Civilising the savages of Yorta Yorta country: legal metaphor, violence and the 'tide of history'

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1 Introduction

As a settler colonial nation, Australia continues to legitimise its possession of First Nations lands through its laws and legal institutions. Posited as race-blind, the 'law' and its institutions are the product of patriarchal white sovereignty (Moreton-Robinson 2015) and continue to claim Australia as a white possession. This is a project that 'lies within an 'originary violence', in which the state retains a vested interest in maintaining the founding order of things' (Watson 2009: 45).[2] This article demonstrates the significance of these conceptualisations of colonial law as a regime of racial violence (Giannacopoulos 2006) by revisiting the Yorta Yorta native title litigation. The Yorta Yorta case (*Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* [1998] hereinafter *Yorta Yorta 1998*) is in some ways a well-known piece of Australia's legal history. But it is not known for its true legacy – a continuation of the law's racialised violence, which ultimately legitimised the colonisation and theft of Yorta Yorta country. In this paper, I analyse the case from my position as a Yorta Yorta woman to demonstrate how the colonial law continues, yet simultaneously conceals, its regime of racial violence.

Specifically, this paper aims to reveal the significant violence underlying the metaphor relied on by Federal Court judge, Olney J, to dismiss the Yorta Yorta native title claim at first instance: that the 'tide of history' had 'washed away' any acknowledgement of traditional Yorta Yorta law and custom (*Yorta Yorta 1998*: [129]). I consider how the colonial law's reliance on this metaphor enacted violence on Yorta Yorta people in several ways. By reference to the trial transcript, I analyse the discursive connotations of the tide metaphor to reveal how it perpetuates racialised narratives of savagery and civilisation, which continue the originary violence of colonisation. Further, I demonstrate how the tide metaphor was deployed to conceal the violence of colonisation and had the effect of silencing Yorta Yorta narratives. But more insidiously, the use of metaphor masks the colonial law's own role in the tide of history, while simultaneously legitimising the 'consummation' (Wolfe 2006: 393) of colonisation of Yorta Yorta country. Ultimately, I argue that the tide of history metaphor was used to signal the 'end stage' of settler colonialism[3], in which the colonial law's own nomocide (Giannacopoulos 2020) (killing) of Yorta Yorta law, custom and connection to land was rationalised. In the end stage of settler colonialism, the settler imaginary (Bell 2014) deems First Nations people as no different from settlers, finally legitimising and indigenising the settler colonial project.

2 Background

This paper has its origins in my current PhD research, in which I aim to reveal the racial logics underpinning the trial before Olney J through an analysis of transcript within a framework built on critical Indigenous, race and whiteness studies. My research is undertaken from my standpoint (Moreton-Robinson 2013) as a Yorta Yorta woman. Yorta Yorta people know, as we have been taught, that we are descended from creator beings that tie us to Yorta Yorta country. This is not an abstract idea or metaphor. We have an ontological relationship to land (Moreton-Robinson 2015), which is underscored by the bloodlines that connect us to Yorta Yorta country and to other Yorta Yorta people (Morgan 2000). The only reason we identify ourselves and each other as Yorta Yorta people is because of our ongoing relationship to Yorta Yorta country.

As Yorta Yorta people, we know and carry with us the violence perpetrated against us through the settler colonial project (Atkinson 2000). As summarised by Amangu Yamatji historian Associate Professor Crystal McKinnon (McKinnon 2020: 692).

> Indigenous people are acutely aware that the Australian state organizes itself in racialized ways. We know because we and our communities, our grandparents and our great-grandparents, have all been subject to its oppression and violence (McKinnon 2020: 692).

We see and feel the violence of the colonial law's racialised logics. However, we have survived and resisted in spite of it. While the colonial law told Yorta Yorta people that our traditional connection to country had been washed away on the tide of history, this is not our lived reality (Morgan 2000). Within the native title system, the colonial law seeks to separate issues of land from others such as massacres, child removal and assimilationist policies. Yet we cannot separate the violence perpetuated on us by the colonial legal system from its claim to possess our land. The colonial law has consistently been deployed to justify and assist in the colonisation of our lands, and it is the colonial law which held our claim to native title had been washed away. It is the duality of living within my Yorta Yorta family and knowing our history, connection and stories, while contending with the colonial legal system's denial of continuing Yorta Yorta law and custom, which forms the basis of this paper.

Yorta Yorta people have a long and proud history of political action and asserting rights in land. As documented by senior Elder and principal claimant in the Yorta Yorta case, Dr Wayne Atkinson (2000), the Yorta Yorta native title litigation was instigated by the Yorta Yorta community in continuation of this activist history. The Yorta Yorta case was the first native title claim filed after the historic *Mabo* decision (*Mabo v the State of Queensland (No. 2)*: hereinafter *Mabo*) and the enactment of the *Native Title Act 1993* (Cth). The perceived success of the *Mabo* decision offered promise to Indigenous groups seeking access to their lands, and the Yorta Yorta claim was filed with the spirit of 'optimism' and hope of a 'positive way forward' (Atkinson 2002: 8).

