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Indigenous heritage protection, native title and regional agreements: the changing environment

J.D. Finlayson

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Summary

Central to the argument of this paper is a critical examination of the potential to strike local and regional agreements in Victoria between indigenous and other parties in a context of impending proposed legislative changes to indigenous cultural heritage (Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*) and property rights (Native Title Amendment Bill 1997).

My intention is to demonstrate that although policy makers might consider legislation as a discrete phenomena, on the ground such distinctions collapse, to be replaced by questions about the source and reproduction of socioeconomic and political power within local communities, and that in settled Australia the impact of these matters is particularly intense. To this end, the paper highlights the terms in which a particular kind of public discourse has been constructed around the native title claim and efforts at site protection of the Yorta Yorta peoples of the Murray Goulburn region of north-eastern Victoria.

The paper examines the construction and dissemination of public information about the basis of the Yorta Yorta peoples' native title claim, and their use of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* as it applies to Victoria under Part IIA, for protection of important cultural sites within the Yorta Yorta native title claim area.

The research concludes:

- That in this part of north-eastern Victoria, rural elites and conservative political alliances have either deliberately or through ignorance, sought to publicly discredit the application by native title claimants of recourse to legislation to legitimately address concerns over site protection and cultural heritage.
- That the construction and public reproduction of uninformed and prejudicial dialogue ultimately serves to undermine and discredit legitimate Aboriginal concerns and to deny these matters as being of substantive and general community interest.
- That newspapers and public radio have been used to promote views antithetical to the legitimate aspirations and actions of the Yorta Yorta peoples over land and heritage matters. Indeed, the position adopted in this paper, is that opponents of indigenous interests have sought to undermine the legislative system and processes by which issues of land management, cultural heritage and land ownership can be critically examined through due process and procedural fairness.
- On the evidence of the case study, the research concludes that agreements should have been possible on specific land matters associated with the Yorta Yorta peoples' claim, but that the use of public media to promote misinformation and political cynicism has seriously and unnecessarily

polarised the wider community to the extent that litigation is preferred to negotiation.

- Following analysis of the ways in which rural power elites have strategically employed their resources and network to engage with native title and heritage protection issues in this case study, the paper suggests that similar situations are likely to occur across settled Australia. In part, this is because of widespread public notions that indigenous people in south-eastern Australia are largely assimilated culturally, if not economically, and consequently, that attachments to country and knowledge of custom and law cannot have survived post-contact settlement.
- An issue raised by the case study, but not explored in any detail, is the relationship between cultural heritage sites and native title. The case study showed that sites on land under native title claim should have attracted the legislative protection of the *Native Title Act 1993* under the future act regime. When the Victorian State Government failed to activate this process, native title claimants resorted to other protective legislation. However, the question of what quality of protection sites will attract under the *Native Title Act 1993* (or equally, under an amended Act) remains a moot question. In a climate of review of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, it is important that legal attention be directed to questions of how inclusive the *Native Title Act 1993* is in terms of site protection; not least as an integral aspect of 'traditional laws acknowledged' and 'traditional customs observed'.

Acknowledgments

Much of my thinking about this paper was the result of a consultancy with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to explore the potential for regional agreements Australia-wide. My consultancy focused on Victoria. The discussion and results of the wider consultancy will be available in 1998.

The present paper deals with a specific set of issues which are treated more expansively in the volume of papers on regional agreements to be published by AIATSIS.

The present paper was first presented as a CAEPR seminar in October 1997 and I thank Sharon Sullivan, Executive Director of the Australian Heritage Commission for her comments on the paper. Linda Roach and Hilary Bek provided careful editing and Jennifer Braid typeset the paper.

Introduction

A position argued here is that a critical relationship exists between the legislative arenas of indigenous cultural heritage, native title and regional agreements. The association between these fields might be viewed as simply coincidental relationships of legislative process. But in this paper I argue a relationship of instrumental connection, both in the way they form a constellation of interests in the realm of political action, and in policy making.

Many indigenous groups believe that on the basis of the outcome of the 1967 referendum, the Constitution enables the Commonwealth Government to enact beneficial legislation on their behalf. Currently, the question of the kind of legislative enactment the referendum conferred on the Commonwealth Government is politically contested; in 1998, this question will be legally tested when the full bench of the High Court hears the Commonwealth's Hindmarsh Island Bridge Act case to determine whether the 'race powers' of the Constitution entitle the Commonwealth to enact legislation detrimental to indigenous peoples.

