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# The Development of Native Title: Opening Our Eyes to Shared History

Justice Michelle Gordon\*

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*Gordon J addresses the question “What is the relationship between history, facts and law in native title?” in her speech for the 2019 John Toohey Oration held 2 October 2019. Hosted by the UWA Law School and John Toohey Chambers, the John Toohey Oration honours the career and contribution to public life of a distinguished graduate of The University of Western Australia, Toohey J, one of the country’s most eminent jurists.*

History is “a constantly moving process, with the historian moving within it”.<sup>1</sup> Sometimes, we are ill-equipped, or singularly lacking in focus, to learn about, and then recognise, that history.<sup>2</sup> Other times, what we once thought were the answers can be, and often are, shaken, displaced, even erased, by new discoveries and new thinking. And the means by which our understanding of history is shaken, displaced and erased are not finite or closed.<sup>3</sup> That is no truer than in our learning and understanding of Aboriginal and Torres Strait Islander cultures and connection to land. We are, as Bruce Pascoe wrote in *Dark Emu*, “at the beginning – not the end – of understanding pre-colonial history”.<sup>4</sup>

It seems that each month we discover new archaeological information – a midden at Warrnambool in Victoria has been dated at around 60,000–80,000 years, and a cave in South Australia has shown Aboriginal occupation of around 50,000 years, which is much earlier than it was previously thought Aboriginal people had occupied that region.<sup>5</sup> Artefacts discovered from a rock shelter in northern Australia have provided evidence of human occupation of northern Australia around 65,000 years ago.<sup>6</sup> Of course, Indigenous Australians have long been conscious of the ancient reach of their heritage. In 1986, while archaeologists explored his land in northern Kakadu, Gaagudju elder Big Bill Neidjie contemplated the antiquity of the Dreaming, stating:

When that law started? I don’t know how many thousand years. European say 40,000 years, but I reckon myself probably was more because ... it is sacred.<sup>7</sup>

And we are still learning not only of the ancient nature of Indigenous life in Australia, but also *what happened* over those 60,000–80,000 years of Indigenous life.<sup>8</sup> We are learning that:

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<sup>1</sup> EH Carr, *What Is History? The George Macaulay Trevelyan Lectures Delivered at the University of Cambridge January – March 1961* (Vintage Books, 1961) 128.

<sup>2</sup> B Pascoe, *Salt: Selected Stories and Essays* (Black Inc, 2019) 14, 33, 36, 57, 59, 62, 79, 107, 195.

<sup>3</sup> See, eg, L Behrendt, *Finding Eliza: Power and Colonial Storytelling* (University of Queensland Press, 2016) 171–178, Ch 8, especially 184, 191.

<sup>4</sup> B Pascoe, *Dark Emu* (Magabala Books, 2014) 60.

<sup>5</sup> Pascoe, n 4, 61, citing D Cooper, “Flinders Rangers Rock Shelter”, *ABC*, 4 November 2016. See also D Cooper, “Oldest Known Evidence of Aboriginal Settlement in Arid Australia Found in Flinders Ranges Rock Shelter”, *ABC*, 4 November 2016 <<https://www.abc.net.au/news/science/2016-11-03/rock-shelter-shows-early-aboriginal-settlement-in-arid-australia/7983864>>.

<sup>6</sup> See C Clarkson et al, “Human Occupation of Northern Australia by 65,000 Years Ago” (2017) 547 *Nature* 306.

<sup>7</sup> B Griffiths, *Deep Time Dreaming: Uncovering Ancient Australia* (Black Inc, 2018) 292, citing B Neidjie, S Davies and A Fox, *Kakadu Man ... Bill Neidjie* (Mybrood, 1986) 48.

<sup>8</sup> See, eg, N Isa, “Indigenous History Along the Murray River Being Unearthed in Five-Year Research Project”, *ABC*, 24 June 2019 <<https://www.abc.net.au/news/2019-06-24/indigenous-history-along-murray-river-being-unearthed/11237698>>.



[o]ver millennia, [Australia's first peoples] explored and colonised every region, transforming the terrain as they moved, making the country their own through language, song and story. They harnessed flame to create new ecosystems, dug the earth to encourage crops, and built water controls to extend the natural range of their resources.<sup>9</sup>

Across the unfathomably vast period of what John McPhee termed “deep time”,<sup>10</sup> Aboriginal Australians established systems of sophisticated housing,<sup>11</sup> built dams, cultivated the land,<sup>12</sup> and altered the course of rivers.<sup>13</sup> Aboriginal Australians created a system of co-operation, which could be considered “jigsaw mutualism”, where:

People had rights and responsibilities for particular pieces of the jigsaw, but ... were constrained to operate that piece so that it added to rather than detracted from the pieces of their neighbours and epic integrity of the land. The part of the tree or stream or land that a group retained responsibility for bled into country so distant that they may never visit. They had to imagine how the whole picture looked, and they had absolute confidence in the coherence of the accretive construction of their law over thousands of years, and knew that the jigsaw would make sense and their responsibility was to ensure it continued to make sense.<sup>14</sup>

As Pascoe said, “[w]e should relish the complexity, the depth, the length of the history”.<sup>15</sup>

This is not to suggest that Aboriginal and Torres Strait Islander cultures were static, or that they froze in time at the point of first European contact, or thereafter. As Toohey J so accurately stated, while many features of Aboriginal life have been altered following European settlement, it is wrong to regard Indigenous cultures as “fixed and immutable”.<sup>16</sup> Toohey J’s experience of land claims “was of an ongoing traditional life that was capable of meeting and adapting to the changes inevitable in continued contact with non-Aboriginal cultures”.<sup>17</sup>

Toohey J would have been the first to acknowledge that the Anglo-Australian legal system has not historically, and does not now, properly or completely give effect to the complexity of Indigenous cultures. For one thing, there are fundamental differences between law as conceived in the various Indigenous communities and the notion of “native title”. As Irene Watson,<sup>18</sup> a Tanganeakald and Meintangk woman, and the first Indigenous person to graduate from the University of Adelaide with a law degree, explains:

We called the land “ruwe”, mother or grandfather, not “Aboriginal title” or “native title.” Native title is a construction of the High Court and it is a very different idea of land from a First Nations perspective. We know ruwe as a relationship in the same way that we are birthed of the mother and are in kinship relationships to the mob or our peoples.

First Nations laws in Australia are ancient and at one time everyone knew them; there was no need to write them down. Law lived in the practice of it, in the singing and in the ceremonies. Songs were a constant reminder of the law, an act of reliving and being in law.<sup>19</sup>

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<sup>9</sup> Griffiths, n 7, 1.

<sup>10</sup> Griffiths, n 7, 2, quoting J McPhee, *Annals of the Former World* (Farrar, Straus and Giroux, 1998) 90.

<sup>11</sup> See Pascoe, n 4, 119.

<sup>12</sup> Pascoe, n 2, 34–35.

<sup>13</sup> Pascoe, n 4, 183.

<sup>14</sup> Pascoe, n 4, 199.

<sup>15</sup> Pascoe, n 2, 198.