The preparation of the claim was a massive undertaking on behalf of the Yorta Yorta community (Morgan & Muir 2002). The claim encompassed a large area of land and waters covering parts of Northen Victoria and Southern New South Wales, and covered major town centres such as Shepparton, Mooroopna, Echuca, Yarrawonga and Wangaratta. The Yorta Yorta claim was contested by over 470 non-Indigenous interests, demonstrating the overwhelming public opposition that the claimants faced.

The claimants ultimately needed to prove that Yorta Yorta people continued to acknowledge traditional laws and customs through which their connection to country had been maintained. After a long and gruelling trial in which the court sat for 114 days and heard 201 witnesses, Federal Court judge, Olney J, took just 19 seconds (Atkinson 2000) to dismiss the Yorta Yorta claim. Olney J concluded that there was no claim to native title, a finding which he chose to express based on a metaphor:

> The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional land in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs (Yorta Yorta 1998: [129]).

Yorta Yorta appealed to the Full Bench of the Federal Court, and when that appeal was dismissed, Yorta Yorta were granted special leave to appeal to the High Court. In 2002, the High Court handed down its decision that Yorta Yorta people had ceased to occupy our lands in accordance with traditional laws and customs *(Yorta Yorta v the State of Victoria & Ors* (2002) hereinafter *Yorta Yorta* 2002). In making their decision, the High Court majority relied on Olney J's interpretation of the evidence, holding that any errors of law Olney J had made did not affect his finding of fact. On the basis of Olney J's findings, the High Court dismissed the Yorta Yorta appeal.

3 'The tide' metaphor, colonial narratives and savagery

> Metaphor as a mode of legal reasoning carries the shame of a law that cannot escape the dispossessive violence of its establishment (Chalmers 2022: 38)

Australia views itself as a race-blind, fair and inclusive society, however racialised discourses of Aboriginality (Atkinson 2005, 2006; Macoun 2011; Moreton-Robinson 2007, 2014, 2015; Watson 2005, 2009) have become embedded into the Australian settler imaginary and work to naturalise Australia as a white possession (Moreton-Robinson 2015). One of the foundational narratives deployed in the colonisation of First Nations territories in Australia is the discourse of savagery and civilisation (Buchan & Heath 2006). Professor Williams of the Lumbee tribe argues that the 'ancient notion of an irreconcilable difference between civilization and savagery has helped to shape and direct the West's response and actions towards the non-Western world' (Williams 2012: 1). Indeed, Williams argues that the West is obsessed with the notion of savagery, and that the language of savagery is now an indispensable part of Western culture (Williams 2012). The racialised narrative of savagery and civilisation works to position First Nations people as savage, nomadic people wandering aimlessly in the landscape, against the civilised settlers, who are thus justified in claiming the wild (empty) lands before them. These narratives also work to emphasise the peacefulness of settlement (Veracini 2008), and construct colonisers as pioneers who harnessed unchartered territories (Behrendt 2002, 1999, 2005; Moreton-Robinson 2015).

Judges, although posited as independent arbiters of the law, are not immune from the influence of these cultural narratives. The idea of a 'common sense', a shared understanding of reasonability and practical judgement, 'is not universal; it is embedded in culture' (Rose 2002: 36). In the High Court's Yorta Yorta decision, Gaudron and Kirby JJ stated that Olney J's expression of the 'tide of history' was a 'finding of fact… expressed in terms of a metaphor'. (*Yorta Yorta* 2002: 465) Although the tide metaphor is taken from Brennan J's judgment in *Mabo* (*Mabo*: 60) it is not a neutral expression of law. In his in-depth analysis of the tide metaphor, Ritter (2004) argued that 'the tide' invoked images of a natural inevitability – tides wax and wane, just as civilisations rise and fall. In this way, Olney J links the 'tide' to the historiography of progress and social Darwinism, and thus 'the tide' is linked to discourses that see the fall of Indigenous, or savage, societies as inevitable in the face of Western civilisation (see also Buchan & Heath 2006). The tide metaphor is based in, and perpetuates, colonial narratives which posit Indigenous people as savage and colonisers as a civilised group whose 'settlement' of the land is justified according to laws of nature.

The trial transcript reveals that the tide of history metaphor was not only relied on by Olney J, but it was fundamental to the respondents' arguments, which sought to prove the cessation of traditional Yorta Yorta law and custom. The respondents' narrative regarding the tide of history further demonstrates the racialised discourses that position First Nations people as savage, and settlers as pioneers, civilising wild new lands. In his closing address, Mr Wright, counsel for the state of Victoria, summarised the case for Victoria as follows:

> The State of Victoria contends that in probably no other region in Australia has the tide of history flowed with such strength as it has in the Murray and Goulburn valleys and across the claimed area as a whole. There's a great deal of evidence before the court in relation to that tide (*Yorta Yorta 1998 transcript of proceedings*, 7 May 1998, hereinafter Transcript: 11149).