Within the broad policy scope of the Liberal-National Party Coalition's political philosophy, there is an apparent connection between the reform of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, and the Native Title Amendment Bill 1997. Current legislative reforms seem grounded in the return of power, particularly in relation to land management and land use, from the centralised umbrella of the Commonwealth Government to that of individual State/Territory Governments. The move reflects Federal Coalition policy views of small Government; especially in areas of legislation where indigenous people have developed a strategic pattern of turning to the Commonwealth Government for 'procedural fairness,' and against a history of partisan State Government policies and legislation in indigenous affairs.

Historically, not all Commonwealth Governments have proactively or unambiguously aided indigenous interests. Yet in the present situation, moments of association are clear. The present Federal Coalition Government, for example, has linked some of its key reforms in indigenous policy with problematic political decisions argued by previous Governments. In hindsight, legislation to enact indigenous property rights emerged as grist for future policy crucibles. The Hindmarsh Island Act represents another such moment. Indeed, the Coalition effectively harnessed public and political turmoil associated with the case to an election promise to review and revamp this Commonwealth Act. They also emphasised that a review was long overdue given that in 1984 the Act was a temporary measure pending introduction of national land rights legislation (Herron 1997).

Another such formative moment was the development of the *Native Title Act 1993* (NTA). Early in the process of its application, matters of workability and uncertainty were raised with proposed revisions mooted prior to the 1996 Federal Government election. But for the newly elected Coalition Government, the push to look beyond easily identified problems in the NTA came largely from the

apparently unexpected High Court Wik judgment in December 1996 that pastoral leases may not extinguish native title. Consequently, the Native Title Amendment Bill 1997 offers an integration of proposed amendments with the Coalition's response to the Wik decision (or what is commonly known as the Ten Point Plan).

A much publicised platform of the Ten Point Plan is voluntary, but binding contractual agreements and the anticipation that such agreements will be viable alternatives to 'the formal native title machinery' (Aboriginal and Torres Strait Islander Commission 1997a: 18). The scope for negotiated agreements is contained within the NTA but in many recent cases, it has also been successfully forged outside s21 of the NTA. But some analysts of the bill suggest that dilution of the effective value of native title as a property right through amendments to the right to negotiate (RTN) process in particular, will simply erode the potential for agreements between native title parties and commercial interests.

Agreements

Indigenous and industry parties have jointly promoted the benefits of agreements; not least, the opportunity to arrive at timely win-win situations and cap financial costs, as against the time consuming, protracted negotiations of formalised processes. Proponents of agreements, when quoting examples from north American land settlements, substantiate the advantages of these arrangements. However, other researchers are more circumspect in their enthusiasm, pointing out the constitutional scope for protection of indigenous rights in Canada, and the cultural and historical disparities between the Australian and Canadian contexts which minimalise commonalities (see Howitt 1997a, 1997b; Ivanitz 1997).

Nevertheless, achievable agreements are being reached within the parameters of specifically Australian contexts. Apart from well-known examples like the Cape York Heads of Agreement and the Rubbi Working Group in the Kimberley, other recent examples worthy of mention are the Alcan agreement in western Cape York, the Queensland Mineral Council's exploration protocols over Deed of Grant in Trust (DOGIT) land, and the Far West Coast Working Group in the south-west corner of South Australia. In the latter case, a regional agreement was reached between native title parties and 14 mining companies as a 'framework' for cultural heritage protection and site clearance procedures during minerals exploration on lands under native title claim (*The Australian* 19 August 1997).

While agreements with mutually beneficial outcomes are being reached, the attraction is their potential to create a matrix for negotiations over both specific and wide-ranging issues. However, if the indigenous capacity to exert leverage in negotiations is diminished first, through the threshold test for access, and second, through its diminished application, then the capacity of agreements is also diminished (see Smith 1996; Clarke 1997).

Regional agreements and the NTA

In the introduction I suggested that a relationship exists between native title, heritage protection and regional agreements. The relationship of these issues raises questions in the case study about the capacity of the political process to uphold the legal entitlements of indigenous peoples and to deliver meaningful legislative and policy outcomes to them on matters of 'land', (in the broadest sense of that word).

The case study also illustrates that barriers to the exercise of legal entitlement operate across political levels from the local to the national level, and that political power exercised through social control is a critical dynamic at the local level.