<sup>16</sup> J Toohey, “Aboriginal Customary Law” (Paper presented at the *National Law Librarians Conference*, 1983) 6. See Behrendt, n 3, 174–175.

<sup>17</sup> Toohey, n 16, 6.

<sup>18</sup> N Thorpe, “Irene Watson: SA’s First Aboriginal Lawyer Welcomes Young Graduates”, *NITV News*, 20 May 2016 <<https://www.sbs.com.au/nitv/article/2016/05/11/irene-watson-sas-first-aboriginal-lawyer-welcomes-young-graduates>>.

<sup>19</sup> I Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 31. The High Court has noted this issue: see *Fejo (on behalf of Larrakia People) v Northern Territory* (1998) 195 CLR 96, 128 [46]; [1998] HCA 58, where the majority stated that “[n]ative title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law”. See also *Yarmirr v Northern Territory* (2001) 208 CLR 1, 37–38 [11]; [2001] HCA 56, where the majority stated that “[b]ecause native title has its origin in traditional laws and customs, and is neither an institution of the common law nor

And as Paul Behrendt, Eualeyai Elder, explained in relation to land ownership:

Ownership [of land] for the white people is something on a piece of paper. We have a different system. You can no more sell our land than sell the sky ... Our affinity with the land is like the bonding between a parent and a child. You have responsibilities and obligations to look after and care for a child. You can speak for a child. But you don't own a child.<sup>20</sup>

Anglo-Australian law continues to grapple with ways to address and acknowledge our history, the complexity of Indigenous cultures, and in particular, the relationship between Indigenous Australians and land. Such grappling reflects that judicial decision-making, and the doctrine of precedent, are characterised by gradual evolution. Judicial decision-making is not perfect – it can be as flawed as any other kind of process of decision-making:

Choices are constrained by earlier choices; facts go undiscovered, ignored, or misunderstood; decision-makers are compromised by groupthink and by their own fallible minds. The most complex decisions harbor “conflicting objectives” and “undiscovered options,” requiring us to predict future possibilities that can be grasped, confusingly, only at “varied levels of uncertainty”.<sup>21</sup>

As Larissa Behrendt said in *Finding Eliza: Power and Colonial Storytelling*:

The law tells our national story as much as historians, prime ministers and novelists do. Law can be complicit in storytelling because, in the process of determining and applying law, judges have to reconcile conflicting arguments and come to a conclusion by relying on the credibility of witnesses and other evidence that has been accepted. This is a human exercise and therefore always susceptible to bias, prejudice, preconceived ideas and existing worldviews.<sup>22</sup>

It is thus not surprising that “[m]any of the best [decision-making] processes unfold in stages”.<sup>23</sup>

The process of native title litigation through the courts has been characterised by steps or stages towards attaining a greater understanding of the relationships between Indigenous people, land and Indigenous cultures, and *recognising those relationships at law*. That process has operated in tandem with, and reflected, gradual steps taken by Australian society more broadly to understand, appreciate and recognise the complexity and richness of Indigenous cultures and the consequences of European settlement.

But the job remains incomplete. The importance of the legal profession continuing to strive to *learn more and recognise more* cannot be understated.<sup>24</sup> Toohey J was acutely aware of this need, and he was at the forefront of so many of the steps that have been taken to address it.

As Toohey J explained extra-judicially in 1983, prior to his appointment to the High Court:

The fact that it may not be possible to reduce Aboriginal customary law to a comprehensive written description, rather in the nature of Halsbury's Laws of England, is not, to my mind, an objection to recognition of that law. Indeed, to speak of recognition is to take a rather blinkered view. Custom does exist and plays a large part in the lives of many Aboriginal communities. For so many people it is the culture that sustains them. *To say that we will give that law no recognition at all is simply to shut our eyes to part of the world around us.*

To Aboriginal people, “culture” (and it is a term very often used) involves the maintenance of ceremonial life, of language and of traditional aspects of their society. It is very much linked with the physical welfare of people. The loss of culture is not simply the loss of intellectual ideas; it may cause illness and death. People say: “*Without the culture we are lost*”.<sup>25</sup>

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a form of common law tenure, it is necessary to curb the tendency ... to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer”. See further in this regard, for an early acknowledgment of the issue, *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 403.

<sup>20</sup> L Behrendt and L Kelly, *Resolving Indigenous Disputes* (Federation Press, 2008) 89.

<sup>21</sup> J Rothman, “The Art of Decision-Making”, *The New Yorker*, 14 January 2019 <<https://www.newyorker.com/magazine/2019/01/21/the-art-of-decision-making>>.

<sup>22</sup> Behrendt, n 3, 190.

<sup>23</sup> Rothman, n 21.

<sup>24</sup> Pascoe, n 2, 100.

<sup>25</sup> Toohey, n 16, 8 (emphasis added).

Toohey J understood the imperative upon the Anglo-Australian legal system, and Australians generally, to open our eyes to the richness and complexity of Indigenous cultures that surround us; to give them recognition and effect; to celebrate and learn from them. Toohey J understood the imperative to learn to see Australia through Aboriginal eyes.<sup>26</sup> As Aboriginal activist Charles Perkins explained to historian Peter Read in 1989:

My expectation of a good Australia ... is when White people would be proud to speak an Aboriginal language, when they realise that Aboriginal culture and all that goes with it, philosophy, art, language, morality, kinship, is all part of their heritage. And that's the most unbelievable thing of all, that it's all there waiting for us all.<sup>27</sup>

Since Perkins spoke with Read in 1989, one landmark step towards building that “good Australia” has been native title. Toohey J was at the forefront of the High Court’s jurisprudence on native title. Long before *Mabo v Queensland (No 2)*,<sup>28</sup> Toohey J was aware of “the need to find some proper accommodation between the recognition of traditional title and reasonable development”.<sup>29</sup> In *Mabo (No 2)*, Toohey J made history when holding, along with the five other justices that made up the majority, that “the common law recognises the survival of traditional interests and operates to protect them”.<sup>30</sup>

In celebration of that particular step, which numbered among so many taken by Toohey J towards developing a “good Australia”, this article focuses in particular on the *facts* that have underpinned the major steps forward that the High Court has made in the area of native title. And by facts, it refers to two categories of facts (although they are of course interlinked).

The first category is *historical facts*. This inquiry is *retrospective* in nature. This article seeks to consider the tectonic shifts in Anglo-Australian legal understanding of Australian history, and in particular, pre-European settlement Aboriginal history, and how these shifts have provoked responsive changes to the law in the arena of native title. As Rosemary Hunter said in the mid-1990s, there exists:

a complex, interdependent relationship between Aboriginal histories, Australian histories, and ‘the law’.

In particular, law is not simply a form of power which confers validity on other stories; and as a discourse it is no more autonomous, self-sufficient or singular than any other.<sup>31</sup>

Law does not stand aside from history, or above it: the disciplines are interlinked, and perhaps no more is this apparent than in the area of native title.

