CJ laws and customs are connected together within one continuity of tradition, so that even 'practices that are not "traditionally based", in the sense that they are not rooted in the past, may still illuminate and support other practices that are "traditional" in the sense used in s 223.'[75] The tradition referred to in s 223 of the *NTA* is, this statement suggests, a collective, praxiological system, rather than a discrete, individual practice.

It is important not to overstate the extent to which Black CJ himself makes these distinctions. For example, Black CJ and the majority relied on the same *Macquarie Dictionary* definition of 'tradition'.[76] I am attempting here to draw out the underlying distinctions between the two approaches to explain the different results reached by the majority and Black CJ.

In my reading, whereas the majority saw the native title inquiry as an inquiry into the survival of particular traditional practices or 'ways'[77] — a traditional 'lifestyle' made up of a bundle of traditional practices — the approach underlying Black CJ's judgment treated it as an inquiry into the continued observance, by a group, of a socio-legal tradition — the maintenance of a particular socio-legal order. For Black CJ, the requisite tradition can be maintained even if it is not practicable to maintain a traditional presence on or occupation of the land,[78]

[72] Ibid. See also *Yarmirr (FFC)* (1999) 101 FCR 171, 194 (Beaumont and von Doussa JJ).

[73] See *Yorta Yorta* (2001) 180 ALR 655, 688–9.

[74] See ibid 666.

[75] Ibid 667.

[76] Ibid 666 (Black CJ); 688 (Branson and Katz JJ). Interestingly, Black CJ cites only the first limb of this definition: 'the handing down of statements, beliefs, legends, customs etc, from generation to generation, especially by word of mouth or by practice'. Branson and Katz JJ also cite the second limb: 'that which is so handed down'. The first limb provides an understanding of tradition as a process; the second, as a bundle of practices. The first is closer to Black CJ's approach, the second to that of the majority.

[77] Ibid 700.

[78] Ibid 669. On the question of occupation, Black CJ concurred with the approach of Beaumont and von Doussa JJ in *Western Australia v Ward* (2000) 99 FCR 316, 382 ('*Ward*'), where they rejected the submission of Western Australia that physical occupation of the claimed land is a necessary requirement for the proof of continuing connection with the land. Black CJ also noted that Beaumont and von Doussa JJ observed (at 383) that the comments of Toohey J in *Mabo* (1992) 175 CLR 1, 188 were not to be

> understood as laying down the requirement of actual physical presence as essential to the maintenance of a connection by traditional laws and customs, in circumstances where that physical presence is no longer practicable or in circumstances where access to traditional lands is restricted or prevented by the activities of European settlers.

On the question of practicability, see also *Yorta Yorta* (2001) 180 ALR 655, 665 (Black CJ), quoting *Mabo* (1992) 175 CLR 1, 59–61, 70 (Brennan J).

since 'native title rights and interests may persist despite the cessation of a traditional — in the sense of pre-contact — lifestyle.'[79]

Whereas for the majority the 'turning away from traditional ways' amounted to an abandonment of the traditions which give rise to native title, for Black CJ the abandonment of a traditional *lifestyle* does not necessarily mean that the group will cease to represent an 'identifiable community' capable of possessing native title.[80] What matters is the maintenance of a certain socio-legal order, not its particular manifestations.

The contrast between Black CJ's underlying approach and that of the majority is highlighted by Black CJ's discussion of *Yanner v Eaton*.[81] In *Yanner*, the High Court held that alterations to traditional hunting practices such as the use of non-traditional means to hunt (in that case, a motorboat) did not alter the essentially traditional nature of the activity.[82] It was, in Gummow J's terms, 'an evolved, or altered, form of traditional behaviour.'[83] While the majority in *Yorta Yorta* did not specifically refer to *Yanner*, it did note that 'a tradition of hunting in a certain area may be maintained notwithstanding that ... the tools used may have changed over time (for example, from spear or throwing stick to rifle).'[84]

It seems reasonable to conclude that, like Black CJ, the majority concurred with the High Court's characterisation of Yanner's hunting activities as 'traditional'. But Black CJ takes the argument a step further. Once we recognise that traditional rights such as hunting rights can adapt and evolve, he writes,

> it can also be readily appreciated how less physical or tangible manifestations of traditional laws and customs can be seen to be rooted in the past and to be traditional customs in the adapted form currently observed. Adaptations of this nature may manifest themselves in many ways including, to take one possible example, changed leadership structures within modern Aboriginal society.[85]

