MABO AND YORTA YORTA: TWO APPROACHES TO HISTORY AND SOME IMPLICATIONS FOR THE MEDIATION OF NATIVE TITLE ISSUES

JOHN LITCHFIELD, MARCH 2001
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Contact:
Dr Klim Gollan
Series Editor,
Research Unit
Klimg@NNTT.gov.au

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Abstract

This paper focuses on the specific challenge that the fluid character of native title is making to institutions that are obliged to grasp an historical understanding of native title. It is argued that positivist modes of historiography, such as occurred in the Yorta Yorta trial are inadequate for the task of developing a concept of native title. Hermeneutics, by contrast, provides a constructive way forward, as was demonstrated in the use of its principles in Mabo (No.2). It is also argued that the Yorta Yorta appeal outcome went some way to realigning Yorta Yorta with the Mabo decision. In concluding this paper, some of the implications for the mediation of native title claims are considered in the context of the legal developments that are discussed.

Key words

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Introduction

The judgement in Mabo marked a moment in time when the High Court of Australia considered the appropriateness of contemporary Australian common law in its evolution from English common law. The High Court’s considerations were measured against contemporary notions of human rights and justice, and were framed in terms of an historical analysis of various legal, political and social developments in Australia since British settlement.

This paper focuses on some implications that emerged from Mabo in relation to the way that historical materials are dealt with by the courts. This paper also looks at the way that issues emerging from such materials may be resolved according to the provisions of the Native Title Act 1993 (the Act). These implications include a clearly articulated role for interpretive approaches in native title matters. The interpretive approach will be discussed in this paper according to the hermeneutic tradition. And while hermeneutics was not referred to explicitly in the Mabo judgement, its principles are clearly evident.

In addition to my support for a hermeneutic approach as a way to represent experience and provide an understanding of a situation, I will develop a corresponding critique of the shortcomings of positivism. It is certainly the case that positivism, as a theory of knowledge, is largely discredited—and the courts have made explicit statements that recognise the limitations of positivism. Nonetheless, the following discussion will highlight some of the implicit ways that positivist methods and techniques for understanding continue to be drawn upon by the courts. Examples of positivist practice are illustrated through Justice Dawson’s dissenting judgement in Mabo and Justice Olney’s judgement in Yorta Yorta.

I will further argue that the Full Federal Court’s reasoning in the Yorta Yorta community’s appeal against the earlier trial determination goes some way to realigning Yorta Yorta with Mabo. While the majority dismissed the appeal, the decision and reasoning of Chief Justice Black, who dissented, provides a clear articulation of the way in which the Yorta Yorta determination could be re-considered based on a more soundly reasoned approach to the issues, particularly historical ones.

This paper will further emphasise that the High Court’s approach in Mabo has been translated into the workings of the Act—which has positioned mediation as a key mechanism for the resolution of native title issues. In this regard, the National Native Title Tribunal (the Tribunal), which is the main body implementing the Act’s mediation

\[1\] My gratitude goes to a number of people who have generously provided comment on drafts of this paper and assisted in developing its constituent ideas and concepts. I thank Graeme Neate, Stephen Sparkes, Lisa Wright, Terry Hall, Klim Gollan, Kerry King and David Palmer. Any errors or dodgy analysis found in this paper are solely my responsibility.

\[2\] Mabo v Queensland (No.2) (1992) 175 CLR 1.

\[3\] ibid, pp.29,30.

\[4\] See for example, Milirrpum and others v Nabalco Pty. Ltd. and the Commonwealth of Australia (1971) 17 FLR 141, p.266.

\[5\] The Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Others, unreported. Federal Court of Australia, 18 December 1998.

\[6\] The Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Others, unreported. Federal Court of Australia, 8 February 2001.

\[7\] The determination in Yorta Yorta was that native title was extinguished at the time of the Yorta Yorta community’s claim.
provisions, is directly involved in developing interpretive approaches for the resolution of native title issues. However, I argue in concluding this paper that the interpretive approach provided for in the Act may be detrimentally affected by a (typically implicit) positivist legal orthodoxy.

It is important to add, as a general note about the method used in developing the argument in this paper, that neither hermeneutics nor positivism is attributed to the various respected judges as their conscious approach. I am interested in some of the principles that are observable, whether or not they can be attributed to the intentions of the judges.

An overview of hermeneutic and positivist methods

Hermeneutics is the art of interpretation and agreement. Modern hermeneutic practice is particularly suited to the study of history. It is aimed at communicating appropriate understandings of past events in the light of present experiences. This dialogue also results in a better understanding of the present through reference to the past. Hermeneutic methods include the work of bringing a sense of, or feeling for, the temporal ‘whole’ together with the particular and immediate moments in which experience takes place.

The dynamic that provides for movement between the parts and the whole is always the immediate experiences that an inquirer has had. Even when past experience is used to question the whole, this process involves recalling a memory into the present. Thus the situation for all questions about the whole is ‘now’.

In taking the hermeneutic ‘whole and particular’ model more broadly, it can be noted that hermeneutics takes its root from ‘Hermes’—who was the winged-heeled god of ancient Greece. One of Hermes’ main tasks was to relay messages between gods and mortals. Hermes had the unique ability among the gods to translate divine knowledge into a form that was comprehensible to humanity, and to translate human concerns to the gods. The work of Hermes can be regarded as a model for the philosophical method of Socrates and Plato. Their method is commonly known as dialectical, which for them was essentially an approach to knowledge that proceeds through a conversational ‘question and answer’ structure.

It was not until the medieval period that the term ‘hermeneutics’ was coined to describe a particular interpretive method for understanding. Medieval hermeneutics evolved into the generally accepted mode used by theologians to interpret the meaning of Scripture. The task of the hermeneutically inclined theologian was to understand human experience of the world by making ultimate reference to the textual unity of the Bible—held to be the inspired word of God. Even the Bible itself was to be understood only from within itself—that is, both the whole and the part. So, for example, the Gospel of Matthew might be regarded, in this tradition, as being free not only from any contradiction within itself but in its relation to the Bible as a whole.

The common thread that connects ancient dialectics and medieval hermeneutics also binds modern hermeneutics—they all work around a conversational model that moves between the part and the whole. However, one of the main developments in modern hermeneutics is the broadening of its potential sources of understanding. This broadening of potential sources for interpretation can include the secular ‘work-in-progress-law’ that is Australian common law.