In this way, the respondents construct a narrative in which the tide of history is a natural occurrence, a straightforward fact which undermined the Yorta Yorta claim. Mr Wright goes on to overtly link the 'tide of history' to the strengthening of the British Empire, when he described the clearing of Murray River Red Gums as providing timber for the construction of British railway projects in India (Transcript 11150). He also linked the destruction of Yorta Yorta land and culture to discourses of the Australian pioneer, battling the uncharted frontiers of new lands when he stated, 'the early explorers, of course, seeking new land, new grazing lands, new stock routes and whatever riches the undiscovered hinterland of a newly settled continent might yield' (Transcript 11150). By invoking images of the expansion of the British empire and the myth of the pioneers, Mr Wright associates the tide of history to the (justified) civilisation of Yorta Yorta savages. Furthermore, these discursive links reassert white possession of Yorta Yorta country, through the justification of British sovereignty as part of the expansion of empire and the dedication of pioneers to the development of Australia as a nation (Moreton-Robinson 2015).

This imagery is also continued by Mr Wright when he highlights the importance of the 'regional economy' and the beef, dairy, wool, cropping, fruit growing and timber harvesting industries, and further reiterates the successful 'harnessing' of the rivers into an 'an irrigation system of a complexity and sophistication which is unparalleled elsewhere in the nation' (Transcript 11150). Not only does this invoke images of the pioneers building the nation, but this imagery also harks back to early colonial discourses of terra nullius, whereby the colonisation of First Nations land was justified due to the supposed superior British use of land (Buchan & Heath 2006). Within this context of British ingenuity and the civilisation of wild and unharnessed lands, Mr Wright makes his ultimate point about the tide of history:

> [T]he successive tides which I have briefly touched upon have effectively washed away any real continuing association, by any descendants of the original indigenous inhabitants, with the lands of their ancestors in accordance with the traditional laws and customs of their ancestors… the imprint of European society upon these gentle people was to deprive them of the access to their land, access to resources of the area, and to remove their ability to continue living in accordance with their traditional laws and customs. It's that cessation which is essentially the crux of this case.
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> It reduced these gentle people initially to a state of dependence upon the grace and favour of squatters, upon government handouts and upon Christian charity, and in more recent times… to a complete detribalisation and in a social sense a regrouping resembling an itinerant rural community dependent upon seasonal employment in the various sectors of the agricultural economy, whether it be shearing, timber cutting, fruit picking or whatever.

> So, your Honour, we submit that it is difficult to conceive of a confluence of circumstances, historical, economic, cultural and social, less conducive to the survival of native title than those which have characterised the story of the Murray and Goulburn Valleys since European settlement (Transcript 11151).

Within Mr Wright's metaphor of the tide, a 'confluence' of factors naturally eroded the traditional customs of Yorta Yorta people to such an extent, that the Yorta Yorta applicants were constructed as a completely different society than the society that existed pre-colonisation. Indeed, Mr Wright contends that the society is so eroded, that we have no 'real continuing association' with our land.

Mr Wright's invocation of the adjective 'gentle' constructs the Yorta Yorta applicants as the complete antithesis of the savages of the colonial imaginary. As summarised by Mr Wright, the contemporary Yorta Yorta applicants are a 'seasonal, rural, working community emphasising values of sharing, loyalty and kinship', which is at odds with the description of the 'savages' recorded in early colonial writings (Transcript 11183). Thus, Mr Wright suggests that the Yorta Yorta applicants have become so far removed from their savage ways of the past that they are now a 'gentle', civilised people, with no real resemblance to 'traditional' Aboriginal people who could be afforded native title rights. The 'tide of history' is thus relied on to perpetuate colonial narratives which construct authentic Indigenous people as savage, and simultaneously justify the theft of Indigenous lands as the natural consequence of civilisation.

But more than this, the tide narrative conceals the extreme violence with which Yorta Yorta land was colonised. Within the tide of history, 'the imprint of European society' is the cause of the 'cessation' of traditional law and custom. Mr Wright does not mention violence, or even colonisation. It is simply the 'imprint' of the settler state which somehow, passively, 'remove[d] [the claimants] ability to continue living in accordance with their traditional laws and customs'. This sanitised language deployed by the respondents exculpates the settler state and the colonial law in the violence which brought about the 'cessation'.

However in concealing the violence of colonisation in the 'civility of the Court's language' (Poynton 2002: 266), the respondents further enact violence on Yorta Yorta people. The truths, stories and lived experiences of Yorta Yorta claimants, elders and ancestors are completely disregarded in favour of a whitewashed (Alford 1999) colonial metaphor of the tide of history. The tide metaphor is thus much more than simply a turn of phrase, an analogy, expression or figure of speech. It perpetuates a racialised discourse of First Nations people as savages and settlers as civilisers, which continues, justifies, and yet simultaneously disavows (Veracini 2008), the ongoing violence of the settler colonial project.