Black CJ recognised here that 'traditions' comprehend more than simple bundles of rights and interests, practices and 'ways' — they are socio-legal orders, involving governance structures and other 'less physical or tangible manifestations'. What is more, he took the important step of recognising that indigenous traditions can exist even 'within modern Aboriginal society'. By implication, the existence of 'modern' Aboriginal social structures does not necessarily indicate the abandonment of 'traditional' laws and customs. For Black CJ, indigenous traditions can survive even the massive social changes occasioned by the arrival of modernity, as in *Ward*,[86] a case concerning native title in an area of the East Kimberley in which the arrival of settlers and miners

[79] *Yorta Yorta* (2001) 180 ALR 655, 670.
[80] Ibid 680. See, eg, *Mabo* (1992) 175 CLR 1, 61 (Brennan J).
[81] (1999) 201 CLR 351 ('*Yanner*').
[82] See *Yorta Yorta* (2001) 180 ALR 655, 668.
[83] *Yanner* (1999) 201 CLR 351, 382.
[84] *Yorta Yorta* (2001) 180 ALR 655, 668.
[85] Ibid 668.
[86] (2000) 99 FCR 316.

in the 1880s and 1890s caused massive social dislocation in indigenous communities.[87]

The different approaches to tradition offered by Black CJ and the majority become crucially important in relation to the treatment of the evidence at trial. For Black CJ, the consequence of the recognition that traditions are fundamentally evolutionary is that

> the correct approach to an application for the determination of native title will, ordinarily, involve the making of comprehensive findings of fact about what are claimed to be the traditional laws presently acknowledged and the traditional customs presently observed that provide the foundation for the asserted native title rights and interests ... A process that begins ... with an assessment of what is claimed at the present time has the fundamental advantage of allowing adaptations and evolution to be seen for what they are and, in some instances, to be recognised at all.[88]

Black CJ here endorsed what we might term a 'retrospective' approach to the determination of the existence of 'traditional' laws and customs. For him, the proper approach is not that of Olney J, which involves 'making findings about the past and then progressing forward from that point',[89] but to characterise current laws and customs by tracing their roots back, to see whether they have evolved through a process of handing down from the traditional laws and customs which were observed at the time of the acquisition of sovereignty.

Black CJ displayed a similar logic in dealing with the appellants' alternative argument that the evidence was not silent in the way Olney J stated in relation to the continued observance in the late 19th century of aspects of traditional lifestyle, customs and laws.[90] The evidence of living witnesses to which the appellants had pointed was, in Black CJ's view, so integral to their argument that contemporary laws and customs were adapted versions of the prior tradition that it

> needed to be dealt with before a finding could be made that native title had come to an end. Once appropriate recognition is given to notions of adaptation and change and the broader concept of what is 'traditional' ... [it is] inevitable that the evidence of living witnesses about these matters required full assessment before a decision could be made about whether all was lost over 100 years ago.[91]

By giving the writings of Edward Curr from the 1840s greater weight in determining the nature of traditional laws and customs in 1788 than contemporary

[87] See *Yorta Yorta* (2001) 180 ALR 655, 668–9. Black CJ supported the approach of the majority in *Ward* (2000) 99 FCR 316, 382 (Beaumont and von Doussa JJ) on this point. Their Honours stated that although it was

> impracticable after European settlement for members of the indigenous population to maintain a traditional presence on substantial parts of the determination area ... it does not follow that the surviving members of the indigenous population have not substantially maintained their connection with the land.

[88] *Yorta Yorta* (2001) 180 ALR 655, 670.

[89] Ibid.

[90] Ibid 677.

[91] Ibid 679; see also at 678–9.

indigenous oral histories, Olney J risked neglecting the oral tradition 'that was of its very nature likely to be reflective — and indeed expository — of changes in laws and customs that occurred over time.'[92]

This risk was realised in Olney J's conclusion that the evidence was silent as to the presence of traditional laws and customs during the late 19th century.[93] The failure to make findings on this evidence was a material error which meant that Olney J's findings should not stand.[94]

Olney J had not, in Black CJ's view, applied a strict 'frozen in time' approach, excluding from the notion of 'traditional' laws and customs 'any that were not virtually the same as those that were proved to have been observed by the ancestors of the claimant community'.[95] Instead he had

> adopted an approach that did not give appropriate recognition to the extent to which 'traditional' laws and customs can adapt and evolve and still have the character of 'traditional laws and customs', capable of providing a continuing foundation for native title rights and interests.[96]

By failing to deal with the possible evolution and adaptation of traditional practices during the late 19th century, and instead searching for evidence of the particular aspects of traditional lifestyle picked up by Curr, Olney J 'failed to give proper recognition to the relevance of adaptation and change in the traditional laws and customs of the claimants' ancestors at about this time.'[97]