The second category is *contemporary or contemporaneous facts*. This inquiry is *forward looking* in nature. We have an ever-increasing understanding of contemporary Aboriginal and Torres Strait Islander cultures and connection to country thanks to talented historians, writers, artists, anthropologists, lawyers and others, both Indigenous and non-Indigenous, who have been generous enough to tell their stories and share their knowledge. Of course, that understanding remains incomplete. This article seeks to consider *why* it is imperative that the legal profession strive to do more to recognise and understand contemporary Indigenous cultures and connection to country, and *how* that increased knowledge has and will continue to impact on the development of the law.

## WHY FOCUS ON FACTS?

As a starting point, it is appropriate to ask, why do facts matter, whether historical or contemporary? Why focus on them in this article? The answer is as simple as the old maxim “law is derived from a

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<sup>26</sup> See P Keating, “Redfern Park Speech 10 December 1992” (2001) 5(11) *Indigenous Law Bulletin* 9.

<sup>27</sup> Griffiths, n 7, 293, quoting P Read, *Charles Perkins: A Biography* (Ringwood, 1990) 315.

<sup>28</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>29</sup> JL Toohey, “Indigenous Peoples and the Industrial System: Lessons from Australia, Canada and the United States” (Paper presented at Washington, 1982), quoted in J Edelman, “A Short Obituary of John Toohey by Justice James Edelman” (Melbourne University Law School, 12 April 2015) <<https://blogs.unimelb.edu.au/opinionsonhigh/2015/04/12/a-short-obituary-of-john-toohey-by-justice-james-edelman/>>.

<sup>30</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 187.

<sup>31</sup> R Hunter, “Aboriginal Histories, Australian Histories, and the Law” in B Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996) 1.

fact” – or more accurately, “by means of a fact, we recognize (or we know) the law”.<sup>32</sup> Legal philosophy has arguably neglected fact-finding as a core concern,<sup>33</sup> even though contemporary legal adjudication is characterised by its fact orientation. Even when dealing with facts that are not disputed, it will be those facts that will be incorporated into the reasons for a court’s decision. As a result, “the adjudication of every dispute under a legal rule is based on what are believed to be, or taken as, the facts of the case”.<sup>34</sup> In other words, the truth or falsehood of factual claims is crucial to substantive justice.<sup>35</sup> And the question of “what is the law” does not neatly separate from the question of “what are the facts” in judicial decision-making. As Ho Hock Lai explains: “Not only is the relevancy of facts, and ... the scope of factual inquiry, determined by the law, the relevant law is determined by the facts. Facts and law are considered in tandem and ‘adjusted to one another continuously until a result is reached’.”<sup>36</sup>

You might ask at this point, what exactly is a fact? A fact can be conceptualised as an observable feature of the world; but at least in a legal context, facts also include, for example, a person’s state of mind,<sup>37</sup> or contested historical words or acts, as this article discusses below. Fact and law, fact and value, the descriptive and the evaluative are interlinked in defining facts; these matters are “indissolubly bound”.<sup>38</sup> And the task of defining facts is inevitably mediated by one’s background assumptions and beliefs<sup>39</sup> – that is, facts are “constructed from a worldview”,<sup>40</sup> and especially in a historical context, facts may be contested or contestable.<sup>41</sup> To admit this is not to accept “overinflated claims about relativism and against the objectivity of truth”.<sup>42</sup> It is to acknowledge the complexity of the legal task of fact-finding, and the fallible nature of it.

## HISTORICAL FACTS

### Mabo v Queensland (No 2)

*Mabo (No 2)* is a starting point for considering the significance of historical facts and, in particular, the significance of a *changing understanding* of historical facts to the development of native title. Historical facts were of critical importance to that case. As was said in Billy Griffiths’ recent and award-winning book, *Deep Time Dreaming*, “[f]rom the moment of first contact, settler history became part of Indigenous history and Indigenous history became part of settler history”.<sup>43</sup> The decision in *Mabo (No 2)* was the first meaningful attempt by the High Court to put aside the “great Australian Silence”,<sup>44</sup> and to acknowledge as much.

<sup>32</sup> HL Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (OUP, 2008) 2, fn 4, citing P Sayre (ed), *Interpretations of Modern Legal Philosophies – Essays in Honour of Roscoe Pound* (OUP, 1947) 578, 582, 583.

<sup>33</sup> D Dwyer, *The Judicial Assessment of Expert Evidence* (CUP, 2008) 11.

<sup>34</sup> Ho, n 32, 2.

<sup>35</sup> S Haack, “Crossing My I’s and Dotting Some T’s: Response to Vern Walker” in C de Waal (ed), *Susan Haack: A Lady of Distinctions – The Philosopher Responds to Her Critics* (Prometheus Books, 2007) 105, 107, quoted in Dwyer, n 33, 11.

<sup>36</sup> Ho, n 32, 7, quoting P Chevigny, *More Speech – Dialogue Rights and Modern Liberty* (Temple University Press, 1988) 165. See also Dwyer, n 33, 11.

<sup>37</sup> Ho, n 32, 7. See also Dwyer, n 33, 20; H Wooten, “Conflicting Imperatives: Pursuing Truth in the Courts” in I McCalman and A McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, 2003) 15, 31.

<sup>38</sup> Ho, n 32, 9.

<sup>39</sup> Behrendt, n 3, 173.

<sup>40</sup> Ho, n 32, 9. See also Wooten, n 37, 29.

<sup>41</sup> Wooten, n 37, 29.

<sup>42</sup> Ho, n 32, 9. See also Wooten, n 37, 29.

<sup>43</sup> Griffiths, n 7, 239, quoting M McKenna, *From the Edge: Australia’s Lost Histories* (Melbourne University Publishing, 2016) xviii.

<sup>44</sup> WEH Stanner, “The Boyer Lectures: After the Dreaming” (1968) in WEH Stanner, *The Dreaming and Other Essays* (Black Inc, 2009) 172, 182, 191.

The background to the decision is well known and can be briefly summarised. The Meriam people occupied and cultivated three Torres Strait islands, known as the Murray Islands – Mer, Dauar and Waier – long before the first European contact with those islands.<sup>45</sup> Their descendants brought an action against the State of Queensland for declarations, among other things, that the Meriam people were entitled to the Islands as owners, possessors and occupiers, and that the State was not entitled to extinguish the title of the Meriam people.<sup>46</sup>

The first point to note is that court decisions pre-dating the decision in *Mabo (No 2)* were sustained by a version of historical facts that denied Indigenous claims to land.<sup>47</sup> Indigenous peoples were conceptualised as “hunter-gatherers” with no property rights because, among other things, they were thought not to use the land in a progressive manner, and were thought to have no claim to it: their lands were deemed “terra nullius” or desert or waste.<sup>48</sup> Congruently with that way of thinking, in *Cooper v Stuart*<sup>49</sup> the Privy Council held that *there was no land law or tenure existing at the time of New South Wales’ annexation to the Crown*. The Privy Council further held it was inevitable that, as soon as colonial land became the subject of settlement and commerce, all transactions in relation to it were governed by English law,<sup>50</sup> partly on the basis that New South Wales had been “practically unoccupied, without settled inhabitants or settled law”.<sup>51</sup> And “[i]n the Gove case<sup>52</sup> ... the law told the Yolgnu plaintiffs that their history had no legal status”.<sup>53</sup>

*Mabo (No 2)* changed that. The High Court held that native title to land *survived the Crown’s acquisition of sovereignty*. The Meriam people were entitled as against the world to possession, occupation, use and enjoyment of the lands of the Murray Islands,<sup>54</sup> although the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.<sup>55</sup>

In reaching that conclusion, the Court set out a number of important propositions. The key proposition was that the theory of terra nullius did not explain what happened in Australia at the point of, and after, European settlement.<sup>56</sup> Brennan J explained that “to reject the theory [of terra nullius] is to bring the law into conformity with Australian history”.<sup>57</sup>

As Brennan J concluded, the terra nullius theory “depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs”.<sup>58</sup> And, “[a]s the basis of the theory [was] false in fact

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<sup>45</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 180.

