

**Indigenous Land Use  
Agreements and the Future  
Role of the Historian in Native  
Title.**

**July 1999**

*Paper presented at the 1999 Australian and New Zealand Law  
and History Society Conference*

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## **Indigenous Land Use Agreements and the Future Role of the Historian in Native Title**

Historians have been involved with Aboriginal claims to land in varying degrees since the early 1970s, originally with claims under the several Aboriginal Land Rights Acts, and more recently, under the *Native Title Act 1993* (Cth) (hereinafter “the *NTA*”). However, whilst fairly constant, this involvement has not always been steady nor predictable. This paper will argue that the requirements of the litigation process have delimited both the boundaries within which historians have operated and the acceptable methodology employed by them. One result of this has been a sometimes uneasy working coalition of legal and historical professionals. However, the introduction of Indigenous Land Use Agreements (hereinafter ILUAs) under the *Native Title Act Amendment Act 1998* (Cth), creates the potential for historians to become an independently respected profession in the field of native title.

Historians undoubtedly played a prominent role in activism for the recognition of Aboriginal rights to land in the late 1960’s and early 1970’s. Indeed, the work of a new generation of historians provided a bridge between these Aboriginal claims and their legislative recognition by challenging the traditional Australian historiography of the “empty land”. Heather Goodall notes that while conventional works by Australian historians had largely ignored Aborigines, by the late 1960s their place in the historical discourse had been reasserted as part of that process of re-evaluation, “stimulated by decolonisation abroad and Aboriginal political activism at home, combined with ‘new left’ politics.”<sup>1</sup>

The publication of revisionist histories in the 1970’s brought to prominence the historical perspective of European invasion and Aboriginal displacement, thereby providing a historical context for contemporary Aboriginal claims to land. Historical revisionism, articulated with passion by these authors, stimulated public awareness of the Aborigines’ historical plight, such that “crucial to the demands of Aboriginal people was a reclaiming of the right to tell their history”.<sup>2</sup> In the legal proceedings which effectively emanated from this activism, historical research bolstered arguments for Aboriginal ownership of land. Thus, the legal arena for the first time became the focus of the “new interpretations of the past”.<sup>3</sup>

In the ensuing land rights campaigns, it seemed likely that Aboriginal histories would play a central role in judicial consideration of the claims. The likelihood was such that Ann McGrath declared in the mid-1980’s that in her view “history is important, if not pivotal, to explaining land rights policy and practice.”<sup>4</sup> However, despite the prospect of history and historians playing a decisive role in the determination of Aboriginal land rights, the reality has proved to be somewhat different. In the practice of native title, law has maintained its pre-eminence, whilst anthropology has supplanted history as the key profession. Goodall explains this occurrence by reference to the fact that :

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<sup>1</sup> H.Goodall, “The whole truth and nothing but...some intersections of Western law, Aboriginal History and community memory” in B.Attwood & J.Arnold, (Eds), *Power, Knowledge and Aborigines*, (Bundoora, Victoria : 1972), pp.105-6.

<sup>2</sup> *ibid.*, p.106.

<sup>3</sup> *ibid.*, p.106.

<sup>4</sup> A. McGrath, “History and Land Rights” in D. Kirkby, (Ed) *Law and History in Australia*, Vol. 3, (Bundoora, Victoria : 1985 & 1986), p.14.

in political decisions aimed at minimising the amount of land accessible to Aboriginal people, the grounds for claiming land were limited to the most narrow definition of 'traditional ownership' with authentication sought in anthropological knowledge.<sup>5</sup>

However, McGrath did not allow historians to escape quite so lightly. She blamed the profession for not aggressively articulating the contextualising role which history ought to play in the history of Aboriginal dispossession and reclamation of land. Noting that land rights principles are not amenable to comprehension in an historical vacuum, she maintained that the general public was ignorant of the history of dispossession.<sup>6</sup> Moreover, she suggested that this ignorance has led to the pejorative labelling of land rights as "trendy", and ultimately "an issue for 'bleeding hearts.'"<sup>7</sup>

Thus, despite the centrality of the narrative in recounting the story of Aboriginal dispossession, historians as a profession have played only a minor role in Aboriginal land rights claims, to the extent that they have not even participated in claims under the relevant legislation in New South Wales. The issue which triggered the need for a working relationship between historians and lawyers was the unlikely one of the overturning of one of the foundational premises of Australian constitutional law - and indeed law in Australia - namely the notion that this was a practically unoccupied land, a *terra nullius*.