4 Unpacking the metaphor: the 'tide of history' in reality

As argued by Veracini (2022: 30), '[c]olonialism and metaphor are especially related'. Tuck and Yang assert that the use of decolonisation as a metaphor underlies settler attempts 'to reconcile [their] guilt and complicity' in the settler colonial project (2012: 3). Without any practical moves to dismantle settler colonial systems, decolonisation as a metaphor further entrenches whiteness and colonialism, and fundamentally, entertains a 'settler future'. Equally, expressing colonisation in terms of metaphor conceals and naturalises 'deep colonising' (Rose 1996) practices and narratives which seek to naturalise and legitimise the settler state.

While decolonisation is not a metaphor (Tuck & Yang 2012), deconstructing the operation of colonising metaphors 'is in itself a decolonial pedagogy' (Veracini 2022: 30). In his powerful critique of the tide metaphor, senior Yorta Yorta elder, Dr Wayne Atkinson, commented that:

> [u]nderpinning the events on which this 'tide' rests, is a history of land injustice and flagrant human rights abuses. They are sourced in violence and bloodshed over the ownership and control of land, acts of genocide in relation to the forced removal and attempted break-up of Indigenous families, and racist government policies aimed at subjugating and controlling Indigenous people. It is ironic in the extreme, many might say obscene, that the crimes against humanity,

> which constitute this 'tide', can be invoked by those seeking to deny Indigenous groups their rights to land (Atkinson 2001: 20).

Uncle Wayne's words express the profound injustice felt by Yorta Yorta people who were required to go before the same colonial law which subjected them, their families and ancestors to dispossession and violence. This section seeks to expand on Uncle Wayne's deconstruction of the tide metaphor by considering the ways the colonial law has worked to racialise and enact violence on Yorta Yorta people. The colonial narratives of savagery and civilisation have been at the heart of the legal racialisation of Yorta Yorta people and have worked to justify the settler colonial regime of violence and theft of Yorta Yorta lands. In examining the violence perpetrated on Yorta Yorta people by the colonial law, this section positions the Yorta Yorta native title case within the continuum (McKinnon 2020) of the colonial law's violence (see also Giannacopoulos 2023).

Goenpul woman Distinguished Professor Aileen Moreton-Robinson argues that patriarchal white sovereignty is a form of racialised power that is a direct result of the dispossession of Aboriginal people (Moreton-Robinson 2004, 2015). Thus Moreton-Robinson's work demonstrates that the racialisation of Aboriginal people fundamentally underpins the claiming of Australia as a British colony. This is reflected in the racist doctrine of terra nullius which was grounded in discourses of savagery and civilisation (Bhandar 2018) and yet was upheld by several court cases until it was eventually overturned in *Mabo*.[4] The racist settler ideologies which marked black bodies as savage, wretched and expendable further justified the massacres and frontier violence enacted on Aboriginal people. The language of savagery permeated the press, where violence was reported as being committed by 'ruthless savages' and their 'native barbarity' (Broome 2005: 78).

As is the case with all Aboriginal families, my family has been marked by the violence of the colonial law, the scars of which have been passed down over generations and are constantly opened up by the continuum of violence enacted by the settler colonial project on our lands (see also Morgan 2009). I often think about the destruction my ancestors would have witnessed in the early stages of colonisation. As Atkinson (2000: 35) describes it, there is no distinction between Yorta Yorta people and other living beings, we are all part of one system. Thus the originary violence of colonisation is not only evidenced through the killings in the frontier wars, but in the destruction of the land. The Murray River pines which marked where our ancestral beings lodged their canoe poles were cut down for fences. Our burial grounds in the sand hills were mined so sand could be used to construct roads. Ancient red gums used as wayfinders and which women birthed under were logged, and plants which were harvested for grain and medicine were trampled and eaten by livestock. To witness the violent destruction of our kin (country, plants and animals) would have been apocalyptic.

In the midst of this destruction, Yorta Yorta people sought survival on missions and reserves. My ancestors lived on Maloga Mission, a religious reserve established by Daniel Matthews on Yorta Yorta land in New South Wales. Matthews was a settler on Yorta Yorta lands who was 'worried' about the 'part-white children' he had observed in Aboriginal camps 'growing up like little savages and running wild' (Cato 1976: 16). In line with the protectionist ideologies of the time, by 1874 he had established a school and a mission station and school to 'lift up the fallen blacks of this land, and to bring them to the knowledge of our saviour Jesus Christ', as 'their minds are very dark and many of them are ignorant' (Matthews, 1882). It is well documented that Matthews forcibly suppressed Yorta Yorta language and culture, the ramifications of which are still felt today. We know that our ancestors hid their language and culture for fear of violence, and as a means to survive in the new world forced upon them.