<sup>46</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 75.

<sup>47</sup> Hunter, n 31, 1. See also *R v Steel* [1834] Legge 65, 68–69; *Hatfield v Alford* [1846] Legge 330, 336; *Doe d Wilson v Terry* [1849] Legge 505; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404; *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54, 71, 75; *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141, 243, 246–247; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 39, 45, 108–109. Compare R Van Krieken, “From *Milirrpum to Mabo*: The High Court, *Terra Nullius* and Moral Entrepreneurship” (2000) 23(1) *UNSW Law Journal* 63, 65, 66–67.

<sup>48</sup> See B Attwood, “Introduction – The Past as Future: Aborigines, Australia and the (Dis)course of History” in B Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996) vii, ix. See, eg, in *Doe d Wilson v Terry* [1849] Legge 505, 508: “The lands in new territories are unoccupied and waste, until granted by the Crown to some individual, willing to reclaim them from a state of nature.” See also H Reynolds, “Native Title and Historical Tradition: Past and Present” in B Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996) 17, 18.

<sup>49</sup> *Cooper v Stuart* (1889) 14 App Cas 286.

<sup>50</sup> *Cooper v Stuart* (1889) 14 App Cas 286, 292.

<sup>51</sup> *Cooper v Stuart* (1889) 14 App Cas 286, 291.

<sup>52</sup> See *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141, 257, 261, 274.

<sup>53</sup> Hunter, n 31, 1.

<sup>54</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 216.

<sup>55</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 75.

<sup>56</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 38–39.

<sup>57</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 58 (emphasis added).

<sup>58</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 40. See, eg, *In Re Southern Rhodesia* [1919] AC 211, 233–234: “It would be idle to impute to [Indigenous peoples] some shadow of the rights known to our law and then to transmute it into the substance

and unacceptable in our society, there [was] a choice of legal principle to be made”.<sup>59</sup> The Court could apply the existing authorities, or overrule those authorities.<sup>60</sup> The Court chose the latter course. And it did so, in large part, by recognising that, as Brennan J explained:

The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession [was] attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power.<sup>61</sup>

The Court’s recognition of the Meriam peoples’ ancient connection to land in *Mabo (No 2)* was a key foundation for these critical conclusions. In rejecting the application of the doctrine of terra nullius, Brennan J acknowledged the Meriam peoples’ traditional connection to the land;<sup>62</sup> that the Meriam people held a “proprietary interest” in the Islands and they “maintained their identity as a people” and “observe customs which are traditionally based”.<sup>63</sup> Or, as Toohey J potently put it, “[t]hat the use of land was meaningful must be proved but it is to be understood from the point of view of the members of the [Aboriginal] society”.<sup>64</sup>

The history, and our understanding of that history, had changed. And we had to change with it. As Brennan J said:

Whatever be the precision of Meriam laws and customs with respect to land, there is abundant evidence that land was traditionally occupied by individuals or family groups and that contemporary rights and interests are capable of being established with sufficient precision to attract declaratory or other relief.<sup>65</sup>

Rosemary Hunter explained that the majority in *Mabo (No 2)* “enlisted history to authorise law. The judges ... suggested that the law’s old view of history lacked credibility, making it necessary to bring law into line with the now-acknowledged ‘facts’ of history in order to restore the law’s legitimacy”.<sup>66</sup> As Gummow J later explained in *Wik Peoples v Queensland*:

[T]he gist of *Mabo [No 2]* lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact, now shown then to have been false. Those assumptions had been made within a particular legal framework which had been developed over a long period.<sup>67</sup>

Toohey J, again writing extra-judicially in 1983, identified these false historical assumptions and the consequence of those falsehoods when he said:

That Australia was a tract of territory practically unoccupied, that it had no settled inhabitants and no settled law, and that it was peacefully annexed *are all notions of the most dubious historical accuracy. But they were accepted*, hence the absence of any recognition of the customary law of the Aboriginal inhabitants of this country and in particular the failure to recognize the very special relationship they had with their land.<sup>68</sup>

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of transferable rights of property as we know them” (quoted in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 39). See also, in a similar vein, *Advocate-General (Bengal) v Ranee Sumomoye Dossee* (1863) 2 Moo NS 22, 59; 15 ER 811, 824, quoted in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 36.

<sup>59</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 40 (emphasis added).

<sup>60</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 40.

<sup>61</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 58 (emphasis added).

<sup>62</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 59–60.

<sup>63</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 61.

<sup>64</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 188 (emphasis added).

<sup>65</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 62 (emphasis added).

<sup>66</sup> Hunter, n 31, 1 (emphasis added).

<sup>67</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 180.

<sup>68</sup> Toohey, n 16, 2 (emphasis added).

The importance of historical fact, accurate historical fact, and a proper understanding of those facts, is apparent from the dissent of Dawson J in *Mabo (No 2)*. Dawson J said that the Crown “upon annexation asserted its right to the land to the exclusion of any rights of ownership on the part of the plaintiffs or their predecessors”.<sup>69</sup> It is, however, at least arguable that his Honour’s analysis did not reflect a number of historical facts that implicitly recognised Indigenous rights. Although in language that we would not use today, two are sufficient to illustrate the point. What was to be made of the guidance given to Cook on discovering land hitherto unknown to Europeans – that “[y]ou are ... with the consent of the Natives to take possession, in the name of the King of Great Britain”,<sup>70</sup> or the creation of Aboriginal reserves and policy of the Colonial Office in the mid-19<sup>th</sup> century to protect native title on all pastoral leases by creating Aboriginal reservations?<sup>71</sup> Accurate historical fact is important but understanding and recognising that history, from infinite sources and times, is equally important.