The shortcomings of this approach were, in Black CJ's opinion, exemplified by Olney J's approach to the 1881 petition. While the petition could legitimately be used as evidence of the abandonment of a traditional lifestyle by some Aboriginal people, it did not 'deny the continuance, in adapted or evolved form, of an acknowledgment of laws and an observance of customs that can properly be characterised as "traditional"'.[98]

This conclusion contains another subtle departure from the reasoning of the majority. First, whereas the majority took the disappearance of traditional indigenous lifestyles as evidence of the disappearance of the traditions which give laws and customs their s 223 'traditional' character, Black CJ distinguished between traditional indigenous lifestyles and a broader socio-legal tradition. Second, the effect of Black CJ's argument is to suggest that, where the evidence is silent as to the continued observance, at any given time, of a particular indigenous tradition, there should be a presumption that the tradition continued to be observed in adapted forms — forms that made it disappear from the colonial view. I will return to this question of the 'presumption of adaptation' later.

In Black CJ's opinion, Olney J's approach to the evidence failed to deal adequately with a number of evidentiary obstacles to a finding that the ancestors of

92 Ibid 675.
93 Ibid.
94 Ibid 680.
95 Ibid 674.
96 Ibid 675.
97 Ibid; see also at 676–7.
98 Ibid 676.

the claimant community had abandoned their traditional laws and customs. In particular, Olney J failed to avoid the risk inherent in using Curr's diaries of relying on a 'historical snapshot of adventitious content' which would 'reveal little or nothing of a process of adaptation and change' within the indigenous community in question.[99] By relying on such 'snapshots', Black CJ noted, we fall prey to misconceptions about adaptation and change, and may fail to recognise the 'extent to which adaptation and evolution can take place without laws and customs ceasing to be "traditional".'[100] Precisely because of the fundamental adaptability and evolution of tradition, such an inquiry should not be conceived of as an

> inquiry about a single historical event concerning which the written record may be a very good guide — such as whether a vessel was lost with all hands — but something entirely more complicated and likely to involve a consideration of events over a lengthy period.[101]

Unless viewed over a 'substantial time frame', there is a real likelihood of a 'false conclusion', because of the failure to account for the evolution of tradition.[102] Because of these errors, Black CJ would have upheld the appeal.

IV THE COLONIAL TRADITION OF NATIVE TITLE

As I have characterised their reasons for judgment, the majority and Black CJ offer two very different approaches to the role of tradition in native title. The majority offers a *traditional indigenous lifestyle* approach. According to this approach, contemporary laws and customs will be 'traditional' if they are evolved or adapted forms of the practices, ways and lifestyle of the claimant group's forebears at the time of the acquisition of sovereignty by the Crown. The *socio-legal order approach*, which I have suggested is implicit in Black CJ's judgment, is altogether different. According to this approach, contemporary laws and customs will be 'traditional' if they issue from an indigenous socio-legal tradition which is the modern, adapted form of the tradition under which the forebears of the claimant group lived at the time of the acquisition of sovereignty by the Crown. In this section, I want to draw out the implications of these different approaches for native title. These implications play out in a number of narrowly jurisprudential ways; but they are perhaps more important at a social level, since they say different things about what kind of indigenous communities the common law will recognise as possessing native title.

In my opinion, the *traditional indigenous lifestyle* approach of the majority is wrong in law. It adopts too narrow an understanding of what is 'traditional'. It imposes a test of communal identity, measuring the identity of the entire claimant group against historical yardsticks of 'traditional lifestyle'. In my view, the *NTA* poses no such test of identity.

[99] Ibid 673.
[100] Ibid.
[101] Ibid.
[102] Ibid.

The approach is also wrong in a broader, sociological sense, a sense perhaps better served by saying that it develops the law of native title in a way that I believe would be wrong for our society, and our law, to choose. It is important to recognise this social aspect of native title. Jeremy Webber has argued that the sociological moment of native title was one of 'regret'.[103] In the rest of this case note, I will argue that, from this origin of regret, native title is slowly developing into a tradition of colonialism, but that the question of 'tradition' provides a sociological moment for reshaping that tradition.

Native title is itself a tradition — a handing down of statements, beliefs, norms, customs, an 'intercommunal body of norms governing indigenous/non-indigenous interaction.'[104] The traditional law of native title provides a cohesive influence on native title determinations, but is, at the same time, a source and resource of change.[105] Like any tradition, it is at once unchanging and dynamic.