While interpretation has been the West’s most common approach to producing understanding and knowledge since the birth of rationalism with the ancient Greeks, its influence has recently stalled. With the rise of the Enlightenment, modern rationalisms

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have privileged that which Georg Simmel termed an ‘objective spirit’.

The objective spirit has increasingly replaced interpretive methods with scientism. This spirit, in essence, values objective phenomena over subjective experience.

A pure expression of the objective spirit is found in positivism. The term ‘positivism’ is commonly traced to August Comte, a sociologist working in the early nineteenth century. Comte developed his positivist method on the basic insight that the only true form of knowledge was scientific. Thus, the models used for the physical sciences were also the only suitable models for social phenomena. Comte’s initial work was, a little later, taken up in a branch of legal theory and historical study. Both these branches soon came to represent orthodox approaches in their respective disciplines.

The shift from interpretive to positivist methods for understanding was initiated by a historical change in perceptions about the human potential to create knowledge and comprehend the world. An interpretive approach was, and is, underpinned by a sense that human knowledge is always partial. Positivism, by contrast, which grew out of an era of intensely self-confident humanism, linked knowledge to the sublime mind, which is able to collect, hold and order concepts in conjunction with a timeless and potentially infinite body of facts. Positivism, thereby, abstracts knowledge from the limitations that are consistent with the human condition, and seeks out universal and absolute positions from which to make grand claims.

**Hermeneutics and positivism in Mabo**

Bain Attwood, a leading Australian historian, makes specific reference to the importance of a hermeneutic approach in contemporary times when he writes:

> if there continues to be a silence in our history, then, this might be because the orthodox historical tradition fails to conceive of history as a hermeneutic and dialogic enterprise, … thus diminishing the sense of an ongoing relationship between past and present, and between Aboriginal and other Australian subjects.

*Mabo* was one event where the silence was broken and the history of relations between indigenous and non-indigenous people was treated according to a hermeneutic enterprise.

In *Mabo* the High Court’s attention focussed on some difficult questions. At a technical level, there was the question whether past acts of government had extinguished what would otherwise exist as the common law native title rights of the plaintiffs. But a more challenging question, and one which operated in an ethical dimension, was whether the common law should be interpreted in a similar way as it had been in the past. I suggest the majority in *Mabo* treated these questions according to hermeneutic method. Having said that, my concern in this paper is not with the majority, but with Justice Brennan’s judgement, as one of the majority, and with Justice Dawson, who dissented.

The hermeneutic dimension in Justice Brennan’s approach is expressed generally in his preparedness to open up the common law’s whole tradition to questioning by particular contemporary concerns. Justice Brennan writes:

> the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes.

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and mendicants for a place to live. Judged by any civilised standard such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.\(^{13}\)

This is not to say Justice Brennan’s questioning was prepared to unhinge the common law from its long tradition and make it vulnerable to the whims of fashion. Justice Brennan was, rather, articulating a line of reasoning that he believed could provide a new—more valid and just—direction in the development of Australian common law while remaining integrally connected to its English traditions.\(^{14}\)

This dual ambition—of staying true to the past and recognising the validity of present concerns—was acknowledged as existing squarely in the midst of a tension. On one side of the tension Justice Brennan posited the following recognition:

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only a historical successor of, but is an organic development from the law of England.\(^{15}\)

On the other side of the tension he observed:

> Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the developments of its colonies.\(^{16}\)

Justice Brennan’s methodological response to this tension was to conduct a conversation within it, and diffuse the tension by finding an intermediate position. He writes:

> The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights … which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.\(^{17}\)

Justice Brennan concluded—as a result of his dialogue—that it is not ‘necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants.’\(^{18}\)

Justice Brennan was able to engage in this dialogue because of his insight that the common law is the contextual ‘whole’ within which ‘contemporary notions of human rights and justice’ (the parts) are provided with their meaning and power. In other words, Justice Brennan recognises the ongoing dialogue that goes on between history and fashion, and that these two conversational partners change and give rise to one another in a ceaseless unfolding of events in time.

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\(^{13}\) ibid, p.29.

\(^{14}\) The Justices in \textit{Mabo} were also concerned to recognise and apply other common law decisions that recognise native title.

\(^{15}\) ibid.

\(^{16}\) ibid.

\(^{17}\) ibid, p.30.

\(^{18}\) ibid, p.48.
Justice Gummow makes the same point plain in *Wik* when outlining the significance of *Mabo*. In his *Wik* judgement, Justice Gummow provides the methodological rationale for the Court’s approach to history in that case by direct reference to *Mabo*. To make his point, Justice Gummow contrasts the declaratory theory—which is the view that the Court’s decisions should be no more than declarations of existing laws—with the Court’s actual approach. Justice Gummow identifies the Court’s actual approach as one where changes are made to the law over time. The method that the Court uses to do this is ‘expressive of movement by consensus, and of continuity rather than rupture.’ Justice Gummow is describing the development of the common law, but the model is, in another context and as it was with Justice Brennan in *Mabo*, that of a worthwhile conversation.

Justice Gummow’s views on the work of the High Court judge in regard to historical method involves the redemption of certain shortcomings that adhere to the trial process. This work can be used to highlight certain similarities between the development of a conversation’s structure and that of the common law. Justice Gummow writes:

> The development of an appropriate historical method to some extent has been constricted by habits of thought engendered by the adversarial processes of common law trial…. From such a foundation, the further elucidation of common law principles of native title, by extrapolation to an assumed generality of Australian conditions and history from the particular circumstances of the instant case, is pregnant with the possibility of injustice to the many, varied and complex interests involved across Australia as a whole. The better guide must be the time honoured methodology of the common law whereby principle is developed from the issues in one case to those which arise in the next.

The ‘case at trial’ to which Justice Gummow refers is, then, the ‘part’. The role of the judge is to bring an understanding of the ‘whole’ to the outcome. Similarly, in a conversation a single statement does not stand isolated but is part of a larger flow toward an improved understanding of a situation. Furthermore, no single completed conversation is ever the ‘last word’; indeed, the last word is always beyond the reach of human experience.