In its earliest days the claim must have seemed somewhat ridiculous. After all, here were Torres Strait Islanders, appalled at discovering that *their* land was not legally *theirs*, with the audacity to question the fundamental basis of British sovereignty over Australia, an issue apparently conclusively settled in the decision of Blackburn J in *Milirrpum v Nabalco*,<sup>8</sup> dutifully following the Privy Council in *Cooper v Stuart*.<sup>9</sup>

However, as the *Mabo* case gained both momentum and credibility a number of factors made the involvement of historical professionals in the State's response to the claim inevitable. The first was the necessity of researching the historical development of claims to native title in other common law jurisdictions to establish what was in fact Imperial practice at the end of the eighteenth century. This in turn created a need to examine the historical sources to discern the understanding of the relevant indigenous peoples as to their rights to land at the time of the British acquisition of sovereignty. Finally, if it were to be established that the traditional laws and customs of the Meriam people in 1788 or 1879<sup>10</sup> were such as to satisfy the recognised incidents of common law native title, extensive genealogical research was required to ascertain whether the claimants in the 1990's were the appropriate people to enjoy these rights.

Accordingly, historians were included in the litigation process as an integral component of the common law adversarial system, and used to fight historical fire with historical fire. However, rather than being the result of a long period of inter-

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<sup>5</sup> Goodall, *op.cit.*, p.106.

<sup>6</sup> McGrath, *op.cit.*, p.14.

<sup>7</sup> *ibid.*, p.14.

<sup>8</sup> (1971) 17 FLR 141.

<sup>9</sup> (1889) 14 App Cas 286.

<sup>10</sup> That is, at either the time of the British acquisition of sovereignty, or the *Queensland Coastal Islands Act* 1879.

disciplinary courtship, this union more closely resembled a litigation-inspired shotgun wedding.

Historical research and teaching had long moved from the fields of Australia's constitutional and legal history into a more intimate study of the processes which had shaped a nation on the verge of the new Millennium. The law, by contrast, continued to recognise only discernible "facts" and strictly relevant, probative information. Ironically, its very placement in a form of historical discourse by means of the doctrine of precedent has caused lawyers to be "bemused by the apparent continuity of [this] heritage into a way of thinking which inhibits historical understanding".<sup>11</sup> Even if a suitable historico-legal taxonomy were to be created, Gummow J maintained in *Wik* that it would be merely "a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts".<sup>12</sup>

Ultimately, this present-based lawyerly appropriation of the past is at odds with a modern historical methodology which embraces post-modernism, post-structuralism and post-colonialism. As has been noted, "it may indeed be the case that history has been marginalised in the native title context precisely because of its own success at modernising."<sup>13</sup>

Nonetheless, the historical input from both sides in *Mabo* was undoubtedly one of the major factors in the conclusion reached by the majority of the High Court. This is explicable by reference to the fact that the historians involved returned to that study of legal and constitutional developments with which the law felt "comfortable". Thus, the historical methodology employed was traditional, empirical and ultimately rooted in political considerations. In effect, the historians involved presented the facts in an intelligible continuum, and placed the common law under the harsh light of its own history. In the words of Brennan J in *Mabo (No.2)* :

According to the cases, the common law itself took from the indigenous inhabitants any right to occupy their traditional land...and made [them] intruders in their own homes and mendicants for a place to live. Judged by any civilised standard, such a law is unjust and its claim to be a part of the common law to be applied in contemporary Australia is to be questioned.<sup>14</sup>

Questioned it was, and found so baseless in the history of native title as applied by the Imperial authorities as to require the conclusion that traditional title to land, arising from prior occupation, survived the much-vaunted acquisition of sovereignty to burden the Crown's radical title.<sup>15</sup> However, what was obvious to the majority of the Justices of the High Court was not quite so obvious to non-indigenous Australia, with Hal Wooten QC noting that:

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<sup>11</sup> Baker, *The Legal Profession and the Common Law - Historical Essays*, 1986, p.436, quoted by Gummow J in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182-3.

<sup>12</sup> Gummow J In *Wik* at 183.

<sup>13</sup> D. Ritter, "Whither the historians? The case for historians in the Native Title Process", *Indigenous Law Bulletin*, December 1998/January 1999, p.4.

<sup>14</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at 18.

