The Great Re-Freezing?
Requirements for Establishing Native Title in Post-Yorta Yorta Jurisprudence

Ross Lennon Mackay
BSc(Chem), LLB

Master of Philosophy (Law)
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I hereby certify that the work embodied in this thesis is the result of original research and has not been submitted for a higher degree to any other University or Institution.

(Signed): ...R L Mackay..........................
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Abstract

In Yorta Yorta, it was expressly found that native title law could not support a ‘frozen in time’ approach. It was held that the rights making up native title could not be considered static and archaic instruments, but must be given reign to adapt. However the question must be asked whether, in its examination of the requirements of native title, Yorta Yorta has in the same breath re-introduced the ‘frozen in time’ approach, albeit in a different form. Specifically, it is a question of whether the continuity of connection requirement means that the evolution of rights is frozen and claimants are burdened with the task of proving they relate to land in exactly the same manner as their ancestors did, over 200 years ago.

That is the question which this thesis attempts to answer. It will do so by examining in detail not only the requirement of continuity of connection as espoused in Yorta Yorta, but the evidentiary analysis which was performed under that requirement. It is the nature of this analysis in which the effect of continuity of connection on the nature of native title rights is revealed.

This thesis will also examine the effect of Yorta Yorta on subsequent cases, particularly how subsequent Courts have interpreted the continuity of connection requirement and how it has affected the questions of proof they felt the claimants were required to answer. Particularly highlighted will be the cases of Larrakia and Single Noongar, two cases which have brought about starkly different outcomes for the claimants.
The approach taken will be to discuss whether the requirements of native title in Yorta Yorta have produced a native title system which equitably and in justice recognises traditional owners’ rights to land in modern times, or whether they consign native title to being an historical relic, of little utility in reflecting the modern-day relationships of traditional owners to their land. In other words, was Yorta Yorta ‘the great re-freezing’?