By contrast to the ‘time honoured methodology of the common law’, Justice Dawson’s reasoning adheres to the other approach that is sometimes used, which Justice Gummow identified as the declaratory theory model. I suggest the declaratory theory model carries some key characteristics of a positivist approach. In legal theory, positivism has a particular meaning. Legal positivism has been defined as an approach that considers laws ‘in the context of the legal system of which they form a part, without drawing any conclusions about their essential justness or merit…. The validity of laws depends merely on the relationship to other laws within the system.’ Legal positivism functions by excluding all factors that do not readily fit its model for generalising about a world. The result of this is a very constrained world; a world that has little or no scope for notions of justice or equity in those situations where, over time, certain practices enshrined in law have come to be regarded as wanting.

The main difference in the approaches of Justices Brennan and Dawson is that while Justice Brennan treated the common law as an entity open to questioning from influences that are not strictly part of ‘positive law’, Justice Dawson treated the common law as an entity that is closed to such questions.

Justice Dawson maintained the closure of the common law to questions by considering it an ahistorical entity. Justice Dawson places the common law outside of the effects of time by reasoning in the following manner:

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20 ibid, p. 228.
There may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences.... The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change of view does not of itself mean a change of law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts.\textsuperscript{23} In the meantime it would be wrong to attempt to revise history or to fail to recognise its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case may be decided.\textsuperscript{24}

The positivist thread in Justice Dawson’s reasoning—that is, where no experience is recognised except that which is expressed in the pre-existing body of the law—can be further emphasised by drawing attention to the continuity from Justice Blackburn’s reasoning in \textit{Milirrpum}.\textsuperscript{25} Justice Blackburn wrote, in contrasting the basis for colonisation under the classes of conquest and settlement, that:

\begin{quote}
The important point for the purposes of this case is not to which class any particular colony belonged, but the fact that the doctrine [of tenure] itself—the distinction between the two classes of colonies and the basis of law applicable to each class—is clearly established in law, and that … the attribution of a colony to a particular class is a matter of law, which becomes settled and is not to be questioned upon a reconsideration of the historical facts.\textsuperscript{26}
\end{quote}

If it is accepted that good decisions are founded on a synthesis of solid reasoning—as exists in relevant conceptual traditions—with an acceptable level of factual information, then it can be observed that for Justice Blackburn the conceptual traditions were not in conversation with the facts but were in relationship based on domination. \textit{Mabo}’s triumph was that it instated a dialogue between the traditions and the facts in a way that was able to overcome a long-held legal fiction.

\section*{Justice Brennan’s \textit{Mabo} judgement: positivist or hermeneutic?}

Despite the differences between Justices Brennan and Dawson, both men shared a similar sense that the essence of the common law could not be tampered with. For Justice Brennan this was described as the ‘skeleton of principle’\textsuperscript{27}, while Justice Dawson described this essence as the ‘foundations of the legal system.’\textsuperscript{28} As such, the common law needed, at some point, protection from excessive strain by particular contemporary perspectives. Justices Brennan and Dawson both saw that at a certain point all dialogue had to be terminated to protect the common law’s already existing form. It could be concluded that this, in itself, makes Justice Brennan’s judgement a positivist one in the same way that Justice Dawson’s decision has been discussed. Justice Brennan was, after

\footnotesize{\textsuperscript{23} This reasoning by Dawson J relates to a tradition that was developed in the work of Austin (\textit{The Province of Jurisprudence Determined}, 1955, Wiedenfeld and Nicholson: London), in which the science of jurisprudence (or positive law ‘as it is’) is kept distinct from the science of legislation (or positive law ‘as it should be’).

\textsuperscript{24} \textit{Mabo} (1992), p.145.

\textsuperscript{25} \textit{Milirrpum and others v Nabalco Pty. Ltd. and the Commonwealth of Australia} (1971) 17 FLR 141, Supreme Court of Northern Territory. Dawson J relies on the \textit{Milirrpum} judgement in his decision and subsequently some historians have emphasised the strong link in the shared logic of Justices Blackburn and Dawson (Hunter, ‘Aboriginal histories, Australian histories and the law’ in Attwood (ed), \textit{In the Age of Mabo: History, Aborigines and Australia}, 1996, Allen and Unwin: Sydney, p.11; and Reynolds, ‘Native title and historical tradition: past and present’ in Attwood (ed), \textit{In the Age of Mabo: History, Aborigines and Australia}, 1996, Allen and Unwin: Sydney, p.19). However, some among the majority in \textit{Mabo} specifically rejected the finding of Justice Blackburn in their decisions (see, for example, Deane and Gaudron JJ, p.102).

\textsuperscript{26} \textit{Milirrpum} (1971) p.203. As noted in the introduction to this paper, Blackburn J was critical of Austrian positivism (p.266). This shows not so much that Austrian positivism is different to the more general prescriptions of positivist theory and method, but that positivism’s general hold is still almost impossible to disentangle from modern Western ways of seeing the world.

\textsuperscript{27} Brennan J, \textit{Mabo} (1992), p.29.

\textsuperscript{28} Dawson J, ibid, p.145.}
all, clear about his preparedness to remove the common law from the risk of any interaction with contemporary notions of values if the ‘skeleton of principle’ was threatened to the point of being ‘fractured’.29

However, it would be disingenuous in the context of Justice Brennan’s achievements to assert that positivism ultimately provides the logic for “bottom line” outcomes. In Mabo there was more at stake than protecting the abstract character of the common law. Justice Brennan observed that the common law is not merely there for itself but is foundational for a much broader conception of the basis for ‘peace and order of Australian society.’30 Thus, there were practical considerations with which Justice Brennan was clearly aware. Quite simply, he was aware that one cannot kick out a set of foundations, no matter how suspect one may believe them to be, without another set being already in place.

The practical considerations that informed the decision by Justice Brennan to limit, or direct, the conversation between past and present was not inspired by a positivist consciousness but was further evidence of a hermeneutic one. The hermeneutic tradition encapsulates a type of knowledge that understands the need to limit the scope of a conversation as an expression of ‘common sense’. We all know, for example, it can be disastrous to always speak one’s mind without limit; it is rarely compassionate or clever to be totally forthright. A person who behaves in such an unconstrained manner is variously regarded as tactless, tedious or dangerous.