Some native title claimants, as mentioned above, have succeeded in gluing the principles of inclusive consultation and heritage protection strategies to local or regional agreements. Often this has been achieved in one of two ways: either through the concept of a framework agreement or by adopting project-based agreements (see O'Faircheallaigh 1995a, 1995b; Howitt 1997a, 1997b: 12). In general terms, agreements like these can be tailored to function as 'steps and stairs' as they move from the in-principle agreement of how to manage a contentious issue, to development of a full-blown regional approach between Aboriginal communities and developers over particular matters.

A framework agreement might be viewed as the protocols for mutually acceptable ways of 'how to think' about issues, and for practical ways of 'how to proceed' in decision-making and implementation. By contrast, a project agreement is often too grounded in the particulars of a specific enterprise to cover the 'big picture' decisions about equity, compensation, employment and participation, service contracts, native title, heritage and so forth. Reaching decisions about these matters will be shaped by the protocols of the framework agreement.

In their simplest form, agreements are about exploring how different cultural, socioeconomic and political groups might 'think together' about issues of common concern—while acknowledging that the conceptual frameworks in which such thinking occurs will differ, but need not limit the potential for agreement.

In the Yorta Yorta claim, political and economic pressures are asserted in the response to cultural heritage and native title. A critique explores what possibilities exist, if any, for achieving workability and certainty within the framework of 'big picture' issues of common law property rights and commercial development, to name but two specific matters. Additionally, by charting the ideological positions of respondent parties in a politicised local claim context, it is possible to see the ripple effect of proposed legislative and national debates about the status of native title as a common law property right and the credibility of customary law outside legal and anthropological circles.

In north-eastern Victoria, the combined effect of proposed legislative changes in cultural heritage and native title has raised direct challenges to indigenous property rights, issues of coexistence and consultation, and expanded definitions of cultural heritage.

Background to the case study

The Yorta Yorta claim extends over a large area of north-eastern Victoria and encompasses various categories of claimable land and waters—ranging from vacant crown land, national park, State forests and the Murray, Goulburn, Edwards and Ovens rivers.[1] Traditionally and historically, Yorta Yorta people were and are linked to the river systems and their resources. They see themselves as having a special right to be involved in decisions about the environmental management of these water systems and the resources of the Barmah and Milewah State forests. Yet many regional industries and interest groups depend upon the same ecological systems and in fact, the viability of primary production in the region owes much to the availability of irrigation water supplied by these rivers. Understandably, feelings are running high in the wider rural community about the claim and its consequences for the economic livelihood of the district.

Local environmental management problems are numerous, with identified critical concerns like rising salinity; forest degradation; pastoralism on crown land; and poor water quality in the Murray-Darling system. Nationally, rural economies are bearing the brunt of reductions in trade tariff barriers and open competition with overseas imports. Into an already volatile economic and social arena, the native title claim has further confronted the expectations and accepted world views about property rights, economic status and decision-making. Consequently, it is no surprise that between 450–500 individuals and/or groups are registered respondents to the Yorta Yorta claim.[2]

What I have briefly described is essentially the setting for a dramatic exchange of social and political views about landownership, social status, authenticity, and economic power. None of these ingredients are specific to the local situation in my view. Arguably, they resonate with concerns driving proposed legislative changes on the national stage.

Victoria: heritage legislation

In Victoria, Aboriginal cultural heritage is currently protected by both State-based legislation (primarily concerned with archaeological relics) and Part IIA of the Commonwealth Government's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This section of the Commonwealth Act only applies to Victoria. Its implementation was a response to a request from the State Government in 1987. Part IIA of the act acknowledges Aboriginal community involvement and decision-making as critical in heritage protection matters.

> It defines heritage broadly and gives local Aboriginal communities an extensive role in the protection of heritage. It provides blanket protection to 'Aboriginal places' and 'Aboriginal objects' as defined. The principles on which the Act is based were developed by the Koori Heritage Working Group after extensive consultation with Aboriginal people. Its guiding principles were based on: Aboriginal ownership and control of heritage; and a definition of heritage which reflects the aspirations of Aboriginal people rather than scientific interests. Part IIA recognises the role of Aboriginal people in the protection of their cultural heritage (Evatt 1996: 363; see also Lahn 1996: 25; McBryde 1997).