*Mabo (No 2)* represented a change in the Anglo-Australian legal system’s learning and understanding of Aboriginal and Torres Strait Islander history. However, inevitably, the decision left many Indigenous Australians disappointed by the “limited form of property law recognition”<sup>72</sup> afforded to Indigenous rights and interests. Put in different terms, Anglo-Australian law was and remains a “prisoner of its [own] history”.<sup>73</sup> As Brennan J said in *Mabo (No 2)*, the Court was not free to adopt rules that might give effect to the rights and interests of the Meriam people where such rules would “fracture the skeleton of principle which gives the body of [Anglo-Australian] law its shape and internal consistency”.<sup>74</sup> Brennan J “navigated a thin line between making the law just and not undermining the property rights structure as it stood. The judgement was an articulation of how far the law would go, a statement about how much institutional change can be tolerated”.<sup>75</sup> Notwithstanding that it was imperfect, the most important aspect of *Mabo (No 2)* was that it constituted a long awaited, and long fought for, “acknowledgment of [historical] truth and validity”.<sup>76</sup> It conveyed a “reconstruction of understanding – shock of awareness – the new realisation of what [the Court had previously] passed over unseeing”.<sup>77</sup>

*Mabo (No 2)* also demonstrates that Indigenous history, law and culture and Anglo-Australian law are systems with their own separate regimes of truth.<sup>78</sup> Determinations relating to native title require “examination of the way in which two radically different social and legal systems intersect”.<sup>79</sup> That intersection also demands that Indigenous stories be “refracted through the rules of evidence and through [Anglo]-Australian history”.<sup>80</sup> For many Indigenous Australians, the fact that they have an interest in their ancestral lands is self-evident; the need to prove that interest is mystifying to them. As Lottie Williams, a Barkindji Elder,<sup>81</sup> wondered in the film *Message from Mungo*, in relation to the study of

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<sup>69</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 163 (emphasis added).

<sup>70</sup> Reynolds, n 48, 24 (emphasis added), quoting H Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen & Unwin, 1987) 171–172.

<sup>71</sup> See Reynolds, n 70, 171–172, quoted in Reynolds, n 48, 24, 29–30.

<sup>72</sup> I Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 42.

<sup>73</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29.

<sup>74</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29.

<sup>75</sup> Behrendt, n 3, 189, citing S Berns, *To Speak as a Judge: Difference, Voice, Power* (Ashgate Aldershot, 1999).

<sup>76</sup> R French, “The Role of the High Court and the Recognition of Native Title: Address in Honour of Ron Castan QC AM” in L Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 78, 79.

<sup>77</sup> French, n 76, 79.

<sup>78</sup> See Hunter, n 31, 1.

<sup>79</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 37 [10]; [2001] HCA 56.

<sup>80</sup> Hunter, n 31, 1.

<sup>81</sup> P Donald, “Mungo Man Remains Handed Back, with an Apology”, *ABC*, 6 November 2015 <<https://www.abc.net.au/pm/content/2015/s4346965.htm>>.

ancient Australia: “What were they trying to prove? When me and all the rest of us know we were here all the time, so that wasn’t news to us.”<sup>82</sup>

Even though the relationship between Indigenous cultures and Anglo-Australian law is destined to be imperfect, *Mabo (No 2)* was an important first step. Anglo-Australian law started taking its own steps towards dismantling what Stanner labelled the “Cult of Disremembering”.<sup>83</sup> But is it a cult of disremembering or, more accurately, a cult of not seeing and then, when the historical assumptions are shown to be false, not developing the law sufficiently quickly to address what we then know to be false?

As French CJ explained, writing extra-judicially:

[T]he decision [in *Mabo (No 2)*] involved not so much the discovery or the creation of a new principle but the *doing of a new thing* – the legal act *we call, metaphorically, recognition* ... That is not just a passive seeing of something afresh. *Its key element is an acknowledgement of truth and validity.* It translates the old into the new.<sup>84</sup>

## Wik Peoples v Queensland

The second landmark decision, *Wik*,<sup>85</sup> again critically turned on facts – historical facts. The Wik Peoples and the Thayorre People claimed to be the holders of native title over certain large areas of land in Queensland. The key question in *Wik* was whether pastoral leases granted under the *Land Act 1910* (Qld) and the *Land Act 1962* (Qld) extinguished their native title.<sup>86</sup>

Prior to the decision in *Wik*, the common expectation was that pastoral leases would extinguish native title.<sup>87</sup> This expectation was partly generated by dicta in *Mabo (No 2)* – for example, from Brennan J, that “[i]f a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term”.<sup>88</sup> The decision in *Wik* on whether that expectation was correct was significant: pastoral leases cover vast sections of Australia, and pastoralists and resource companies were acutely interested in the outcome, the latter because a very large amount of mining in Australia occurs on pastoral leases.<sup>89</sup> The decision was also very significant for Aboriginal and Torres Strait Islander peoples, given the magnitude of the country covered by pastoral leases. If the claimants failed in *Wik* then, as Kirby J said in *Wik*, the High Court’s holding in *Mabo (No 2)* would be “revealed as having little practical significance for Australia’s indigenous people over much of the land surface of the nation”.<sup>90</sup>

*Wik*, like *Mabo (No 2)*, turned on *facts*, and in particular, *historical facts*. It was the historical facts that “show[ed] ... why the judges dashed ... expectations ... in such a dramatic fashion by ruling that native title could survive on pastoral leaseholdings”.<sup>91</sup> Whether there was extinguishment or not turned on the particular rights and interests asserted under native title and the terms of the pastoral leases. That conclusion turned, among other things, on a *historical analysis of the pastoral leases in issue*.<sup>92</sup>

<sup>82</sup> Griffiths, n 7, 136, quoting Williams in A Pike and A McGrath, *Message from Mungo* (Ronin Films, 2014).

<sup>83</sup> WEH Stanner, “After the Dreaming: Black and White Australians – An Anthropologist’s View. The Boyer Lectures” (Australian Broadcasting Commission, 1969) 18, 53, quoted in French, n 76, 79.

<sup>84</sup> French, n 76, 79 (emphasis added). See also Van Krieken, n 47, 75, quoting G Nettheim, “Judicial Revolution or Cautious Correction? *Mabo v Queensland*” (1993) 16(1) *UNSW Law Journal* 1, 16.

<sup>85</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>86</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 64–65.

<sup>87</sup> See, eg, P van Hattem, “Native Title after Wik: Where to Now?” (Paper presented at the 67th Annual Conference of the Pastoralists’ and Graziers’ Association of Western Australia, Perth, 27 February 1997) [1], [4].

<sup>88</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 68 (Brennan J), 110 (Deane and Gaudron JJ).

<sup>89</sup> See S Beckett, “The Impact of *Wik* on Pastoralists and Miners” (1997) 20(2) *UNSW Law Journal* 502, 503; M Bachelard, *The Great Land Grab* (Hyland House, 1997) 31–32; P Keane, “Native Title: The *Wik* Decision” in *The AMPLA Yearbook* (1997) 402.

<sup>90</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 220. See also Bachelard, n 89, 32.

<sup>91</sup> Bachelard, n 89, 40.

<sup>92</sup> See P Butt, R Eagleson and P Lane, *Mabo, Wik and Native Title* (Federation Press, 4th ed, 2001) 104.