<sup>15</sup> *Mabo (No 2)* per Toohey J at 144.

when the Mabo decision was given...it became apparent that there were still many people, including eminent lawyers and senior mining executives, who were surprised by, indeed indignant at the suggestion that Australia was not peacefully settled...and that Aboriginal people were not thereafter lovingly tended by missionaries, enlightened officials and Daisy Bates.<sup>16</sup>

History and historians played an even more decisive role in the next phase of the native title “campaign”, on the issue of the ability of a pastoral lease to extinguish native title within its boundaries. In the preparation of the Wik peoples’ case, Professor Henry Reynolds, already enjoying a high public profile from his popular revisionist histories of Aboriginal dispossession, played a prominent role. His work, in collaboration with Jamie Dalziel, combined with the earlier research of Dr Thomas Fry on freehold and leasehold tenancies in Queensland to provide the central plank of the historical argument that the pastoral leases in question were peculiar to Australian conditions, and not to be equated to the notion of a lease familiar to English common law.

To arrive at this conclusion, Reynolds and Dalziel emphasized the implied intention of the Colonial Office regarding land settlement in the colony of Australia. The impact of the historical arguments presented can be seen by the fact that within their judgements, not only do all of the High Court majority cite Fry, but :

at least three of them either acknowledge their debt to Henry Reynolds, or quote the key passages from Earl Grey’s despatches about the intention of the Crown with respect to pastoral leases and their effect on Aboriginal occupation which is central to Reynolds and Dalziel’s argument handed up to the court.<sup>17</sup>

The respect and credence given to the arguments put forth is even more closely related to the type of material presented than is the case with respect to *Mabo*. However, Jonathan Fulcher has referred to it as “Whig history producing Whiggish Law”<sup>18</sup>, in that it provided the High Court with a conveniently de-contextualised version of events which presented the Applicants’ case as the inevitable result of an evolutionary constitutional history. What more respectable form of scholarship to present to the court than history based on British Government archival sources, a methodology which would have appealed to the discipline of law? Goodall notes that:

a commitment to a simple view of the past, of the possibility of learning the ‘facts’ and making judgements of guilt and responsibility is not only held in the discipline of law. It was central to the development of positivist history and has remained common in empirical historical work to the present.<sup>19</sup>

In the aftermath of *Wik* and *Mabo* and the enactment of the *Native Title Act (1993)*, it might have been expected that the role of the historian in native title would be both assured and secure. Indeed, the response of the State Governments of both

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<sup>16</sup> H. Wootten, “Negotiation, mediation and third party decision in the age of Native Title” in G.G. Meyers, (Ed) *Implementing the Native Title Act - The Next Step - Facilitating negotiated agreements*, (Perth : 1997), p.191.

<sup>17</sup> J. Fulcher, “Sui Generis history? – The use of history in Wik” in G. Hiley, (Ed) *The Wik Case – Issues and Implications*, (Sydney : 1997), p.51.

<sup>18</sup> *ibid.*, p.52.

<sup>19</sup> Goodall, *op.cit.*, p.109.

Queensland and Western Australia was to secure the services of a cadre of historians to undertake historical research for native title matters on a permanent basis.

In the years since the passing of the *NTA*, historians have been employed extensively in native title research. Parties on both sides of the process have hired historians, sometimes on a consultancy basis and sometimes as employees with a more permanent tenure. Other historians have served as expert witnesses presenting evidence to the court, but above all historical material has informed the conduct of native title cases and provided interpretations of context for the court.

However, the seeds of historical dissent which were sown by the competing historiographies in *Wik* in particular were reaped in the handing down of the *Yorta Yorta*<sup>20</sup> and *Miriuwung Gajerrong*<sup>21</sup> decisions in late 1998. In *Yorta*, Justice Olney relied heavily on historical material in his decision – primarily the work of the nineteenth century ethnographer Edward Curr, and the correspondence and diaries of his rough contemporary, the Methodist missionary Daniel Matthews. Nonetheless, he did not otherwise find the historical materials presented by the parties to be of much benefit. He held that :

the Court has derived little assistance from the testimony of the various experts who have given evidence in this proceeding and this because apart from the recorded observations of Curr and Robinson, much of the evidence was based upon speculation. I say that without in any way meaning to disparage the qualifications, experience or integrity of the witnesses concerned.<sup>22</sup>

