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The Indelible Onus & Frankland

NAIDOC WEEK 2021

In September this year, it is the 40th anniversary of the hugely significant case of *Onus v Alcoa*[1]. Well before *Mabo*[2] & *Wik*[3], two young women bravely stepped up to 'Heal Country!'.

The Country was at Portland. The People were the Gunditjmara (given as Gournditch-jmara in the case). Two young women Lorraine Sandra Onus and Christine Isabel Frankland were plaintiffs for their People. These People were the People of Archie Roach's mother and, at the time of the case, Archie had not yet met Ruby Hunter who became his great singing partner and wife. So, along with this case, these young women and their People were coping with the sufferings of the stolen generation alongside many other social and practical problems.

Image: Onus and Frankland in 1980 at a protest site on Gunditjmara country.[4]

Alcoa of Australia (Alcoa) was the opponent. After a major deal with the Victorian government, it was required to build an aluminium smelter on the land at Portland.

The smelter land contained relics of former Aboriginal occupation with workshops, stone tools and manufacturing debris. The land was covered with thick scrub.

The High Court case concerned whether the young women were entitled to approach the Court at all. The Victorian courts ruled against them (Brooking J, then at Court of Appeal, Starke, Kaye & Jenkinson JJ).

Onus and Frankland bravely continued against all the odds. On the legal front, the lawyers had to distinguish a recent High Court case that had rejected the right of the Australian Conservation

[1] *Onus v Alcoa Australia Ltd* (1981) 149 CLR 27.
[2] *Mabo v Queensland* (No.1) (1988) 166 CLR 186; *Mabo and others v. Queensland* (No.2) [1992] HCA 23; (1992) 175 CLR 1.
[3] *Wik Peoples v The State of Queensland* [1996] HCA 40.
[4] Jessica Kate Weir, 'The Gunditjmara Land Justice Story'. https://aiatsis.gov.au/sites/default/files/research_pub/weir-2009-gunditjmara-land-justice-story_0_3.pdf accessed 9 July 2021.

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Foundation to approach the court seeking orders as to unlawful Ministerial action[5]. Dr Kelleher was the instructing solicitor in that case.

Onus and Frankland had to prove that they had a 'special interest' in their own Country! It is incredible that Aboriginal Australians had to prove they had a right to come to the Court to remedy a wrong to their Country. That is precisely what they succeeded in doing through a unanimous decision of a full High Court. It was their sheer connection with Country that forged their win and distinguished their case from the earlier *ACF* case.

The case concerned the *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic) (Archaeology Act) which sought to preserve relics for Aborigines. Their counsel argued that Onus and Frankland were members of a class with rights as individuals to apply to the Court to prevent relic destruction. They were members of a People who were 'linked to their tribal relics by the fact of their ancestry and descent; they had obligations and responsibilities in respect of the relics. They used the relics to educate the children of their tribe. A non-economic interest could constitute special interest whereby Onus and Frankland suffer an injury distinctively different from othes

The Court recognised Onus and Frankland as descendants from inhabitants of Australia in prehistoric ages and custodians of the relics of their People according to their laws and customs.

It found their evidence revealed that:

> 'the Portland area was inhabited in prehistoric times by a group of aboriginal people known as the Gournditch-jmara people and that descendants of these people, who still live in and around Portland, form "a tightly knit ethnic community in the area".'[6]

Mrs Onus' voice in evidence was:

> *'Well, that particular area where the smelter — not just where the smelter is going to be, but the land that Alcoa has purchased, has been land that my people have frequented. It is near land that has not been or is not frequented by other members of the community so much as the Gournditch-Mara [sic] people. We have been free to more or less do what we like there: camp there, teach our children our culture, explain to them what different parts of the land are and how important different sites are on that area; we go fishing there, we go hunting there.'*[7]

In answer to questions, her evidence still rings true today:

[5] *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.
[6] *Onus v Alcoa Australia Ltd*, 32.
[7] Ibid 32.

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> 'Are the relics which are to be found at the sites there of significance in terms of the use which you have made of this area of land?'
>
> ***'They are significant because they are part of our culture. It is an area that we well know because, as I have just stated, it is educational for our children.'***
>
> 'So far as the sites of the relics, do they have any spiritual significance to you?'
>
> ***'The land as it stands is of spiritual significance to the aboriginal people, that area particularly because we frequent it, and we are very much aware of what went on their with our people.'***
>
> 'And is there any significance in the fact that these sites were sites where your ancestors lived in antiquity?'
>
> ***'Very much so. It is a very deep thing with aboriginal people.'***[8].

She withstood cross-examination. Leading QC Cliff Pannam led the case for Alcoa. Under cross-examination, she said that all descendants of her People "have a responsibility to ensure that any relics on the Aboriginal sites, sacred or otherwise, are protected, and that all the members of the tribal group were just as much entitled to be custodians of the relics" as herself and Frankland.

Key extracts from the Court's judgement record:

> 'While Europeans may have cultural difficulty in fully comprehending that significance, the importance of the relics to the appellants and their intimate relationship to the relics readily finds curial acceptance. It is to be distinguished .. both in terms of weight and, in particular, in terms of proximity, from that concern which a body of conservationists, however sincere, feels for the environment and its protection.'[9]

Wilson J noted, in distinguishing this case from ACF, and the interest of an environmental body, that there was 'nothing abstract' about the interest of Onus and Frankland:

> 'There is nothing voluntary about it, as there would be if it were a cause which if not pursued at Portland today may be pursued in the Kimberleys tomorrow. The Gournditch-jmara people, of which the appellants are representative, are involved with these relics, whether they like it or not. It is to their ancestors, their history, that the relics bear silent but meaningful testimony. Furthermore, the corporate nature of the interest, resident as it

[8] Ibid 32.
[9] Ibid, Stephen J, 42.