Toohey J, writing in the majority, conducted a “historical survey”<sup>93</sup> of pastoral leases, going on to find that “[w]hat is important about this history of legislation, both in New South Wales and Queensland, is that it is *essentially the story of the relationship between the Crown and those who wished to take up land for pastoral purposes*”.<sup>94</sup> Australian pastoral leases:

*reflected a regime designed to meet a situation that was unknown to England, namely, the occupation of large tracts of land unsuitable for residential but suitable for pastoral purposes. Not surprisingly the regime diverged significantly from that which had been inherited from England. It resulted in “new forms of tenure”.*<sup>95</sup>

Given that history, Toohey J recognised the importance of characterising pastoral leases in light of the *relevant statutory provisions*, instead of *by reference to the creation of interests by a common law owner of land* – in other words, to consider the leases from an *Australian* rather than an *English* legal perspective. As Toohey J explained:

[T]o approach the matter by reference to legislation is not to turn one’s back on centuries of history nor is it to impugn basic principles of property law. Rather, it is *to recognise historical development, the changes in law over centuries and the need for property law to accommodate the very different situation in this country*.<sup>96</sup>

That historical development recognised that the regime under which pastoral leases were granted was established before the turn of the century and was itself part of the historical development of the colony. The thrust of historical documents, in particular communications by the Secretary of State, Earl Grey, to the Governor of New South Wales made it clear that Aboriginal persons were not to be excluded from land under pastoral occupation. Earl Grey wrote of pastoral occupation in 1848 that pastoral leases “are not intended to deprive [Aboriginal persons] of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed”.<sup>97</sup>

It was against this background that Toohey J held it unlikely that the *intention* of the legislature, in authorising the grant of pastoral leases, was to confer possession on the lessees to the exclusion of Aboriginal people, even for their traditional rights of hunting and gathering.<sup>98</sup> And further:

[T]here [was] nothing in the statute which authorised the lease, or in the lease itself, *which conferred on the grantee rights to exclusive possession*, in particular possession exclusive of all rights and interests of the indigenous inhabitants whose occupation derived from their traditional title.<sup>99</sup>

Based on this careful historical analysis, Toohey J held that the pastoral leases did *not confer exclusive possession on the leaseholders*. It was the historical facts that cleared the path for the majority’s ultimate decision that native title rights and interests could co-exist with pastoral leases depending on the terms of the statutory grant and the rights and interests being asserted against it.<sup>100</sup> History compelled the answer.

## Yarmirr v Northern Territory

Did the enactment of the *Native Title Act 1993* (Cth) remove the need for, or at least reduce the significance of, historical fact? The Court’s decision in *Yarmirr v Northern Territory*<sup>101</sup> shows that not to be the position. *Yarmirr* concerned a native title determination in respect of an area of seas in the north-western tip of

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<sup>93</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 108.

<sup>94</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 111 (emphasis added).

<sup>95</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 110 (emphasis added), quoting *Stewart v Williams* (1914) 18 CLR 381, 390.

<sup>96</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 112 (emphasis added).

<sup>97</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 119, quoting Despatch No 24 Earl Grey to the Governor Sir Charles FitzRoy, 11 February 1848.

<sup>98</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 120.

<sup>99</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1, 122 (emphasis added).

<sup>100</sup> See *Wik Peoples v Queensland* (1996) 187 CLR 1, 133.

<sup>101</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1; [2001] HCA 56.

Arnhem Land in the Northern Territory.<sup>102</sup> It was decided *under* the *Native Title Act*. The *Native Title Act* establishes a system to address, in a practical way, the consequences of acts impacting native title rights and interests. The system is complex. The complexity “arises because the Act seeks to deal with concepts and ideas which are both ancient and new; developed but also developing; retrospective but also prospective”.<sup>103</sup>

It is beyond the scope of this article to explain each aspect of the operation of the *Native Title Act*. However, some key points can be noted. The *Native Title Act* recognises, and protects, native title<sup>104</sup> and provides that native title is not able to be extinguished contrary to that Act.<sup>105</sup> Not only is native title recognised and protected in accordance with the *Native Title Act* but if native title is extinguished, then the *Native Title Act* provides for compensation.<sup>106</sup> Critically, “native title” or “native title rights and interests”, defined in s 223(1) of the *Native Title Act*, comprise a number of elements, and each must be given effect.<sup>107</sup> Relevantly, those expressions are defined to mean:

[T]he communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land *or* waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia. [emphasis added]

In *Yarmirr*, the Commonwealth argued that the claimed native title rights and interests were not “recognised” by the common law of Australia because, among other things, the common law did not extend to the relevant area – namely, a sea area.<sup>108</sup> The majority rejected that argument, stating that:

If the contention that the common law does not “extend”, “apply”, or “operate” beyond low-water mark is intended to mean ... absent statute, no rights deriving from or relating to events occurring or places lying beyond low-water mark can be enforced in Australian courts, it is altogether too large a proposition and it is wrong.<sup>109</sup>

The majority reached that critical conclusion in part on the basis of historical analysis spanning centuries. The majority considered the historical development of the territorial reach of the common law. Their Honours noted that “the very existence of the body of Admiralty law denies the generality of [the] proposition”,<sup>110</sup> that “the history of the jurisdictional conflicts between the courts of Admiralty and the common law courts reinforces that view”,<sup>111</sup> and that from 1536 the criminal jurisdiction of the Admiralty in relation to crimes at sea was exercised by the judges of the common law courts as commissioners of oyer and terminer.<sup>112</sup> The proposition that the common law did not extend beyond the low-water mark was rejected.<sup>113</sup> The question then was whether the common law would recognise native title rights and interests in areas beyond the low-water mark.<sup>114</sup>

<sup>102</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 32–33 [1]; [2001] HCA 56.

<sup>103</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 341 [27]; [2019] HCA 7.

<sup>104</sup> *Native Title Act 1993* (Cth) s 10.

<sup>105</sup> *Native Title Act 1993* (Cth) s 11(1).

<sup>106</sup> See *Native Title Act 1993* (Cth) ss 17, 20, 22D, 22G, 22L, 23J, 48, 79; *Northern Territory v Griffiths* (2019) 93 ALJR 327, 341 [25]; [2019] HCA 7.

<sup>107</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 340 [21]; [2019] HCA 7, citing *Members of the Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 440 [33]; [2002] HCA 58.

<sup>108</sup> See *Yarmirr v Northern Territory* (2001) 208 CLR 1, 40 [21]–[22]; [2001] HCA 56.

<sup>109</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 45 [34]; [2001] HCA 56.

<sup>110</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 45 [34]; [2001] HCA 56.

<sup>111</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 45 [34]; [2001] HCA 56.

<sup>112</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 46 [34]; [2001] HCA 56, citing WS Holdsworth, *A History of English Law* (Methuen and Co Ltd, 7<sup>th</sup> ed, 1956) Vol 1, 550–552.

<sup>113</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 47 [39]; [2001] HCA 56.

<sup>114</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 46 [39]; [2001] HCA 56.