Justice Elizabeth Evatt's review of the Commonwealth legislation, including State Government Acts where relevant, was published with recommendations in 1996. The Commonwealth Act was expected to have a limited shelf life, and the review took up the challenge to rethink the broad spectrum of issues associated with cultural heritage protection, heritage management, land ownership and policy matters (Evatt 1996: xiii–xxi). As already mentioned, the Act had been at the centre of major political controversies and was singled out for review on the basis of a Coalition election promise.

Evatt was frank about the problems of jurisdictional responsibilities between Commonwealth and State ministers in relation to Victoria. She was equally candid about the degree of recognition Part IIA gave to local Victorian Aboriginal people to control and protect their own heritage in accordance with established cultural principles of authority and entitlement. What was special about Part IIA was that it made it possible for communities to articulate their social and cultural landscapes and to protect the contexts of this heritage and thus enable its cultural reproduction. By contrast, other forms of State legislation in south-eastern Australia, gave heavy emphasis to protection of objects and places from a distant cultural past. (There is much which could be said about the present reviews of cultural heritage Acts under way in most States as adjuncts to the proposed Commonwealth changes. But these issues cannot be discussed here (see Aboriginal Affairs Victoria (AAV) 1997; Aboriginal and Torres Strait Islander Commission 1997b, 1997c).)

Evatt's comprehensive recommendations referred to specific details of the present Act, including how to develop a suitable bipartisan legislative scheme to avoid overlapping responsibilities. Her recommendations used the principles of Part IIA as a guide to what constitutes appropriate mechanisms and processes of consultation, decision-making and community participation. The review advocated a necessary integration between environmental and development planning processes with heritage protection, mediation for conflict resolution, and site clearance procedures. Two issues highlighted by the Hindmarsh Island experience, but equally present in other cases examined, received specific recommendations from Evatt. These issues were first, the need for a separation in legislation and decision-making between significance and land use over the question of protection, and second, confidentiality of restricted information. Other key recommendations were procedural fairness and a continuing role for a national monitoring body in conjunction with reform of State-based legislation to

provide accredited minium standards. The Federal Government's response to these recommendations has been piecemeal and less than what Evatt had originally intended. Indeed, they propose the access to Commonwealth legislation will, in the future, only be possible through a case of site protection in the 'national interest' (Aboriginal and Torres Strait Islander Commission 1997b, 1997c).

The Yorta Yorta case

In my view, the Yorta Yorta claim represents in microcosm the tangled concerns associated with native title claims in south-eastern Australia generally; indeed, it exposes the intersection of heritage protection, land management and arguments of coexisting interests in land. It also demonstrates how, in south-eastern Australia, indigenous groups face a combination of political and class interests amongst rural-based elites intent on maintaining the socioeconomic marginality of rural Aboriginal communities.

Estimates of the total number of Yorta Yorta claimants range between 4,000–6,000 people. Many of these individuals and families live within the claim area, while those resident in urban centres, like Melbourne, maintain regular contact with the area through visiting and extended stays. Some legal parties argue that Yorta Yorta claims to their ancestral lands are simply a recent response to land rights legislation; and undoubtedly, contested views of cultural continuity will be associated with cultural heritage in south-eastern Australia. But the present claims are consistent with demands lodged by Yorta Yorta people in the past. Historical documents confirm that by the late 19th century, Yorta Yorta people were repeatedly seeking compensation from government for loss of their traditional lands and resources. Petitions were sent to the Victorian Parliament in 1881 and 1887 (see Goodall 1996). There is also evidence that Yorta Yorta people were in close physical association with their country both during the years the Maloga and Cummeragunya missions operated, and after their closure. At various times Yorta Yorta people lived in camps on the Murray, Goulburn and Broken Rivers, subsisting on traditional food resources.

Today, Yorta Yorta peoples want recognition of native title to public lands within their traditional lands and compensation for areas which have been alienated (Hagen 1996). Between 90–150 parcels of Crown land are under claim. Much of this land is used by the wider community. Consequently, the 500 respondents to the claim represent a cross-section of interests. Local government municipalities, such as the City of Greater Shepparton, and the shires of Campaspe and Moira in Victoria, and in New South Wales, the shires of Murray, Corowa and Berrigan, are prominent stakeholders; as are the three State Governments (New South Wales, Victoria and South Australia) bordering the Murray River.