Residents of Maloga began to tire of Matthew's violence and the meagre rations they were afforded. A petition signed by some of the residents of the Maloga resulted in a grant of 1800 acres of (Yorta Yorta) land in New South Wales reserved for an Aboriginal settlement known as Cummeragunja. By 1888 the houses and schoolhouse at Maloga were relocated to Cummeragunja, and by 1900 Cummeragunja was a large community of mostly Yorta Yorta people totalling 300 (Broome 2005). My ancestors and grandfather resided on Cummeragunja, along with many other Yorta Yorta families. However in 1909, New South Wales enacted the *Aborigines Protection Act* 1909 (NSW), which established the Board for the Protection of Aboriginies (NSW Board) and legitimised colonial control over Yorta Yorta families on Cummeragunja. Section 7 of this Act gave the NSW Board duties such as the custody, maintenance and education of 'children of Aborigines'. The amendments to the NSW Act in 1915 further broadened the powers of the NSW Board to remove 'the child of any Aborigine' from their family with no parental or other legal approvals required (s 13A). With these amendments, the Board no longer needed to produce evidence of neglect to remove children from their families.

The language of the legislation is also relevant to the examination of the law's violence. In refusing to name the 'children of Aborigines' as Aboriginal children, the colonial law racialised Aboriginal people according to a logic of elimination, where native people are gradually absorbed into the settler stock (Wolfe 2006). Further, as argued by Land (2006), the protectionist era reflected the re-racialisation of Aboriginal people as 'half-castes' in order to take control over the rising numbers of Aboriginal people (see also Nielsen 1998). Cloaked in the rhetoric of civilisation, the colonial law purported to protect the savage Aborigines, however the practical effect of its 'protection' was to gain further control over and access to First Nations lands. The hugely traumatic effects of the protectionist legislation is well-documented and is evidence of the racialised violence perpetrated by the settler state and its law. The trauma of these policies is carried in Aboriginal families today and is continued by the high rates of child removal experienced in our communities.

The threat of child removal was ever present, and it motivated Yorta Yorta people to act in ways which would preserve their families. The removal of children combined with deteriorating conditions and abuse inflicted on the residents of Cummeragunja by the mission manager prompted a 1939 action known as The Walk Off.[5] Following The Walk Off, residents of Cummeragunja established their own camp on the banks of Goulburn River in between Mooroopna and Shepparton (on

Yorta Yorta country in Victoria), which became a town camp known as 'the Flats'. While most people were employed, residents of the Flats could live frugally by collecting scrap materials from the nearby tip to build their homes and by subsisting on bush foods. The Flats housed a large community of mostly Yorta Yorta families, including my nan and pop who shared their first home there. Life at the Flats is within living memory for many Yorta Yorta people and is remembered fondly as the community was relatively free. However the freedom of life at the Flats was short lived.

In 1947, the Shepparton community became increasingly concerned about the growing population of the Flats. The community was considered by the Police to be a 'menace' to the town of Shepparton (Herald, 3 March 1947: 8). Additionally, Yorta Yorta children continued to be removed from the Flats in high numbers. According to Broome, in 1956, 34 children were removed from their families living at the Flats, and it was unlikely that all were 'neglected' (2005: 266). While child removals continued, the Victorian Board for the Protection of Aborigines (the Board) did not provide any assistance to the families of the Flats, as they were considered legally white and not subject to protection by the Board (Broome 2005). It is apparent that the colonial law worked to define Yorta Yorta people according to a logic of race, where some families of the Flats were deemed incapable of looking after their children due to their Aboriginality, yet they were not sufficiently Aboriginal to be offered the assistance of the Board.

Newspaper reports demonstrate the anxiety the local council had regarding the use of the land at the Flats by Yorta Yorta people. As reported in the Herald,

> The camp area [of the Flats] is on Government land outside the municipal boundary, and the local council has no control over it. They have incorporated it, however, in a plan for future Shepparton beautification, and want to secure it for parks (Herald, 6 March 1947: 9).

It appears that the impetus for colonial law's interference into Yorta Yorta lives at the Flats was two-fold – the purported protection of

Yorta Yorta children (who were not *really* Aboriginal according to the colonial law), and the further acquisition and control of Yorta Yorta land for the settler colonial project.

My pop found work which allowed him to move his family off the Flats and into a shed on the orchard where he was employed, on Yorta Yorta country. My nan also worked picking fruit and in the cannery. By working and earning money, and living in permanent accommodation, they were safe(r) from the prying eyes of the Board. In accordance with assimilationist aims of the time, Victoria formed a new Aborigines Welfare Board (Welfare Board) pursuant to the *Aborigines Act* 1957 (Vic). In 1958, the Welfare Board established a transitional housing project called 'Rumbalara' one kilometer outside the township of Mooroopna on Yorta Yorta country. My grandparents were offered a place at Rumbalara, and so they moved their young family, including my mum and uncles into the new housing project.