Similarly, in the *Miriuwung/Gajerrong* case, Justice Lee relied heavily on a range of anthropological, archaeological, ethnographic and historical evidence. He was, however, unimpressed by the reports handed up to the Court and evidence given on the stand by historians, particularly the history presented by Western Australia. Here especially he typified the judicial wariness of history as a discipline, in his apparent frustration with the inability of the competing sides to present an agreed history. Ultimately, he placed far greater emphasis on the oral histories presented by the claimants whose credibility was backed by evidence collected by Dr Bruce Shaw in the 1970's, to hold that *Miriuwung* and *Gajerrong* people had maintained the requisite connection to land.<sup>23</sup>

Not only have historians given evidence in Court in cases relating to native title, but in a recent New South Wales decision two historians were called upon to give evidence involving the history of a Sydney building. However, Justice Young was brusque, if not scathing, about the value of their evidence to the court. To quote at some length, he noted as follows :

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<sup>20</sup> *Yorta Yorta Aboriginal Community v Victoria*, Fed C of A, Olney J No 6001/95, 18 December 1998, BC9806799, Unreported.

<sup>21</sup> *Ward v Western Australia* (1998) 128 FLR 90.

<sup>22</sup> Olney J in *Yorta Yorta*, para 54.

<sup>23</sup> In fairness to lawyers, it ought to be added that many historians working in native title appear to be either slightly bemused at legal critique of their work or downright indignant that their work may be sacrificed on the altar of probative value, and operate to some extent as if the statutory framework of the *NTA* and the litigation process will go away if ignored for long enough.

In each case the witness concerned was a woman who had degrees in arts and who had then taken a keen interest in study, obtained a higher degree and had produced a series of local histories. I have no doubt at all that these ladies are eminently acceptable in the community as being excellent writers of local history and the papers that they have produced tend to show that there is a large number of consumers who wait on their analyses.

I did, however, reject considerable part of one historian and virtually all of the other historian's evidence. As far as counsel and I are aware this particular problem - that is, the problem of an alleged expert giving evidence of what life was like a hundred years ago - has not come before the courts for decision before...It seems to me that there is a distinction...between the facts of history and what might be called social history. Whilst courts may obtain the basal facts such as when a particular war broke out or other matters of record from reputable histories, analyses as to why certain things happened and generally how people behaved is not a matter which can be proved by the evidence of people who were not there but have ascertained the historical facts and then have analysed them to work out a conclusion.

It was urged on me that...this sort of evidence is now admissible...[the historian's] knowledge is, first of all, based on the hearsay material of the past and then the opinion is not wholly or substantially based upon that knowledge but, rather, is an analysis. Accordingly, I rejected this material. I do not really think it made much difference in the result as the primary documents by the historians were before the Court. Moreover, whilst the material was not admitted, there is scope for judicial notice and Judges may inform themselves from details which are open and apparent and of general knowledge to the whole community so long, of course, as they make that known to the parties.<sup>24</sup>

Justice Young's dismissive and patronising attitude to the historians reflects the fact that they failed to establish what has been termed "a professional presence"<sup>25</sup>, and shows the persistent belief that anyone with the time and desire can write a history. As McGrath noted in the context of land claims "an 'old timer' writing down a few memories of the local blacks, or their absence from land under claim, receives as much credibility as a trained professional."<sup>26</sup>

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<sup>24</sup> *Bellevue Crescent Pty Ltd & Anor v Marland Holdings Pty Ltd & Ors* (1998) 43 NSWLR 364 per Young J at 371.

<sup>25</sup> A. McGrath, " 'Stories for country': Oral History and Aboriginal Land Claims" *Oral History Association of Australia Journal*, No. 9, 1987, p.18.

<sup>26</sup> *ibid.*, p.18.

The problem alluded to by Justice Young - that of historians presuming to give evidence of times past - is a challenging one. It hinges upon the notion of empathy and conjures up the debate about the legitimacy of historians reconstructing the past by attempting to understand the motivation of people who lived in previous times. Goodall notes that while the discipline of law is “past-oriented...legal decisions must rest on primary evidence, that is from a witness.”<sup>27</sup>

Whereas anthropologists rely on direct, immediate contact with indigenous people to give their work credence in the legal field, history, on the other hand, “is often seen as something kept in archives and libraries: dilapidated dusty volumes and papers.”<sup>28</sup> By implication, anthropology requires specialist methodological skills, and an accompanying terminological repertoire - anyone can pick up a book, dust it off and write “history”. As it currently stands, historians have been marginalised within native title and may feel somewhat uncertain about their future in this sphere.