A host of non-government interest groups are also represented. One such party is the recreational Victorian Field and Game Association Incorporated (a

sporting shooters and fishing group). They took legal action to be joined as a party to the claim after Justice Peter Gray ruled recreational users out during the initial Native Title Tribunal mediation sessions. (An account of the action, initiated by Mr Ross McPherson, is described in the *Aboriginal Law Bulletin, Vol. 3, No. 83, August 1996.*)

Mr McPherson participated in Radio National's *Background Briefing* program (11 May 1997) and was introduced by the compere Ann Arnold, in these terms:

> Ross McPherson has been a constant critic of the Yorta Yorta claim, and he's a powerful leader of community opinion. His family are media barons of the region. They own twelve newspapers, one in each of the main towns. As well, Ross McPherson has now joined the Yorta Yorta case as a participant—as an individual who fishes, camps, and hunts... Before the claim shifted to the Federal Court, 'he wrote editorials about why he thought the native title process was wrong'.

As the Editor-in-Chief of the local newspaper the *Shepparton News*, Mr McPherson is a voice for regional political interests. He is only one of a number of local opinion leaders who have sought to disclaim any legitimate process to native title claims or any basis to the legal recognition of indigenous property rights. McPherson explicitly refutes native title as an entitlement of the common law. He explained his position on Background Briefing:

> I think if I was to be overly cynical I would say this whole native title process has opened up a Pandora's Box for the legal profession. But there's also a sincere I think, legal activist approach by progressive lawyers, where they want to see the law extended and used as a tool for social reform. So those dynamics are at play as well, and again it is interesting to see it applied to your own community when you perhaps have the perception of both sides of the issue.

Local politics

The area of the Yorta Yorta native title claim falls within the Federal electorate of Murray. Since the early years of 1900, this basically conservative rural electorate has been continuously held by a member of the National Party. However, in the Federal elections of 1996 the seat was won by Sharman Stone, a woman and a member of the Liberal Party. On both counts, (gender and party), this was a reversal of a time-honoured voting pattern. Indeed, within the electorate of Murray, Stone's intention to stand for the seat initially upset many National Party members. Her win has meant confronting a good deal of political resentment from stalwart National Party voters surprised not only by her audacity to stand, but her victory.

Naturally, the newly elected Federal member has taken an active political interest in local native title issues. She is keenly aware of the intense political and community agitation from local farmers who see themselves under siege economically, in part because of the immediacy of indigenous claims over land and land management issues, but equally, because of the local effects from

dismantling tariffs. Regional primary producers are dependent on the Murray River waters for agricultural production, and the wider regional community values the water for recreational tourism and household use. A widely-voiced common fear is that a successful native title will cut off rights of access to the Murray River waters for primary producers at worst, and regulate its use by taxes, at best. On both counts, such consequences are seen as undesirable.

In this corner of Victoria, a political storm has been whipped up over the relationship between native title and heritage legislation. Mrs Stone, who describes herself in the media as an anthropologist, has been affronted by Aboriginal use of the powers of 'local inspectors' (appointed under Part IIA of the Commonwealth Act) to place emergency bans on cultural heritage sites in need of protection, since in her electorate these bans have been placed over sites within the Yorta Yorta claim area. Stone's concern is that the power to place bans is open to an abuse of 'procedural fairness'. In her view, the power to make emergency bans should be *either* the local inspector *or* the minister.

Yet the power to declare such bans has been judiciously used. Indeed:

> Emergency declarations under s21C [since 1987] have been made in relation to 10 separate locations containing Aboriginal cultural property. In some cases [notably at Bucks Sandhill in Barmah Forest, and at Kow Swamp], multiple emergency declarations have been made in relation to the same area of land. Only one location [Bucks Sandhill] has been subject to a temporary declaration under s21D, and an application for long-term declaration of this site under S21E is yet to be made (AAV 1997: 15).

If declarations are made in accordance with the Act and its regulations, they cannot be overturned by the Minister. Because site protection at locations like Kow Swamp and Bucks Sandhill have involved rolling over the period of emergency declaration, Stone argues a general proposition: that Aboriginal cultural heritage legislation is being inappropriately applied to native title claims and that this represents an abuse of the heritage protection powers. Her intention is to close the loophole which enables claimants to draw on the local inspector's power with amendments introduced through a private member's bill (see *Weekly Times* 9 April 1997).

Kow Swamp: conjunction of native title and heritage?