However, the conditions at Rumbalara were terrible. The houses were tiny and cheaply built from concrete, and had no internal or back doors. The indignity of the living conditions at Rumbalara is still in the living memory of many Yorta Yorta people. According to my family, the residents of Rumbalara preferred the living conditions on the Flats – although Rumbalara had running water and electricity, the residents had to suffer the indignity of welfare checks, ensuring the residents there were living like civilised white people. In addition, the children were collected by Christian organisations to attend Sunday school and Bible study.

The Rumbalara houses were meant to be transitional – halfway houses to teach the Aborigines to live as well as white people before making the transition into mainstream housing. The idea was that by living in a permanent residence, the residents were taught how to pay rent, undertake gardening, maintain a home and so on. According to Broome, this form of (colonial) social engineering was undertaken to 'copy the ideal white, middle-class family home of the post-war years' (2005, 320). In 1959, my Nan and Pop were the first Aboriginal people in the area to purchase a commission house, which allowed them to live more freely, and a safe distance from the constant surveillance of the Board.

The surveillance and assimilationist agenda of the government continued, but the bulldozing of the humpies at the Flats combined with the establishment of the Rumbalara transitional housing (and later, commission housing) meant that the majority of Yorta Yorta people were moved into white 'civilised' style housing. The decades of protectionist and assimilationist law and policy had finally racialised Yorta Yorta people to an acceptable point of civilisation, or indeed a point of *whiteness*. As explained by Moreton-Robinson, the racialisation process operates to construct whiteness 'as the pinnacle of its own racial hierarchy' (Moreton-Robinson 2015: *xx*). In accordance with these colonial narratives, Yorta Yorta people continue to be racialised as half-castes, mixed race or otherwise 'not really' Aboriginal by settlers on our land. As discussed above, this is also demonstrated by the narrative of savagery and civilisation perpetuated within the Yorta Yorta trial, which was used to undermine the Yorta Yorta claim.

The above history does not mean to demonstrate that Yorta Yorta people have been washed away on the tide as of history as insinuated by Olney J and the respondents to the Yorta Yorta claim. This Yorta Yorta story exemplifies our survival despite the unrelenting and overwhelming colonial project. Our ontological connection to country has not been severed, despite the best efforts of the settler colonial project and its law. The above examination has merely demonstrated the colonial law's central role in the racialisation of Yorta Yorta people throughout the various stages of the 'tide of history'. The colonial law has been a key tool in the colonial project, deployed in order to justify the elimination of Yorta Yorta people from our lands. In unveiling the reality behind the tide metaphor, the violence of the colonial law is made clear. But more specifically, the colonial discourses of savagery and civilisation which justified the violent colonisation of Yorta Yorta country is echoed in the tide of history metaphor which permeated the trial and underscored Olney J's finding of fact. Thus the failed Yorta Yorta claim is seen as an extension of the racialised violence enacted against Yorta Yorta people by the colonial law.

During the trial, Yorta Yorta people attempted to bring the violent truths underlying the tide metaphor into evidence. They spoke of frontier violence, sexual violence, hiding from welfare, child removals, the suppression of language and ceremony, and other evidence of attempted genocide. However, in his judgment, Olney J described some of this evidence as 'prolonged outbursts of what can only be regarded as the righteous indignation of some witnesses at the treatment they, and their forebears, have suffered' and stated it was an 'unfortunate aspect of the… applicant's evidence' (*Yorta Yorta 1998*: [21]). This was reinforced by the High Court judgment, where Gleeson CJ, Gummow and Hayne JJ held that the colonial law is not concerned with why there is no claim to native title – 'the inquiry about continuity of acknowledgment and observance [of traditional law and custom] does not require consideration of why, if acknowledgment and observance stopped, that happened' (*Yorta Yorta 2002*: 457).

Within the logics of the colonial law, evidence of continuing law and custom for the purposes of native title is somehow separate from the colonial violence enacted on First Nations people. While Yorta Yorta people see our continuing existence on Yorta Yorta country as evidence of our survival and resistance in the face of the colonial project, the racialised logics of the colonial law rationalise our survival as positive proof that we had 'surrendered [our] Indigeneity and sovereignty' (Moreton-Robinson 2015: 91). As described by Uncle Wayne Atkinson (2001: 20), it is 'obscene' that the colonial law seeks to construct Yorta Yorta survival as evidence that we have been washed away on the tide of history as it disavows its own role in the violence of the tide of history. It is against this background that Deborah Bird Rose, one of the anthropologists who assisted the Yorta Yorta claim, asked – has the settler nation state 'institutionalised the right to kill… spread it out across time [and] labelled it history'? (2001: 161).