That required identification of the claim group's native title rights and interests. These were described by the trial judge as including: "[U]se[] [of] the waters of the claimed area for the purpose of hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices."<sup>115</sup>

The trial judge found the asserted native title rights and interests were *non-exclusive*. This important finding depended in part on the trial judge's assessment of evidence given of frequent visits to the waters of the claimed area made during the 18th and 19th centuries by fishermen from the port of Macassar (now known as Ujang Pandang) in southern Sulawesi.<sup>116</sup> The majority explained that:

For four to seven months each year, large numbers of Macassans (sometimes over 1,000 men) came to gather trepang (also known as beche-de-mer or sea cucumber) in the claimed area. Thus before 1824, when British sovereignty was first asserted over any of the claimed area, there had been regular contact with other, non-Aboriginal peoples who sought to and did enter the area and take its resources. The primary judge found that it was not demonstrated that under traditional law and custom such persons were to be excluded.<sup>117</sup>

The majority also found that the claimed native title rights and interests were *incompatible* with common law public rights of navigation and fishing, which were held to have owed their origin to custom since "time immemorial ... [t]he public right to fish in tidal waters might be seen as having been preserved by the Magna Carta of John".<sup>118</sup> The two sets of rights "[could not] stand together".<sup>119</sup>

Historical facts were critical to two issues in *Yarmirr*: the acceptance that the common law *could* recognise the asserted native title rights and interests; and the identification of the *nature* of the asserted native title rights and interests, and the rights and interests *asserted against* those native title rights and interests.

The Court had the relevant historical facts in *Yarmirr*, at least in part, because of the willingness of claimants to share their stories and history. The history of claimants, as narratives of the past,<sup>120</sup> may be quite different from those of anthropologists, historians or archaeologists. That difference arises in two ways. First, as we have seen from new archaeological information put before the public over the last 50 years, anthropologists, historians and archaeologists are still learning. Their learning and understanding of Indigenous cultures and connection to land has fundamentally shifted. The idea that the Indigenous peoples were hunters and gatherers was and is so wrong. In addition to the most wonderful philosophy, art, language and ideas about morality, the Indigenous peoples established systems of sophisticated housing, built dams, cultivated the land, altered the course of rivers, had complex land management practices, to name just a few. These facts – this new history – call into question the accuracy of historical records, and the bias of what is recorded in those records.

Not only that but the claimants' knowledge often includes a human genealogy that is orally transmitted: the claimants may "not validate their knowledge by testing it against other frames of reference, and ... with reference to the written word".<sup>121</sup> As a result, a native title claim hearing is a:

hybrid event that allows for multiple systems of knowledge and meaning to engage with each other [being for example the Anglo-Australian legal system, various experts such as anthropologists, historians and archaeologists, both Indigenous and non-Indigenous, and of course, the evidence of the claimants] ... [and] this must be reckoned an achievement.<sup>122</sup>

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<sup>115</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 64 [87]; [2001] HCA 56, quoting *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, 593–594.

<sup>116</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 65 [89]; [2001] HCA 56.

<sup>117</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 65 [90]; [2001] HCA 56.

<sup>118</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 56 [60]; [2001] HCA 56 (citations omitted).

<sup>119</sup> *Yarmirr v Northern Territory* (2001) 208 CLR 1, 68 [98]; [2001] HCA 56.

<sup>120</sup> See DB Rose, "Histories and Rituals: Land Claims in the Territory" in B Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996) 35, 48.

<sup>121</sup> Rose, n 120, 48.

<sup>122</sup> Rose, n 120, 51. Compare *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, in which "[i]n making findings of fact about the status of Aboriginal culture, the court relied on squatters' diaries, valuing this evidence more than the oral evidence of the Yorta Yorta people about their cultures": Behrendt, n 3, 173.

Australia's pre-colonial history is central to, and intertwined with, accurate Indigenous history. The significance of the more recent discoveries and narratives cannot be overstated. As the Anglo-Australian legal system continues to develop its understanding and recognition of that history, as well as the relevant aspects of Anglo-Australian law, the law will need to, and should, adjust, change and develop.

## CONTEMPORARY OR CONTEMPORANEOUS FACTS

### The Timber Creek Appeals

So far this article has been concerned with the significance of historical facts and the consequences for decision-making when it is based on false historical assumptions. Do the same or similar concerns extend to contemporary or contemporaneous facts? A sharp dividing line between historical and contemporary facts is artificial, and no more so than in the area of native title. This article puts to one side, because of space, what might be described as “intermediate facts” of the kind considered in *Kruger v Commonwealth*.<sup>123</sup> In that case, Brennan CJ and Toohey J each said that, in determining whether a discretionary statutory power had been exercised reasonably, reasonableness can be determined only at the time of the exercise of the discretion according to the prevailing norms of the time even though, by contemporary standards, the same decisions would not be reasonable.

What then is meant by contemporary facts for the purposes of this discussion? They are features of the world as those features exist, contemporaneously, at the time of a native title decision.<sup>124</sup> And they are becoming increasingly relevant. The High Court's recent decision in *Northern Territory v Griffiths*,<sup>125</sup> often referred to as the *Timber Creek* appeals, is illustrative and instructive. The *Timber Creek* appeals concerned the amount of compensation payable under Pt 2 of the *Native Title Act*, by the Northern Territory to the Ngaliwurru and Nungali Peoples, for the effect of certain acts on that claim group's native title rights and interests over lands in the township of Timber Creek in the north-western area of the Northern Territory.<sup>126</sup> The appeals were the first time the High Court had been asked to consider the principles applicable to the assessment of compensation for impairment or extinguishment of native title rights and interests.

The claim group sought: compensation for economic loss of their native title rights and interests; compensation for *loss or diminution of connection or traditional attachment to land* (ie cultural loss<sup>127</sup>); and compound interest.<sup>128</sup> For these purposes, it is sufficient to consider the cultural loss compensation claim.

Timber Creek is on the Victoria Highway, about halfway between Katherine and Kununurra, and covers an area of approximately 2,362 hectares.<sup>129</sup> Between 1980 and 1996, the Northern Territory was responsible for 53 acts within the town, which affected native title rights and interests. It was these acts that underpinned the claim group's compensation claim under the *Native Title Act* (the compensable acts).<sup>130</sup> The native title rights and interests affected by the compensable acts consisted of non-exclusive rights exercisable in accordance with traditional laws and customs of the claim group.<sup>131</sup>

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<sup>123</sup> *Kruger v Commonwealth* (1997) 190 CLR 1, 36–37, 92–93.

<sup>124</sup> See Ho, n 32, 7.

<sup>125</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327; [2019] HCA 7.

<sup>126</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 335 [1]; [2019] HCA 7.

<sup>127</sup> See *Northern Territory v Griffiths* (2019) 93 ALJR 327, 368 [154]; [2019] HCA 7.

<sup>128</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 337–338 [11]; [2019] HCA 7.

<sup>129</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 336 [5]; [2019] HCA 7.

<sup>130</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 336 [6]; [2019] HCA 7.

<sup>131</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 337 [10]; [2019] HCA 7.

A question in the *Timber Creek* appeals was the date to be used to assess the claim for compensation for cultural loss.<sup>132</sup> The majority held that date to be the date of judgment. Thus, contemporaneous facts were relevant in assessing compensation for cultural loss *as at that date*.

The first step was to define compensation for “cultural loss”. It was described as “compensation for that aspect of the value of land to native title holders which is inherent in the thing that has been lost, diminished, impaired or otherwise affected by the compensable acts”.<sup>133</sup> There was no dispute that an award of that kind was appropriate and that the award was to be made on an in globo basis to the claim group.<sup>134</sup> The question in relation to the cultural loss claim was *how* the claim group’s cultural loss, assessed *as at the date of the judgment*, should be assessed and quantified. And the answer turned on *contemporaneous facts*.