Kow Swamp is an important archaeological site renowned for its human skeletal remains and some years ago, the focus of controversy surrounding reburial of the human skeletons excavated from the site. More recently, Kraft Foods Ltd made public their plans to lay a waste products pipeline from their Leitchville cheese factory into an area near the Swamp. The proposed pipeline was part of a $25 million expansion of the processing factory and represented a possible major increase in employment opportunities for local people.

The area of the Swamp where the pipeline was to be located is part of the Yorta Yorta claim and therefore the matter should have been dealt with under an

s29 notification (Future Act) of the NTA. AAV had previously carried out a heritage impact assessment to check on potential site damage and recommended an alternative siting of the pipeline route. Yet newspaper articles describing the AAV report claimed that no threat existed to heritage sites in the siting of the proposed pipeline (*Herald Sun* 23 January 1997).

However, the local inspector stationed at the Njernda Aboriginal Corporation in Echuca maintained the emergency declaration on behalf of the Yorta Yorta people. His decision was partly an effort to ensure that future acts are dealt with as RTN procedure under the NTA. But until recently in Victoria few s29 notifications were issued other than for large industrial projects such as the Eastern gas pipeline; consequently, access to this procedure for resolution of issues like Kow Swamp was problematic.

To some non-Aboriginal people, the inspector's actions could only be understood in terms of a wider political conspiracy where native title interests were advanced under the umbrella of powers granted by Part 11A of the Heritage Act. The *Herald Sun* newspaper wrote:

> The AFL Grand Final, the Grand Prix and even City Link are vulnerable to activists exploiting a flawed federal law which protects Aboriginal sacred sites in Victoria. It potentially gives Aboriginal inspectors the power to stop indefinitely major sporting events and projects. The absence of just three words in the Aboriginal and Torres Strait Islander Heritage Protection Act means any enterprise or activity on crown land can be banned. And where an Aboriginal inspector slaps an emergency ban on a site or project, the federal Aboriginal Affairs Minister has no power to over-ride that ban... The flaw in the act was discovered during the controversy which erupted over the proposed waste pipeline, which was to be built a considerable distance from the site.... By adding the words 'or the minister' Mrs Stone says the Act would then give the federal minister the power to over-ride an emergency order made by an inspector for political or other reasons (Gerald McManus, *Herald Sun* 23 January 1997, p. 3).

The implication, fuelled by legal representatives of respondents to the Yorta Yorta claim and public figures in the region, is that in Victoria native title claims are simply maverick, ambit actions by local Aboriginal groups, and that the claims are devoid of any legitimate basis either as a native title claim or in terms of heritage issues.

Rat Castle: another conjunction?

Another example of the alleged misuse of heritage legislation in the Yorta Yorta claim area occurred in April 1997 and was reported in the *Shepparton News* at the request of Mrs Stone. A local man was granted a permit to log red gum timber at Rat Castle, a site in the Barmah Forest. An emergency declaration had not been issued for Rat Castle but, the Victorian Department of Natural Resources and Environment (DNRE) received a letter from the Yorta Yorta Murray Goulburn

Rivers Clans Group indicating concern over destruction of midden sites in the area of the logging operation.

Mrs Stone commented in the newspaper:

> ...it was similar to the incident at Kow Swamp... The logger had his plans exposed to the public and had approval to log on the basis there was no heritage problems—it is not fair that bona fide logging was stopped without any proof being given that the middens even existed (*Shepparton News* 15 April 1997).

According to the newspaper article, the local DNRE spokesperson was unhappy with the media attention and talk of bans and acknowledged that while the plans for logging certainly had been publicly displayed no direct consultation about the matter had occurred with the Yorta Yorta people. He conceded the legitimacy of the Yorta Yorta complaint and that direct consultation, given their interests in the areas as native title claimants (and presumably their entitlement to consultation under the future act process) should have occurred. In the meantime, the matter had been resolved.

Interpretation of Rat Castle and Kow Swamp incidents

In my view, some members of the rural elite have encouraged a public perception that the Yorta Yorta peoples' desire to be consulted about cultural heritage protection and lands under native title claim is an illegitimate desire. This position was certainly aired on public radio (see Radio National transcripts of *Background Briefing* 11 May 1997).