Professor Irene Watson, member of the Tanganekald, Meintangk, and Boandik nations, maintains that the settler state 'is yet to resolve… its own illegitimate foundation and transformation into an edifice deemed lawful' (2009: 46). Thus the continuing existence of Aboriginal sovereignty creates anxiety within the settler state, and a resultant 'narcissistic drive' (Veracini 2010: 77) to disavow its own foundational violence. But the tide of history metaphor does more than conceal the violence and questions of legitimacy at the foundation of the settler state. Its discursive links to savagery and civilisation specifically feed settler fantasies (Strakosch 2015) of a righteous presence on First Nations lands, and assures the settler state of its moralising and civilising authority which justified colonisation in the first place. Within the tide of history metaphor, Aborigines are savages doomed to extinction, through no fault of settlers, and settlers are constructed as pioneers, who struggle against wild and untamed lands. Thus it is lands, not people, who are conquered by settlers, and so the violence of dispossession is erased and the 'mythology of peaceful settlement is perpetuated' (Moreton-Robinson 2015: 29). The Yorta Yorta case demonstrates that the violence of the colonial law is not historical, it continues in the present. The functioning of the settler state continues to legitimise its own existence and belies the illegitimacy of its own foundations. This was demonstrated in the Yorta Yorta case, where the colonial law sought to rename this violence as the 'tide of history'.

5 End stage settler colonialism: the consummation of colonisation

The native title jurisdiction is one of the primary ways that the settler state has legitimised its existence. Native title requires that claimants appear before the colonial law to 'prove the extent to which their nativeness has survived genocide' (Watson 2002: 263), or indeed, the extent to which they have survived the tide of history. Evidence of 'washing away' of traditional law and custom therefore legitimises settler possession of First Nations lands by killing (Giannacopoulos, 2020) native title applicants' interest in their own lands. The late historian Patrick Wolfe has argued that the tide metaphor relied on by Olney J described the 'consummation' of colonisation, which 'canonizes the fait accompli' (2006: 393). This is the end stage of settler colonialism, where the settler colonial aim of legally possessing native land is fulfilled. In the end stage of settler colonialism, the settler state attempts to indigenise itself through the disavowal of First Nations rights in land, effectively denying our identities as First Nations people.

Olney J's reasoning reflects the racialised narratives underpinning the tide of history metaphor, which work to construct the elimination of Yorta Yorta society as the inescapable end stage of colonisation. Before assessing any of the evidence pertaining to native title, Olney J states that 'it is necessary to say something regarding European settlement within the claim area' (*Yorta Yorta* 1998: [26]). He then goes through the colonial history of the claimed area, replete with anecdotes of friendly Aborigines guiding early colonial explorers towards South Australia (*Yorta Yorta* 1998: [31]) and descriptions of land being (unproblematically) 'taken up' by white settlers (*Yorta Yorta* 1998: [34]). He then states that by 'the 1850s physical resistance to settlement had ceased' and that an '1857 census found only 1769 Aborigines left in Victoria' (*Yorta Yorta* 1998: [36]), before providing an overview of the establishment of missions, the fringe camp at the Flats, the Aboriginal housing project at Rumbalara, and Yorta Yorta people moving into houses in townships by the 1970s (*Yorta Yorta* 1998: [37]-[49]). This history of 'European settlement' describes Yorta Yorta people in varying degrees of civilisation, a narrative which underscores the tide of history metaphor.

It is against this background that Olney J held that the writings of early colonisers contained the most credible source of evidence pertaining to traditional law and custom of Yorta Yorta people. Olney J preferred this evidence to the evidence of the Yorta Yorta claimants themselves, reasoning that the early colonisers had 'at least observed an Aboriginal society that had *not yet disintegrated*' (*Yorta Yorta* 1998: [101], emphasis added). Olney J's 'disposition towards disintegration' (Kerruish & Perrin 1999: 5) reflects the settler colonial logics in which the disintegration of Aboriginal societies is part of the natural, inevitable progress of civilisation, 'sweeping the backwards races from the face of the earth' (Blandowski, cited in Broome, 2005, 98).

Olney J's judgment thus discursively constructs Aboriginal people as doomed to be washed away on the tide of history. Yorta Yorta 'words, lives, bodies and vivid living evidence' of our continuing survival and resilience were ultimately 'transparent' in the eyes of the colonial law (Rose 2001: 160). Continuing the metaphor of the tide of history, if the traditional Aboriginal society that once occupied Yorta Yorta land has been washed away, that society has been replaced by the settlers left in the tide's wake. Because Yorta Yorta traditional law and custom was supposedly washed away, the colonial law considers that we have no different interest in our land to that of settlers. Through a supposedly impartial legal process, the colonial law produced settlers as 'nonimmigrant' (Giannacopoulos 2007: 1), ultimately legitimising the settler state on Indigenous lands.