The hermeneutic conception of common sense has its modern roots in a direct resistance to scientism’s rise in the seventeenth and eighteenth centuries. The achievements of an increasingly self-confident scientific culture in that century led to an emphasis on intellect and logic in isolation from broader cultural and social sensitivities.31 By contrast with scientism, the hermeneutic focus on common sense (or good sense) has been described in the following manner:

‘while other senses relate as to things, “good sense” governs our relations with persons’. It is a kind of genius for practical life, but less a gift than the constant task of adjustment, a work of adapting general principles to reality, through which justice is realised. [Good sense is essentially] a tactfulness in practical truth.32

In the hermeneutic tradition common sense is one of the most esteemed qualities in bringing conceptual knowledge into a practical situation; it compares with the Aristotelian notion of wisdom (phronesis).33 It is esteemed because common sense is recognised as a difficult achievement and yet crucial in the task of acquiring understanding of ‘the whole’. And an understanding of the whole was precisely what Justice Brennan was pursuing. He speaks, for example, not only of the legal system but of its aspirations to universal virtues of justice and (human) rights.34

Justice Brennan conducted a hermeneutic process by skilfully conducting a conversation between the common law, a broad range of historical events, and contemporary values. He displays common sense by maintaining a broad social perspective (despite whether one considers the judgement conservative or its counter) and placing a limit upon the scope of the conversation. Thus, I suggest Justice Brennan works within a hermeneutic tradition not because he closes the conversation in the way that a positivist would, but because he is aware that the conversation had enormous implications in Australia. The fact that he was able to carry this weight—in staying mindful of the practical

29 Brennan J, ibid, p.29.
30 ibid, p.30.
32 ibid, p.25.
33 ibid, p.21.
implications—while also remaining open in a conversation, must be recognised as an expression of great skill, perhaps even ‘a genius for practical life’.

The *Yorta Yorta* trial determination

There was a broad difference in the issues that constituted *Mabo* and those that constituted *Yorta Yorta*. On balance, the issues in *Yorta Yorta* were empirical by contrast with the conceptual nature of many issues facing the High Court in *Mabo*. Justice Olney’s task in *Yorta Yorta* was to consider whether native title existed in the terms provided for in the Act. He did not need to do the same work as the High Court Justices in establishing the basis for native title. Justice Olney observed that the template had been supplied in s223 of the Act, which is ‘consistent with the language of *Mabo*’.  

However, against this apparently clear-cut process, and as Justice Olney was aware, the Act does not codify what common law native title ‘is’. In fact, even the general method that Justice Olney used to make his determination could not be drawn directly only from the Act, but was much more heavily reliant on the judgements in *Mabo* and *Wik*. Moreover, native title in Australia is still such a novel area of law and policy-making that the development of modes of recognition, and corresponding practical application of certain mechanisms, is occurring with a degree of volatility.

It could be argued, therefore, that an approach that draws on positive legal categories for making judgements was always likely to be better suited to *Mabo* than *Yorta Yorta*—a point not lost on Justice Olney himself. The ‘past’ that the Justices in *Mabo* were able to draw upon to make their judgments was a tradition, expressed in written precedent that had been subject to extensive scrutiny over centuries. Justice Olney, on the other hand, had nothing so obvious and well documented with which to work. Justice Olney certainly had ‘evidence’ but much less could any of it be considered an objective measure for making reasoned decisions. For Justice Olney, the evidence about the past was constituted by a number of diaries, journals, publications and government and mission records made by settlers last century. The Yorta Yorta people, moreover, provided evidence that was largely in the form of oral testimony. A major difficulty with all of this related to the huge amount of material and evidence that was provided to the Court. As was noted by the Full Federal Court that heard the *Yorta Yorta* appeal, Justice Olney’s task was onerous. Chief Justice Black writes:

> This was the first application for a determination of native title to come on for trial after the enactment of the *Native Title Act*. The hearing of the application, which was completed before the 1996 amendments to the Act came into force, was necessarily lengthy and complex. There were initially some 500 non-claimant parties to the proceeding. Subsequently, other parties obtained leave to be joined, and others withdrew. Many of the respondents took an active part in the hearing. Altogether, the Court sat for 114 days and heard 201 witnesses. The transcript exceeds 11,000 pages. A total of 48 witness statements were also admitted into evidence without formal proof. The Court sat to hear evidence at many places within the claim area. For the purposes of the appeal the transcript was reproduced electronically, but even so there

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35 *Yorta Yorta* (1998), [1]. NTA s223 provides the statutory definition of native title.
36 ibid, [3] to [5].
37 The decisions in *Ward* is a case in point here. In the original *Ward* case (*Ward and Ors (on behalf of Miriuwung Gajerong People) Western Australia* (1998) 159 ALR 483), Justice Lee found that native title existed in the application area, and made some findings that arguably extended on the generally accepted idea of what native title might mean. The appeal however, heard by Justices Beaumont, von Doussa and North, did the opposite (*State of Western Australia v Ward* [2000] FCA 191 (3 March 2000)). The majority in that decision (Justices Beaumont and von Doussa) found that native title was more vulnerable to extinguishing acts than had been previously thought. This decision has had a great impact on the manner in which native title matters are dealt with. Other examples of factors that contribute to a volatile environment include different and changing policies of various State governments and representative bodies.
38 *Yorta Yorta* (1998), see esp. [24].
39 ibid, see for example [57] and [58].
are in excess of 6,000 pages in the appeal books, contained in 11 volumes. At one point in the submissions on the appeal it was said that ‘boxes’ of historical material had been tendered during the course of the trial. Clearly, the task of the learned primary judge was an exceptionally complicated and difficult one.40

This summary of the magnitude of the task also carries with it a sense that a key difficulty in Yorta Yorta was always going to involve reconciling written records with oral accounts of history. Accordingly, Justice Olney’s capacity to distil the facts from among the competing claims presented the single greatest methodological challenge in Yorta Yorta.

In addressing the challenge, Justice Olney was clearly working within an accepted and orthodox legal tradition. As will be discussed below in relation to Graeme Neate’s overview of the subject,41 Justice Olney’s approach was well within a Court’s accepted modes for reconciling and making distinctions between oral and written histories. However, as will also be argued, this tradition appears to be struggling to deliver outcomes that accord with contemporary standards of fairness.