Arguably, behind such positions are a number of beliefs held and promoted by non-Aboriginal stakeholders in the public debate over the extent and nature of indigenous property rights. These positions are first, that native title is a fabricated and romanticised view of the Aboriginal past with little demonstrable continuity in the Aboriginal present; second, that the *Archaeological and Aboriginal Relics Preservation Act 1972* most closely represents the position of Victorian Aboriginal people's cultural heritage today; third, that in settled Australia generally, the claims for continuity of Aboriginal custom and of what that might consist should be open to public debate and scrutiny; and that fourthly, at the end of the day, the natural resources of Crown land belong to all Australians. Finally, there is a view that native title is being used as 'core social policy' to mend the socioeconomic disadvantages of indigenous Australians.

In part, the vociferous opposition builds on moral notions of the appropriate use of the landscape. Elsewhere, in relation to the mining industry, Trigger has demonstrated how corporate narratives operate to focus 'on growth and progress [by] marginalise[ing] alternative 'stories' about the landscape' (Trigger 1997: 4). Parallels exist between these contexts; for example, in the dismissal of indigenous concerns over extractive operations on claimable land and the application of due process to protect indigenous rights to consultation and decision-making. Trigger

(1997: 2) also highlights the 'language or discourses of development ideology' across a range of sources including the media, industry and other texts associated with land use and development issues. His key themes in development ideology are progress, civilisation, and investing the landscape with meaning and agency as part of a global narrative. In the same way, opposition to the Yorta Yorta people's entitlements in decision-making over land, or application of legal processes associated with these rights, are either represented as mischievous or their narratives and meanings about country are marginalised.

In Victoria, native title claims and by implication regional agreements, face deeply entrenched obstacles to success. One hurdle has been efforts to discredit the NTA and tribunal processes. Critics have questioned whether the National Native Title Tribunal operates in accordance with any identifiable process; although Justice Olney responded to this underlying criticism when explaining why the federal court hears evidence in native title cases in particular ways.[3] Other opponents implicitly deny any recognition that native title is a property right acknowledged by the Australian legal system. Such denials are captured by the words of a vocal legal opponent of the Yorta Yorta claim when explaining how local non-Aboriginal people found it hard to grasp the concept of native title and the implications of claims:

> Its a very difficult concept to understand, accepting some very rudimentary lay terms that 1 per cent of Australia's population have a right to remove from 99 per cent areas which have been traditionally used for rest and recreation and occupation and water which is used and considered vital to your life (Radio National transcript of *Background Briefing* 11 May 1997).

Two points in the quote need clarification. First, the idea that the NTA offers a potential land grab by indigenous people is factually incorrect. Either this reflects the speaker's flawed understanding of the law or it is provocative misinformation. Second, the use of phrases like 'traditionally used for rest and recreation' or 'water which is considered vital to your life' refer to non-Aboriginal views of the significance of the Murray River and associated forest resources. There is a degree of appropriation of Aboriginal values and rhetoric about the landscape to substantiate counter claims of ownership and association. Significantly, there is no suggestion of incorporation of Aboriginal interests on terms of a common interest (such as traditional use of the land and water) nor any overture for coexistence of interests and occupation.

Proponents of such views argue that native title should be confined to heritage protection. They argue for a separation of the protection and management of cultural sites from control of natural resources by indigenous groups. According to this argument, Aboriginal groups may well claim continuity of tradition with the past, but that continuity can only be meaningful in terms of preserving and protecting the physical artefacts of the past. The significance of these archaeological objects is their association with a previous existence, the traditional hunter-gatherer way of life.

Views like this deny any notion of a 'cultural landscape' by which contemporary Aboriginal people read and make sense of themselves as a social

group (Finlayson 1994). They deny incorporation of the ancestral past in their contemporary lives or as evidence of continuity in terms of how Yorta Yorta people see particular actions relating to their landscape or country. They reify culture as a museum artefact for which there can be reverence, but no articulation with contemporary Aboriginal lifestyles, stories and social values. By promoting protection of the past solely in terms of archaeological relics, there is an effective denial of cultural continuities and native title claims based on continuity of custom and law.

Yorta Yorta people are aware of the implication of relics-based heritage protection laws. Monica Morgan, a Yorta Yorta claimant, told *Background Briefing* (11 May 1997):

> A focus on heritage sites only—oven mounds and burial grounds for example—has kept [her] people out of broader decision making about their country.

Conclusion

My intention in writing this paper was to canvass a number of issues.