As theorised by Associate Professor Maria Giannacopoulos (2020), the colonial law wages a nomocidal war on Indigenous people, which seeks to kill and deny Indigenous sovereignty. In the Yorta Yorta case, the colonial law attempted to complete its nomocide of Yorta Yorta sovereignty by asserting that the tide of history had washed away the observance of laws and customs that connect us to our country. From a Yorta Yorta perspective, by denying our traditional connection to country, the colonial law effectively denied our identity as Yorta Yorta people. In this way, the colonial law finalised the objectives of the settler colonial project on Yorta Yorta country, legally eliminating the native population and affirming the patriarchal white sovereignty of the settler state. Thus, in the Yorta Yorta case, the colonial law continued its work which began with the originary violence of colonisation and which relentlessly sought to civilise the so-called 'savages' (Curr 1883) of Yorta Yorta country. Based on racialised discourses of savagery and civilisation, the tide of history metaphor worked to enact further violence on Yorta Yorta people by legitimising the theft of Yorta Yorta country. Within the settler imaginary, First Nations people are on a 'trajectory of loss' (Rose 2001), degradation, disintegration and death. According to the racialised logics of the settler colonial project, our Aboriginality is terminal, and we are coming to the end stage of life as Indigenous peoples. In effect, in the end stage of settler colonialism, settlers are indigenised through the disavowal of First Nations indigeneity.

6 Conclusion

This paper has examined the Yorta Yorta native title case as a direct function of the law's racialised violence, which continues to subjugate and dispossess First Nations people and sustain the colonial project. My analysis of tide of history metaphor has revealed that it is based in racist discourses and was deployed throughout the Yorta Yorta case to conceal the violence of colonisation. In unpacking the reality behind the metaphor, this paper has demonstrated the fundamental role that the colonial law has had in the violent colonisation of Yorta Yorta country. The Yorta Yorta case is thus seen as part of the continuum of violence which has been enacted on Yorta Yorta people by the colonial law since the beginning of colonisation. However, in the Yorta Yorta case, the colonial law sought to disavow this violence, and simultaneously justify the dispossession of Yorta Yorta people through the inevitable tide of history. Within the tide of history metaphor, Aboriginal culture is seen as decaying as it encounters Western civilisation. Thus it was deployed by Olney J to signal the end stage of settler colonialism, where white possession of First Nations country is justified by the washing away of First Nations law and custom. Through a supposedly impartial legal process, white possession of Yorta Yorta lands was legitimised and naturalised, effectively indigenising the settler state.

However, the way that the law has sought to define us does not reflect our realities as Yorta Yorta people. Our sovereignty comes from our bloodlines that connect us to country and belies the colonial law's insistence that we have been washed away. As explained by Moreton-Robinson,

> '[o]ur ontologies, our ways of being Indigenous are inextricably connected to being in and of our lands. This is an inherent sovereignty not temporally constrained. It functions through the logics of relativity finding expression in kin relations, respect, responsibility and obligation that exist outside the logic of capital and familial ties to private property and nation states' (2021: 259).

McKinnon (2021) further explains that First Nations sovereignty is 'performative' in that it is performed to maintain one's identity as a First Nations person. This understanding of embodied, performed sovereignty cannot be comprehended, or indeed recognised, by the colonial legal system predicated on a claim to 'singular, exclusive sovereignty' (McKinnon 2020: 692); such is the fragility and insecurity of the colonial law's own foundations.

Our sovereignty connects us to our 'histories and futures which are outside the logics of colonialism' (McKinnon 2021: 324). Through our sovereignty, we are connected to other First Nations people, land, creator beings, human and non-human kin, waterways and tides. In this way, the tide does not just represent an endless stream of colonisation as asserted by the law of native title. Our embodied sovereignty and connection to country endures, unsettling and disrupting the violent foundations of the colonial law.

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Endnotes

1 Holly Charles is a Yorta Yorta and Gunai woman living on Yorta Yorta country. She is in her final year of her PhD studies at RMIT University in the School of Global, Urban and Social Studies. Using the example of the Yorta Yorta native title case, Holly's PhD research analyses the ways in which racialised logics operate within the colonial legal system. Before commencing PhD studies, Holly worked as a lawyer within the Commonwealth Government, and previously worked at the Victorian Equal Opportunity and Human Rights Commission and the Federation of Women Lawyers in Kenya.

2 See also Derrida, J (1992)

3 Dr Eugenia Flynn, a Larrakia and Tiwi organiser and academic, uses the term 'late stage settler colonialism' to describe the evolving and ongoing nature of settler colonial violence against native populations in settler colonies such as Australia.

4 The failure of *Mabo* to engage with fundamental questions of Australia's sovereignty has also been theorised as a function of the colonial law's violence (Giannacopoulos 2007).

5 The Walk Off is a seminal political action protesting poor conditions on Cummeragunja. It was one of the first political protests organised by Aboriginal people and was supported by organisations such as the Aborigines Progressive Association and the Australian Aborigines League. Yorta Yorta people celebrate the Walk Off as a significant act of Yorta Yorta resistance and as part of the beginning of a new era of Aboriginal political activism.

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