The challenge of fairness was recognised by Lamer CJC in his decision in Delgamuukw.42 In that decision, the Supreme Court of Canada found that decisions by the Supreme Court of British Columbia and by the British Columbia Court of Appeal made errors in not treating the oral evidence given by the plaintiffs with adequate regard. Lamer CJC writes:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.43

The argument that is put forward in this paper is that the tradition the Court often relies upon in attempting to reconcile written and oral forms of evidence is typically underpinned by an implicit reliance on positivist principles. The outcome of this tradition in Yorta Yorta was that Justice Olney made his determination of native title by relying most heavily on written history rather than oral accounts of history. This is not necessarily a problem, as in any particular case the written sources may really be more reliable. Moreover, any attempt at correcting a perceived bias toward the written with a simple reactionary counter-bias to the oral is hardly a solution. Nonetheless, the argument below identifies that the tradition available to Justice Olney is pre-disposed to finding the written form more reliable. To make this argument I draw on an insight from Jurgen Habermas, a leading contemporary social theorist, who writes that a key principle of positivism is its tendency to eliminate ‘the knowing subject … [as] the system of reference.’44 Thus, Habermas suggests that positivism typically assumes that the most ‘reliable’ sources are the most abstract ones.

**Judicial authority concerning written and oral histories**

The difficulties that Neate identifies with reconciling, or even relating, the written and the oral concern the provision of either a consistent version of history or in finding a way to deal with the inconsistencies that may emerge. Neate notes that when dealing with the written and the oral an inquirer’s first step would be to reflect on whether initially perceived inconsistencies may, in fact, be misplaced. A careful analysis of different modes of representing history may reveal greater levels of consistency than first perceived. Beyond this, however, Neate highlights that:

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40 The Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Others, unreported. [2001] Federal Court of Australia, 45 (8 February 2001), [4].
43 Neate, p.232.
there is judicial authority for the view that where there is a conflict between traditional evidence and contemporaneous written documents (and the reliability of the documents can be established), the contents of the documents should be preferred.45

This basis for ‘judicial authority’ is then highlighted with a passage from the Full Court of the Supreme Court of Papua New Guinea in Gaya Nomgui v. Administration of the Territory of Papua New Guinea.46 In that judgement Justice Clarkson stated:

It would be quite wrong for social groups with no written history or written records to be bound to the same methods of proof as are permitted to those who use writing. Where traditional histories conflict, the courts test each against known facts. But where traditional history conflicts with contemporary official records, the latter must receive special weight. The contemporary record reflects the facts as seen by the recorder; no subsequent event can change what has been written the only point at which the accuracy of the record can be challenged is at the time of the recording.

Traditional history, on the other hand, is in addition liable to corruption as a result of the self-interest, pride, misunderstanding or mere forgetfulness of any narrator or listener.

If special weight were not given to contemporary records, there is the danger that they would with the passage of time and the disappearance of collateral supporting evidence be discarded in favour of traditional history as propounded by the last listener with the result that claims based on traditional history which would have failed when all the facts were known would succeed where knowledge of most of the facts had been lost.47

**Yorta Yorta and the interpretation of written and oral histories**

Justice Clarkson’s views will not be pursued in detail here. However, it should be noted that some studies have revealed that the way certain written documents are pieced together routinely draw on unsubstantiated imaginings of authors, and these documents are commonly accepted as reliable.48 In addition, cultures that are based around orality are not necessarily as unreliable, or unchecked as is suggested by Justice Clarkson. That is, cultures that rely predominantly on oral forms for communicating traditions develop different structures and techniques that are not found in cultures that rely on literacy (or at least, the strongly developed orality-related structures and techniques are weakly developed in literate cultures). But in an even stronger sense, people who live according to a predominantly oral culture develop a unique way of ‘being-in-the-world’ (ontology) by contrast with people who live in literate cultures.49

Given that the court system is a product of a literate culture it is proper that judicial authority defaults to the written document if a conflict in substance cannot be resolved. To do otherwise would be ingenuous, as it would demand that the court base its decisions in systems of knowledge and ways of being that are not part of its experience. I would argue, nonetheless, that more could have been done in *Yorta Yorta* to test the reliability of written documents by reference to the oral historical evidence that was also presented.

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45 Neate, p.316.
47 Neate, pp.316, 317.
48 See for example, D.H. Zimmerman, ‘Fact as a practical accomplishment’ in *Ethnomethodology*, R.Turner (ed), 1974, Penguin: Hamondsworth, pp.128-143. This study is considered a classic in the ethnomethodological tradition (which is part of sociological phenomenology). Zimmerman’s study details ways that workers in a government department develop particular documents about their clients. Zimmerman notes that the workers’ attitude is typically one of scepticism toward clients’ stories. However, Zimmerman shows that the workers’ capacity to produce the required documents while holding a sceptical attitude is often ‘bridged’ by including information based on intuition and hunches about the ‘real’ situation. As a consequence, unsubstantiated opinions of workers are often documented as the ‘facts’ that constitute the official files.
49 A classic text that makes these types of distinctions is W.J. Ong, *Orality and Literacy: Technologizing the Word*, 1982, Methuen and company: London.
Thus, while it was plain that Justice Olney was working within a legal tradition that is well established, that method has some serious shortcomings. The shortcomings are essentially those of positivist method, where the knowing subject is eliminated—as has been explicitly noted by Habermas.

The elimination that Justice Olney carried out affected those giving oral testimony about their connection to the traditional law and custom that was earlier observed by the two ancestors who were ‘allowed’ (Edward Walker and Kitty Atkinson/Cooper). Justice Olney writes:

The most credible source of information concerning the traditional laws and customs of the area from which Edward Walker’s and Kitty Atkinson/Cooper’s early forebears came is to be found in Curr’s writings. He at least observed an Aboriginal society that had not yet disintegrated and he obviously established a degree of rapport with the Aboriginals with whom he came into contact. His record of his own observations should be accorded considerable weight. The oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it than to the information recorded by Curr. Much of what subsequent writers have said about early Aboriginal life is necessarily based upon other than original observation and much is mere speculation. Curr himself was not averse to a degree of speculation and to the extent that he indulged in that practice his opinion should not be accorded any weight but his record of his own observations and of what he was told by his Aboriginal informants, must be regarded seriously. As has been done in considering the question of descent from the indigenous inhabitants, it will be necessary to draw inferences from known facts concerning traditional laws and customs observed in the 1840s in order to relate back to the time at or prior to the first exercise of British sovereignty.50

The effect of this approach was that Justice Olney felt he could make his determination that native title did not exist at the time of the Yorta Yorta peoples’ native title claim largely through his reading of certain written documents. He based his decision on his finding that the documents pointed to a time when the Yorta Yorta people had lost their connection to traditional law and custom not long after Walker and Atkinson/Cooper had died—which was about 100 years ago. On this basis, Justice Olney’s reasons did not need to take account of the claimant group’s evidence regarding current expressions of traditional law and custom, because of the provision that once extinguished, native title cannot be revived.51

In short, Justice Olney weighted the written records heavily. Oral testimony, by contrast, was treated as comparatively lightweight. Consequently, the written word from last century could be privileged over and above the oral testimonies given in Court.