The trial judge had awarded \$1.3 million for cultural loss.<sup>135</sup> The Commonwealth and Northern Territory contended that the amount was manifestly excessive.<sup>136</sup> Much of their argument was directed to a contention that two findings by the trial judge were determinative and not justified<sup>137</sup> – namely: first, that certain of the compensable acts affected not only the precise *geographical area where the act took place* but, in a more general way, *related areas*; and secondly, the extent that each compensable act resulted in incremental detriment to the enjoyment of the native title rights and interests *over the entire area* leading to diminution of the claim group’s cultural and spiritual connection with the land.<sup>138</sup>

The Commonwealth and Northern Territory’s arguments were rejected, and it is instructive to consider why. The High Court held that the relevant task was to determine the essentially spiritual relationship that the Ngaliwurru and Nungali Peoples have with their country and to translate the spiritual hurt from the compensable acts into compensation.<sup>139</sup> Evaluation of the compensable effects required an understanding of the relevant effects of the acts on the claim group and that, in that respect, *evidence about their relationship with country and the effect of the acts on that relationship was paramount*.<sup>140</sup> To that end, the Court considered in detail the evidence of the claim group’s connection to the land; the effects, under their laws and customs, when country is harmed; and, then, the effects of the compensable acts.<sup>141</sup>

Some of that evidence included evidence from claimants as to the effects of acts done on land without permission. For example, one claimant (now deceased), gave evidence that:

Each group has to look after its bit of the Dreaming. If something goes wrong with our part, others think we are no good. That’s what happened when all of these things have been built in the town. Other Aboriginal people complain about it and say that we are letting them down.<sup>142</sup>

Mr Griffiths, another claimant (now deceased), gave evidence in a similar vein:

Every time I come ... there seems to be something new in Timber Creek. Each time something new. Might be a new building, a new road, or someone taking gravel. That hurts my feelings and makes me angry. ... [*G*]ardia, white fellas, don’t do the right thing. ... Those kinds of things make me angry and sad. When things go wrong like that then the old people; and other Aboriginal people, will think that I can’t look after country properly. That makes me feel ashamed.<sup>143</sup>

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<sup>132</sup> See *Northern Territory v Griffiths* (2019) 93 ALJR 327, 383 [253] (Edelman J); [2019] HCA 7.

<sup>133</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 368 [155]; [2019] HCA 7.

<sup>134</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 368 [156]; [2019] HCA 7.

<sup>135</sup> See *Northern Territory v Griffiths* (2019) 93 ALJR 327, 339 [16(2)(d)], [17(4)]; [2019] HCA 7.

<sup>136</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 338 [12(3)]; [2019] HCA 7.

<sup>137</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 379 [221]; [2019] HCA 7.

<sup>138</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 376 [200]; [2019] HCA 7.

<sup>139</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 368 [154]; [2019] HCA 7.

<sup>140</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 370 [166]; [2019] HCA 7.

<sup>141</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 370 [167]; [2019] HCA 7.

<sup>142</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 372 [180]; [2019] HCA 7.

<sup>143</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 373–374 [189]; [2019] HCA 7.

The loss was identified. But, significantly, the evidence from the claimants showed that their loss was permanent and ongoing;<sup>144</sup> incremental and cumulative. That evidence of their loss had to be understood in terms of the pervasiveness of the Dreamings and the significant sites. The anthropological evidence was that:

[A]lthough country is defined by reference to named sites and by reference to the Dreamings which are believed to have ordained and sanctified the sites, many of the Dreamings wandered over areas of country with the result that their identity was not confined to bounded segments of the landscape but was pervasive.<sup>145</sup>

It explained why a compensable act itself had a compensable effect that *was not one-dimensional*.<sup>146</sup> As the majority later explained:

[T]he people, the ancestral spirits, the land and everything on it are “organic parts of one indissoluble whole” ... the effects [of the compensable acts] are upon an Aboriginal person’s feelings, in the sense of a person’s engagement with the Dreamings; an act can have an adverse effect by physically damaging a sacred site, but it can also affect a person’s perception of and engagement with the Dreamings because the Dreamings are not site specific but run through a larger area of the land; and as a person’s connection with country carries with it an obligation to care for it, there is a resulting sense of failed responsibility when it is damaged or affected in a way which cuts through Dreamings.<sup>147</sup>

The compensable acts were not to be considered in isolation, and the trial judge had not erred in respect of the two matters identified above. As the majority explained:

[E]ach act put a hole in what could be likened to a single large painting – a single and coherent pattern of belief in relation to a far wider area of land. It was as if a series of holes was punched in separate parts of the one painting. The damage done was not to be measured by reference to the hole, or any one hole, but by reference to the entire work.<sup>148</sup>

Contemporaneous facts were important. By speaking of their connection to country and the impact of the compensable acts on their relationship with country – in other words, by speaking of *contemporary* or *contemporaneous facts* – the claim group showed that the compensable acts could not be considered in isolation; demonstrated, to the extent it could be expressed in words and translated, the great magnitude of their cultural loss; and facilitated the Court’s task of translating the “spiritual ... into the legal”<sup>149</sup> in order to ascertain the right amount of compensation for what had been done – an award that was appropriate, fair and just.<sup>150</sup>

## CONCLUSION

In 1977, speaking to law students at the Western Australian Law School, Toohey J spoke of the critical importance of listening to Aboriginal and Torres Strait Islander voices, and of recognising that within one community there may be a diversity of viewpoints and ambitions.<sup>151</sup> That warning – the critical importance of listening, and being guided by Indigenous voices – is apt not just for law students in 1977, but for each and every one of us regardless of who we are or where we come from.

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<sup>144</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 380 [229]–[230]; [2019] HCA 7.

<sup>145</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 371 [175]; [2019] HCA 7.

<sup>146</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 372 [180]; [2019] HCA 7.

<sup>147</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 379 [223]; [2019] HCA 7.

<sup>148</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 379 [219]; [2019] HCA 7.

<sup>149</sup> *Western Australia v Ward* (2002) 213 CLR 1, 64–65 [14]; [2002] HCA 28. Compare *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, in which “Justice Olney dismissed evidence of contemporary cultural activities, such as the protection of sacred sites management of land and waters, finding that these were not practices that had occurred in pre-contact society”: Behrendt, n 3, 173.

<sup>150</sup> *Northern Territory v Griffiths* (2019) 93 ALJR 327, 381 [237]; [2019] HCA 7.

<sup>151</sup> J Toohey, “The Impact of Anglo-Australian Law on Aborigines” (Paper presented at the Western Australian Law School, 1977) 35.

With new learning and understanding of Indigenous culture over the last 80,000 years – our shared history – we should not be surprised to see the common law developing in step with our learning and understanding. Indeed, such development is not only a product of the common law method but it constitutes one step towards developing a “good Australia”.

And what more recent litigation has taught us is that there is a new sphere of facts – contemporaneous facts that exist and intersect with historical facts. Facts that cannot be considered in isolation. Facts that affect the way we look at history, the now and the future.

History will tell us whether we have really looked, listened and learned about our shared history and, then, whether we have responded in a way that is appropriate, fair and just.