First, I argue that native title in south-eastern Australia is under direct political attack as a recognisable legal concept and that the battle for credibility is not being waged in the courts so much as it is a battle for the hearts and minds of the general public. Ordinary people, the 'man and woman in the street' who live in rural areas alongside Aboriginal populations and have done so for generations are being challenged. These groups are likely to have worked together and shared in the same local sporting activities. Ostensibly, they 'know' one another. But opinion leaders from the rural elites—lawyers, newspaper editors and politicians—are presenting misinformation about the legal rights of local Aboriginal people in such a way that they become 'unknowable' neighbours.

The wider question must be asked; for what reason is misinformation and factually incorrect legal advice publicly disseminated? Whose interests stand to benefit from the manipulation of public opinion? In Yorta Yorta country, the investigative journalism of *Background Briefing* flushed out the basis of both public and personal misinformation and ignorance. In some cases, people argued that native title is simply the product of the 'hocus pocus of judicial activism', even 'poor social policy' to 'solve the educational and health needs of Aboriginal people' (transcript of Radio National *Background Briefing* 11 May 1997). In other cases, people were possibly genuinely ignorant.

Second, native title and heritage protection are intimately linked in south-eastern Victoria and consequently, revision of Commonwealth legislation and the notion of a minimum standards as bench-marking for State legislation warrants careful scrutiny. Evatt canvassed the possibility that heritage sites on Crown land may be used as evidence for coexistence in south-eastern Australia when she observed:

> The relationship between native title and heritage protection is complex. Certainly, the recognition that there is a place of particular significance in an area may make it easier to succeed in a native title claim because 'areas and objects of cultural significance are likely to be evidence of the continued existence of native title'. Although views differ as to whether the existence of a site of significance in a particular area is a form of native title interests or not there may be a connection. On the other hand, the [Heritage] Act is not a form of proprietary interests in land. Native title procedures are likely to be the first mechanism native titleholders, claimants or potential claimants use to protect their heritage from changes to land use (Evatt 1996: 26).

Others contest this connection. A legal representative for respondents in the Yorta Yorta claim explicitly rejected any relationship between native title and cultural heritage saying:

> I think we have to be very careful in dealing with native title claims, that we don't confuse the protection of traditions and customs and the history of the Aboriginal people with the finding or determination of native title. I think we have to divorce the idea of interests in land and water away from protection and consideration and care of Australia's history and background and its early people.... I believe that those public lands—and let's avoid the word 'Crown' if you like—but those public areas of lands and waters belong to the whole of Australia, all Australians, and that's a fact of history. Now obviously, steeped in the history were traditional users and owners of those lands and waters, but that has disappeared to a degree, except where the lands and waters are continually occupied and used by those Aboriginal people as they were in the past (transcript Radio National *Background Briefing* 11 May 1997).

A third purpose was to look at the potential for regional agreements in south-eastern Australia through a case example. My key finding is that the agreements will be achievable if there is some measure of community acceptance of the notion of native title itself and that the processes of the NTA have public credibility. In the Barmah and Milawah forests particularly, a regional agreement between State Governments and the Yorta Yorta *should* have been possible for management of timber and water resources and to negotiate future acts like logging permits at Rat Castle, and heritage clearance in Kow Swamp, according to principles of an agreed process.

One of the reasons claimants will continue to seek site protection under the NTA is the lack of options for dealing with land use and management available under other legislation. Smyth and Sutherland (1996: 55–9) describe a raft of Victorian Acts with provisions for land management agreements, conservation covenants, cooperative arrangements, heritage agreements and so forth. Most of these legislative options are structured in terms of relationships between Government and private property owners; to date this has not included Victorian Aboriginal people as an interest group in any comprehensive way. In such a policy climate, we should not be surprised that Victorian Aboriginal people have cherished native title as a window of opportunity (such as the future act process) which actually requires their comment and incorporation on land matters.

Notes

1. On the respondents' cases there are a total of 129 parcels of land and waters claimed. These 129 parcels are further divided according to the gazetted status of the lands and waters within Yorta Yorta country. However, the Yorta Yorta claim is, of course, to one area—their traditional country and the unalienated Crown land within it recognised by the common law as potentially attracting native title.

2. There are ten groups of respondents represented in the Federal court proceedings. These comprise the State Governments of New South Wales, Victoria and South Australia; Telstra; Murray Darling Basin Authority; respondents with resource licences (such as water, timber and grazing licences); recreational users, and local governments in the eastern section of the claim area; Emat Industries; and New South Wales Aboriginal Land Council.

3. See Radio National transcript of *Background Briefing* 11 May 1997.

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