An alternative way to apply judicial authority concerning written and oral histories

To be sure: writing and speech are different. As Gadamer has observed: ‘all writing is … a kind of alienated speech.’52 However, in the politics that accompanies competing theories of knowledge production, this difference has been accepted by many people to mean that written documents are more objective, or at least more reliable. While a written document may be more reliable in a particular situation, the important point here is that no general rule can be assumed. Accordingly, it is the concern of this paper to highlight certain implications in using ‘alienated speech’ to eliminate the subject who provides oral testimony.

For the positivist, the detachment of the subject (author and/or contemporary speakers) and object (text) is the fundamental basis for the popular claim about the written word that

50 ibid, [106]
51 NTA s237A.
‘the facts speak for themselves’. By contrast, hermeneutics proposes that texts can never speak for themselves; in this regard Gadamer observes:

Writing has the methodological advantage [of being] detached from everything psychological. What is, however, in [positivist] eyes and … purposes a methodological advantage is at the same time the … specific weakness … of writing…. We need only to think again of what Plato said, namely that the specific weakness of writing was that no one could come to the aid of the written word if it falls victim to misunderstanding, intentional or unintentional.\textsuperscript{53}

Gadamer’s insight provides a tension in Justice Clarkson’s observation that ‘traditional history … is … liable to corruption as a result of self-interest, pride, misunderstanding or mere forgetfulness of any narrator or listener’. Indeed it may be that Justice Clarkson’s observations about oral communication is just as apt as a description of the written form. In a sense it is more apt because there is a tendency not to interrogate the subjective dimension inherent in written documents as thoroughly as is done to oral testimony—especially in an adversarial court setting.

The only hope for a text that displays ‘the specific weakness of writing’ is, as Gadamer continues in this passage in outlining Plato’s strategy, that it will be made subject to a conversational (or question and answer) process that involves elaboration. In the present context, this elaboration relates to the thinking, speaking and further writing by judges. It is the judge who is able to express an understanding of the situation by bringing both the written and oral evidence together. That is, the judgement is the site at which a conversation is played out—in mind, in discussion and on paper. In this view, ‘judicial authority’ would be better grounded if it was thought of as defaulting neither solely to the written nor the spoken word, but the outcome of a conversation that draws on both documents and oral histories.

Some may wish to argue that this is what always happens. Indeed, the earlier discussion of Justice Gummow’s views suggested that ‘the time honoured method of the common law’ is a conversational process; accordingly, it is not a huge step to see the moderation of written documents and oral testimony as a variant on a conversational process. But in \textit{Yorta Yorta} this did not happen. As will be elaborated below, this was the basis of the appeal, which complained that Justice Olney began with the written documents when he should have began with the present expressions of traditional law and custom—which were largely constituted by oral forms of evidence. The problem with that judgement, so the appellants argued, was that once Justice Olney found the written documents from last century convincing he determined that the contemporary evidence would not change what he believed was a fact of history—which was: native title had been extinguished. As a consequence, all oral testimony was treated as a footnote.\textsuperscript{54}

In short, Justice Olney did not test the potential weakness in every text. Rather, the ‘untested texts’ were used to eliminate the validity of all the claimants who were claiming to be ‘knowing subjects’. And this is the crux of this paper’s criticism of the approach taken in \textit{Yorta Yorta}: the method was flawed.

\textbf{The \textit{Yorta Yorta} appeal}

The argument that the Full Federal Court needed to decide on in the appeal against Justice Olney’s \textit{Yorta Yorta} determination was put forward by the counsel for the Yorta Yorta people in the following terms:

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\textsuperscript{53} ibid.

\textsuperscript{54} \textit{Yorta Yorta} (1998), [121]
... the trial judge erroneously adopted ... a ‘frozen in time’ approach and that his Honour failed to give sufficient recognition to the capacity of traditional laws and customs to adapt to changed circumstances. 55

The judges on the full bench were unanimous that a frozen in time approach was not appropriate as a basis for making a native title determination. In seeking to respond to the appellants’ argument the three judges dealt with issues that it raised in a similar way; essentially, they broke the general argument into two discrete concerns. One of these concerns was the substantive issues related to what constituted a ‘frozen in time’ concept of traditional law and custom. The other was with the method that should be used to avoid making a determination based on the mistaken use of a frozen in time approach. The result of this was that the appeal judges held that Justice Olney was either in error (according to Black CJ) 56 or probably in error (Branson and Katz JJ) 57 because he based his determination in an approach that was too restrictive in its conception of traditional laws and customs.

Despite this general level of agreement in responding to the appeal, the majority (Branson and Katz JJ) upheld, in a joint judgement, Justice Olney’s original decision. Chief Justice Black dissented. The following discussion comments, for the most part, only on Chief Justice Black’s judgement. Despite the minority status of Chief Justice Black’s judgement, it outlines a clear and rigorous method for dealing with both written and oral historical evidence in native title cases. Moreover, there was nothing in Chief Justice Black’s methodological prescriptions that were disagreed with by the majority.