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> is collectively in the tribe, also serves to identify an interest which is deeper and more significant than a mere emotional attachment.'[10]

In an insightful reference to the Archaeology Act, Wilson J added:

> 'whether there are spiritual implications is something which is unclear, perhaps because we have been concerned with stone chips rather than with the land itself.'[11]

Justice Murphy referred to the Court of Appeal Reasons by Jenkinson J, who stated that:

> '(whilst recognising that) some human biological relationships have grave legal consequences of general kinds, because of the fundamental importance of those relationships in Western European Judeo-Christian culture …the descent of the appellants from those whose relics lie at Portland is not in my opinion such a relationship as a court administering the common law can, without legislative direction or encouragement, regard as conferring that special interest'.

Murphy J utterly rejected this approach:

> 'Australia is a nation composed of peoples deriving from a variety of cultures, which are not restricted to Western European. Our people also adhere to a variety of religions many of which are not "Judeo-Christian", and many have no religion. "Western European Judeo-Christian culture", if there is such a culture, has no privileged status in our courts. Aboriginal culture is entitled to just as much recognition. … There is no justification for using 'standing' to introduce religious, racial or cultural discrimination to the courts.'[12]

Senior counsel for Onus and Frankland was the now retired John Dwyer QC. We contacted John for his memories of the case. He recalls coming into it when Ron Castan[13] was unable to appear for some reason. John recalls Onus '*demonstrating the hesitancy that came from systematic disadvantage*'. Nevertheless, speak up she did and John skilfully used her evidence to do justice to her case.

Junior Counsel in *Onus v Alcoa*, Noel Magee (now QC), recalls the case well.

[10] Ibid 62.

[11] Ibid 62.

[12] Ibid 46.

[13] As a barrister, Ron Castan was senior counsel in *Mabo* and was involved in numerous cases involving the rights of Indigenous people, including *Wik*, providing advice in the *Tasmanian Dams Case* (1983) 158 CLR 1 and supporting objections made by Indigenous peoples to amendments to the *Native Title Act* in 1998. Aptly called a "champion in the field of human rights", Monash University honours Castan with the Castan Centre for Human Rights https://www.monash.edu/law/research/centres/castancentre accessed 9 July 2021.

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'Ron Castan and I were in this case from day one. We were working together on another matter concerning Aboriginal legal rights, when Ron was contacted by, as I recall, the Aboriginal Legal Service. It received contact from people concerned with Alcoa's smelter. There were middens there and it was a place where they had things over the years. Mick Dodson was running it.

Ron and I went down to Portland. I asked the women what they wanted us to achieve for them. Onus said 'all we want is land'. They did not want money or a payout. They wanted something for the whole community. I said we could only hope to get land if we could secure a negotiating position.

Alcoa's lawyers made us prove that our clients were Aboriginal people from this area. We got an anthropologist who located, in Scotland, letters from a missionary's wife who wrote home when the Onus family came into the Mission for protection.

When we won before the High Court – that was how the Gunditj'mara got the Lake Condah land

Ron Castan was a giant – a great man.

Obviously we were not paid and did not seek or get publicity. I found that we could call on any amount of support as we needed it – accountants, experts – all buckshee.'

The significance of the return of Lake Condah cannot be over-estimated. It includes the former Mission area, and the wet lands where internationally significant ancient engineering and building structures and eel farming infrastructure is located.


An eel trap at Lake Condah[14]

This land orients to Budj Bim, the mountain site that is the first Australian Indigenous site to secure World Heritage Listing.

[14] https://uploads.knightlab.com/storymapjs/3091a540e94e8fd91e4986828ff6d7c9/budj-bim-lake-condah-aboriginal-engineering/index.html accessed 9 July 2021.

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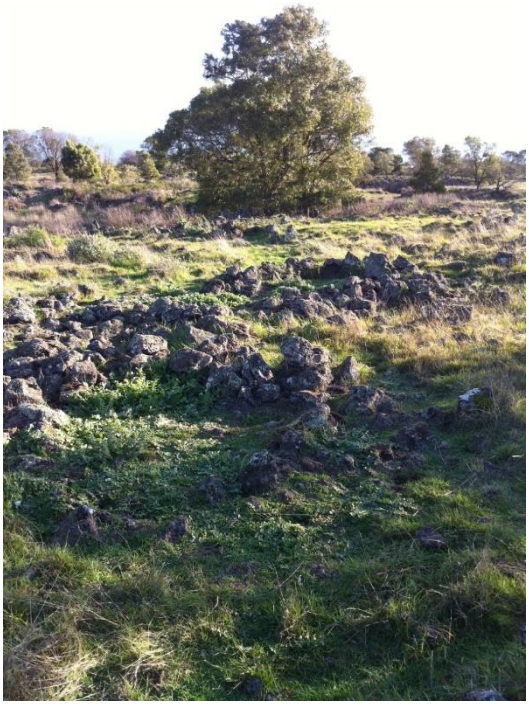
They secured land for their People that it richly protected for the future of the people as well the entire Australian nation. All Australians should be grateful to them.

It also made extremely important Australian law as to who could have standing to access the courts.

Asked why he chose to do the case, Noel stops:

'*You just do it because it is right.'*



Ancient structures at Lake Condah[15]

[15] Leonie Kelleher, accessed 9 July 2021.

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