The central question that *Yorta Yorta* raises about the tradition of native title is that of its developing role in reconciling two independent legal and social traditions. How, as a social phenomenon, is native title dealing with the competing traditions with which it purports to deal: indigenous traditions and the tradition of the common law?[106]

At a basic practical level, the native title tradition is, notwithstanding High Court comments to the contrary,[107] a branch of the larger common law tradition.[108] It is administered by common law judges in common law courts, with common law rules of evidence under common law value systems. Seen from this perspective, native title cannot escape its predominantly common law character. The indigenous tradition becomes a source for elements of the native title tradition, controlled and constructed by the non-indigenous tradition;[109] it is colonised by the common law. This colonial aspect of native title is emphasised by the extent to which its basic contours are those of the common law. There can be no recognition of indigenous rights or interests which would 'fracture a skeletal principle' of the common law,[110] nor where such recognition is 'fundamentally inconsistent with its basic precepts by reason of being repugnant to natural justice, equity and good conscience'.[111] Precisely because of the dominance of this approach in native title jurisprudence, because native title cannot be inconsistent with basic common law rights, native title has been held not to

[103] Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17 *Sydney Law Review* 5.

[104] Ibid 10.

[105] H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2000) 23.

[106] On the 'traditional' characteristics of the common law, and especially the system of precedent, see ibid 205–50.

[107] *Mabo* (1992) 175 CLR 1, 59 (Brennan J): though native title is 'recognised by the common law, [it] is not an institution of the common law'. See also *Wik Peoples v Queensland* (1996) 187 CLR 1, 91 (Brennan CJ); *Fejo v Northern Territory* (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Fejo*').

[108] Cf Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 115.

[109] See Luke McNamara and Scott Grattan, 'The Recognition of Indigenous Land Rights as "Native Title": Continuity and Transformation' (1999) 3 *Flinders Journal of Law Reform* 137, 159.

[110] *Mabo* (1992) 175 CLR 1, 43 (Brennan J).

[111] *Yorta Yorta* (2001) 180 ALR 655, 685 (Branson and Katz JJ).

extend to rights over sea areas which contradict the public right of navigation or the public right to fish.[112] We should not agree that native title is a 'hybrid',[113] if that implies equality of input, nor a 'recognition space' for the two traditions,[114] if that implies that it is as concerned with the recognition of the common law by indigenous traditions as vice-versa. If native title 'has its origin in and is given its content by the traditional laws' of the indigenous tradition, as Brennan J suggested in *Mabo*,[115] then it has its conclusion in and is given its form by the common law.

Nevertheless, it is important to acknowledge that native title does offer the occasion for the modification of the common law in a process of accommodating pre-existing native interests previously unknown to it.[116] It provides a unique (sui generis)[117] opportunity for the transformation of the common law tradition, and for the generation of a body of law which gives meaningful expression to, and reconciles, elements of two competing socio-legal orders. The approaches offered in *Yorta Yorta* are two different responses to this opportunity for development. In the rest of this section, I want to explain how the *traditional indigenous lifestyle* approach develops native title in a way that retains, and perhaps even emphasises, the colonial heritage of native title, while the *socio-legal order* approach minimises those colonial tendencies by giving greater respect to indigenous traditions.

The native title tradition is colonial in both historical and teleological senses. It is colonial in a historical sense because, as a product of the common law tradition, it is the product of the legal tradition of a colonising power. It is colonial in a teleological sense because it serves the ends of that colonial power, using the resource of the indigenous traditions to serve and protect the colonial power — the Crown — and the legal interests which issue from it. The majority's *traditional indigenous lifestyle* approach manifests these colonial tendencies

112 *Yarmirr* [2001] HCA 56 (Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 11 October 2001) [97]–[100] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

113 In *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1081; 153 DLR (4th) 193, 241 ('*Delgamuukw*'), Lamer CJ (Cory, Major and McLachlin JJ concurring) espoused a characterisation of aboriginal title in Canada as a hybrid: 'its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems ... [I]t must be understood by reference to both common law and aboriginal perspectives.'

114 See Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land Is Our Life: Land Rights Past, Present and Future* (1997) 150.

115 (1992) 175 CLR 1, 58:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

116 See, eg, ibid 86–7. Deane and Gaudron JJ were here arguing that the existence of native title must require either the modification of the pre-existing native interest into some form recognised by the common law, or a modification of the common law to accommodate the pre-existing native interest. Whether the common law has in fact been modified is a question to be answered from the common law perspective; I argue here that it has. Whether the native interest has, analogously, been modified to accommodate the common law's demands is a question to be answered from the perspective of each indigenous legal tradition. It is not a question I am qualified to answer. Such an accommodation may, however, represent precisely that kind of evolution of tradition to which *Yorta Yorta* draws attention.

117 See, eg, ibid 89 (Deane and Gaudron JJ).