Chief Justice Black summarised the appellants’ argument regarding the correct historical method in the following manner:

A related issue on the appeal concerned what was said to be the failure of the trial judge to make necessary findings of fact, particularly in relation to the traditional laws presently acknowledged and the traditional customs presently observed by the members of the Yorta Yorta community. Counsel for the appellants submitted that the judge had approached the matter from the wrong point in time and that he should have commenced with the present instead of commencing, as they said he had, with the past…. It was submitted that the terms of the Native Title Act itself revealed that an assessment of the present laws and customs of the claimant group was the correct starting point. It was also said that a failure to adhere to that process, by beginning instead with an analysis of the situation as at 1788, would result in a court placing undue and potentially misleading reliance on historical documents, and was liable to lead it to overlook permissible adaptations in behaviours and practices. In other words, it was argued, the nature of an inquiry that begins in the past and traces forward is, in itself, likely to result in an erroneous ‘frozen in time’ approach being adopted. 58

In dealing with this argument, Chief Justice Black went through a logical sequence, where first he highlighted Justice Olney’s reasons for his determination; second, he identified the approach set out in Mabo and the Act so as to provide a basis for a correct approach; and third, the consequences of this approach were identified.

In regard to the first step, Chief Justice Black highlighted that, as was outlined in the discussion above, Justice Olney gave considerable weight to written documents and less to oral sources. 59 Chief Justice Black noted that it was a reliance on written materials from the 19th century that allowed Justice Olney to make ‘the factual finding that was

55 Yorta Yorta (2001), [5]
56 ibid, [91].
57 ibid, [145].
58 ibid, [12].
59 ibid, [20].
determinative of the appellants’ claim.” Chief Justice Black quotes from Justice Olney’s decision as follows:

It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim; and the dispossession of the original inhabitants and their descendants has continued through to the present time.

In regard to the second step that Chief Justice Black took in responding to the appellants’ argument, he provides a discussion of the legal framework. The main work of Chief Justice Black’s overview of the framework was to test the appeal argument’s validity in regard to whether Justice Olney had ‘approached the matter from the wrong point’. The counsel for the Yorta Yorta community argued that ‘the wrong point’ was working toward the present by assuming a knowledge of traditions as they existed in a previous time. For his part, Chief Justice Black was concerned to make a clear statement that identified the correct way to deal with historical materials as provided for in High Court native title cases and in the Act.

In addressing this issue Justice Black writes:

[The common law as expounded in Mabo (No 2) recognises the universal reality of change, as a system based upon rationality would necessarily do. Thus, Brennan J, in one of the most frequently cited passages from his judgment in Mabo (No 2), said (at 61):

Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. (Emphasis added by Justice Black).]  

Furthermore, Chief Justice Black noted that the definition of native title (section 223 of the Act), which deals with rights and interests possessed under traditional law, is ‘in the language of the present.’

The unambiguous method for dealing with historical materials as prescribed in the legal framework for native title matters is summarised by Chief Justice Black in his discussion on the consequences of Justice Olney’s determination. He writes:

[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…. The approach taken by the judge in this case was quite different. It was, in substance, an approach that involved making findings about the past and then progressing forward from that point. Because, in the course of that process, his Honour reached a conclusion that native title had expired over 100 years ago, it did not become necessary for him to make findings about what the appellants contended were fundamental aspects of their case concerning what they said are the traditional laws currently acknowledged and the traditional customs currently observed.]

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60 ibid, [23].  
61 ibid  
62 ibid, [28].  
63 ibid, [34].  
64 ibid, [50], [51].
A further valuable point to come out of the *Yorta Yorta* appeal was some concluding advice from Justices Branson and Katz to claimants regarding the importance of setting out how present practices are continuous with traditional laws and customs. These suggestions constitute the basic aim for whatever methods are utilised in future native title cases.

The *Yorta Yorta* appeal outcome strengthens the alignment in the methods used by the Federal Court in native title cases with the approach used in *Mabo*. The *Yorta Yorta* appeal has made it clear that inquiries into contemporary expressions of traditional law and custom start and finish with the present.

What this also means is that the weight typically given to written documents is no longer an issue to the same extent that it was in the *Yorta Yorta* trial. This is because records of the past (whether textually or orally transmitted), will not to be regarded as foundational for a determination of native title. Instead, traditionally based laws and customs as currently acknowledged and observed constitute the foundation. Undoubtedly, issues remain regarding ways of reconciling the written and the oral records; and this continues to be a serious area of concern because demonstrating continuity is a key component in any native title case. But the *Yorta Yorta* appeal confirms that a concept of what happened in the past does not stand alone as the basis for a determination—and as was demonstrated in the earlier discussion, this essentially meant the concept that was developed solely from written records.

**Mediation and the role of the Tribunal**

A core function of the National Native Title Tribunal is mediation.⁶⁵ Mediation is, by nature, an interpretive enterprise that is achieved by all parties through dialogue. One of the keys to successful mediation is for all parties to be prepared to question, and be questioned on, any issue of concern. And while certain issues may be taken off an agenda, this only occurs through agreements emerging from dialogue.

The link between the High Court’s dialogical approach in *Mabo* and the Act—as the legislative response to *Mabo* that enshrines mediation as a key mechanism for resolving native title issues—is a highly consistent development. But the ongoing nature of various methods used by the Courts in making native title determinations will have a direct impact on the efficacy of processes that have been established for the resolution of native title issues.

Of course, the courts have a particular job to do and not every issue can be resolved through mediation. Neate observes that litigation, rather than mediation, may provide a fairer process for the recognition and protection of native title in two situations:

- Native title holders may consider that their native title will be compromised or significantly reduced if they agree to a determination in the form acceptable to other parties, and hence they may seek a determination by a Court of ‘the nature and extent of the native title rights and interests in relation to the determination area’ [s225(b)].