Adopting the approach proposed by Brennan J in *Mabo*, the *NTA* provides that native title hinges upon two basic points. These are biological descent - a genealogical concept; and attachment to country - an anthropological concept. These criteria provide some explanation as to the means whereby the legal process has to some extent skirted both history and historians. Genealogists supply the answer to the first definitional point and anthropological studies address the second, with history almost relegated to a convenient backdrop. The final decision of the court rests on “provable” issues of descent and continued connection to the land under claim.

However, with the passage of the *NTA* Amendments in 1998, the emphasis on negotiated agreements in the form of ILUAs has been brought to some prominence. Three types of ILUAs exist, only one of which requires a determination of native title prior to its implementation, this being the body corporate agreement. While the *NTA* did previously allow for negotiated agreements, these were only of substance in the wake of a determination of native title.

Each of the three forms of ILUA must relate to a specifically defined area, and must relate to specific matters, although these may be of any agreed type. The differences between them hinge upon the nature of the area in question, the existence of an applicable native title determination, the parties to the agreement, and the registration requirements. Nonetheless, each form of ILUA operates to afford certainty to the extent that it provide for things to be done for all parties. An area agreement, or an alternative procedure agreement, may be reached in the absence of a native title determination, thereby allowing for Aboriginal involvement without the legal procedural restraints inherent in such a determination.

Among the potential benefits to historians under this new regime is the fact that a framework which is cognizant of regional history and indigenous cultural diversity is required in respect of each agreement. Specifically, any agreement will need to be “capable of accommodating both the northern remote areas and the southern more

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<sup>27</sup> Goodall, *op.cit.*, p.41.

<sup>28</sup> *ibid.*, p.41.

intensively settled areas”.<sup>29</sup> Thus, prior to the conclusion of an agreement a profile of the region will be necessary, one dealing with “its geography, demographics, cultural ecology and its interest groups” as well as its history.<sup>30</sup> Such a profile easily falls within the ambit of the professional skills of the historian.

The flexibility of ILUAs addresses a number of limitations previously encountered under the *NTA* regime. These included the considerable expense of litigation, the unpredictability of the outcome and the emphasis on the strict observance of the legalities of each case. Within the earlier context, the “social, economic, environmental or political interests of the parties [were] either not taken into account or [were] limited to the extent to which they arose within a relevant statute”<sup>31</sup> - the very areas in which the expertise of the historian is most applicable.

As with the most recent determination of native title, *Miriuwung/Gajerrong*,<sup>32</sup> the realities of the application of native title require that an ILUA framework will put into practice the relevant native title right. The National Native Title Tribunal has noted that one of the *NTA*'s main limitations was that reliance on the litigation process resulted in “narrowly defined legal answers, providing little in the way of guidance to the real issues facing people going about their usual business.”<sup>33</sup> Conversely, the role of the historian has the potential to be prominent in the formulation and adoption of ILUAs, as their focus is to ascertain whether the applicants have a viable claim to the land. The cardinal factor in determining this is the history of the area and the claimant group.

The disciplines of history and law sit together uneasily, and this uneasiness has had the effect of marginalising history within the field of native title. As Justice Gummow noted in *Wik* :

the development of an appropriate historical method to some extent has been constricted by habits of thought engendered by the adversarial processes of common law trial.<sup>34</sup>

Perhaps the advent of negotiated agreements, with the concomitant reduction of the pre-eminence of these common law processes, will allow history to resume the active and constructive role which it played in the nascent Aboriginal land rights movement, so as to become a valued profession within the context of native title in Australia.

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<sup>29</sup> P. Sullivan, “Regional Agreements in Australia : An Overview Paper” *AIATSIS Issues Paper*, No.17, 17 April 1997, pp.2-3.

<sup>30</sup> *ibid.*, p.13.

<sup>31</sup> R. Farley, & P. Lane, “Outlook for regional development: opportunities for regional agreements.” *Northern Australia Regional Outlook Conference Proceedings*, (Darwin : 1997), p.2.

<sup>32</sup> This decision of Lee J is currently under appeal.

<sup>33</sup> National Native Title Tribunal, “Native Title: A Five Year Retrospective 1994-1998” (Perth : 1999), p.45.

<sup>34</sup> Gummow J in *Wik* at 182.