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⁶⁵ Under the Act, mediation is provided by the Tribunal in a number of circumstances. Mandatory mediation occurs when a claimant application (s61) is referred to the Tribunal by the Federal Court (s86B(1)). Mediation is also mandatory for the Tribunal if a party requests it in relation to a future act that is subject to the Right to Negotiate regime (s31(3)). In regard to non-mandatory mediation, the Act provides that mediated-related assistance may be provided by the Tribunal at the request of any party for Indigenous Land Use Agreements (s24BF, 24CF, 24DG). Further, if a member of a native title claim group wishes to make an agreement about access to non-exclusive agricultural or pastoral lease land for traditional activities (s44A and s44B), then mediation-related assistance may be provided by the Tribunal if it is requested (s 44B(4) and s 44F). The Act also provides, at s 78, that the Native Title Registrar has the discretion to provide assistance in a range of general circumstances, which may include mediation-related assistance.
• There are important legal issues that need to be resolved and test cases are appropriate to obtain authoritative rulings.66

Nish provides an illustration of an unfair situation that arises in mediation that may cause certain parties to seek resolution through the courts; he writes:

[if] key parties, such as the State, are not prepared to engage in mediation in a meaningful way, [then] holding the applicants in a mediation process not only fritters away valuable time in which elders are able to provide crucial evidence of connection but also unreasonably denies native title holders the opportunity of the recognition and exercise of their native title rights. It is also unreasonable to hold other parties in a process which is not progressing to an outcome.67

Moreover, the Tribunal is required to operate informally.68 This obligation is met through, for example, autonomy from ‘technicalities, legal forms and rules of evidence’.69 The Court is, by contrast, obligated to operate formally. In this regard, no sensible argument can hold that the approach of Federal Court and that of the Tribunal should resemble each other. Despite the differences, there is some scope to argue that the Federal Court should recognise that its decisions in litigation will affect what happens in mediation.

The fairness of mediation rests on a capacity to provide all parties with opportunity to present their views in a relatively open forum with the aim of agreeing to mutually beneficial outcomes. Often this will hinge on claimants having the opportunity to present and elaborate upon their relationships with country without assistance from written documents. Now, it is always open to non-indigenous parties to question these presentations. Questioning can happen in any number of ways; in a mediation it is possible to engage in this questioning through methods of genuine conversation, marked by techniques that aim for clear understanding of an issue among all participants.

Conversation is a common thing, so much so it is usually taken for granted as a sophisticated social accomplishment. Good conversation requires tact, courtesy and attunement to a certain flow—the so-called ‘thread’ of a conversation. Importantly also, in conversation lies in its capacity to unselfconsciously recognise, and provide space for, another’s right to be treated with dignity. This may be an idealistic view of the potential for mediation, but it is no more difficult than ‘playing tough’. In any case, playing tough has been recognised by some experienced practitioners as not the most pragmatic path to an agreement.70

The courts will, through their trial and appeal decisions, influence parties’ strategies within mediation. This point can be illustrated by reference to the Act’s provisions for mandatory mediation.71 The overall effectiveness of mandatory mediation will depend not only upon the specific characteristics of each application and the decision of the court in giving directions for mediation, but also on the attitude of parties.72 Thus, the effectiveness of mandatory mediation can be partly gauged according to its capacity to

68 NTA s109(1).
69 NTA s109(3).
71 NTA s86B(1).
72 See, for example, Cohen (1995) ‘Mediation Standards’ in Australian Dispute Resolution Journal, p.27.
assist in changing the attitude of parties who are initially reluctant to engage in mediation. If, during the three months that mediation is mandatory for parties, reluctant parties begin to negotiate with a positive attitude toward a mediated outcome, then the mandatory dimension in the mediation provisions could be said to be effective. However, the likelihood that parties will engage in mediation positively is affected by their reading of what they perceive as other alternatives. The Harvard school of mediation would term this process a party’s assessment of their BATNA—that is, their ‘best alternative to a negotiated agreement’. 74

Typically, a BATNA for the mediation-reluctant party will involve an assessment of their chances of receiving a favourable outcome from a litigated determination. The Yorta Yorta trial determination makes the Court option much more attractive. The appeal outcome, however, gives a little more pause for continued consideration. In this paper I would highlight two direct results of a shift in the strategic thinking of parties towards a more favourable view of litigation: an increased case load for the Federal Court and a financial burden for the taxpayer. As the previous President of the Tribunal, Justice French, stated:

[T]here simply isn’t enough money to go round in the country to litigate all of the native title claims and issues that arise under them. We have to have test cases of course to try and settle and resolve the law … but hopefully the bulk of cases will be able to be resolved through a process of negotiation. 75

At another level a shift away from the resolution of issues through mediation will have the consequence of weakening a much-needed civic forum for discussion between indigenous and non-indigenous people in this country. Of course, some may say that native title is not about improving Australian civic culture, it is about dealing with the facts of a matter in a timely manner. And so it is. But to pretend that this is all native title is is to admit that the spirit of Mabo has gone from native title. In Mabo native title emerged as an issue that presented an opportunity to address and improve the relationship between contemporary notions of human rights and justice and the common law specifically as it regards indigenous people. If this spirit has indeed gone from native title, then questions about what it has become are likely to yield responses that do nobody proud.

Conclusion

For certain: a court cannot make its decisions on anything other than the merits of the evidence that is placed before it. Accordingly, the argument here has only concerned itself with methods that are appropriate for native title matters, and has not commented upon substantive matters.

The courts can draw on a range of methods to make their judgements. In this discussion, the approach in Mabo was highlighted and utilised as the standard. It was argued that Mabo has much in common with hermeneutics, which is the pre-eminent philosophical discipline concerned with interpretation.

In developing the argument of this paper further, the Yorta Yorta trial was said to exhibit a tension with Mabo. The basis for this tension, I argued, was caused by a disjuncture between interpretive techniques and (usually implicit) positivist ones. This discussion subsequently showed that this tension was resolved somewhat, through the reasoning in the Yorta Yorta appeal, which realigned its method with the prescriptions laid out in Mabo.

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73 NTA s 86C(2).
Within this context, the Tribunal is committed, under the Act, to contribute to native title processes through mediation—which essentially is a process that gets people talking and engages their interpretative capacities to new and challenging levels. The political climate affecting native title picks up on these challenges with criticism that the resolution of its constituent issues are subject to needlessly onerous complexities and processes that are resource intensive.

While improvements in cost-effectiveness are always likely to be possible, it is also the case that, on a resource level alone, resolution through the courts is not an option. Another non-option, is legislating native title away. This will never happen, as native title is a pre-existing right recognised by the common law. In short, these two constraining realities mean that native title must be addressed in good faith and in a practical manner. The question that follows is ‘how?’ The response of this discussion to that question has been to promote conversation as the context for strategies that can develop understanding of native title. Agreements that are made between parties are likely to provide the most stable long-term basis for clarifying relationships. But even within litigation, it is possible for outcomes to be based on an interpretive approach—as occurred in *Mabo*—that adopt an openness to evidence that is not possible when drawing on positivist assumptions about knowledge production.