

## AUSTRALIAN HISTORIANS AND HISTORIOGRAPHY IN THE COURTROOM

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*This article examines the fascinating, yet often controversial, use of historians' work and research in the courtroom. In recent times, there has been what might be described as a healthy scepticism from some Australian lawyers and historians as to the respective efficacy and value of their counterparts' disciplinary practices in fact-finding. This article examines some of the similarities and differences in those disciplinary practices in the context of the courts' engagement with both historians (as expert witnesses) and historiography (as works capable of citation in support of historical facts). The article begins by examining, on a statistical basis, the recent judicial treatment of historians as expert witnesses in the federal courts. It then moves to an examination of the High Court's treatment of general works of Australian history in aid of the Court making observations about the past. The article argues that the judicial citation of historical works has taken on heightened significance in the post-Mabo and 'history wars' eras. It concludes that lasting changes to public and political discourse in Australia in the last 30 years — namely, the effect of the political stratagems that form the 'culture wars' — have arguably led to the citation of generalist Australian historiography being stymied in the apex court.*

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## I INTRODUCTION

The role of ‘history’ in the courtroom, and the role of historians in the process of tendering evidence to the court of that history, is an area of study well-trodden by academic lawyers and historians.<sup>1</sup> It is probably safe to say that there is a healthy scepticism from some lawyers and historians as to the respective efficacy and value of their counterparts’ disciplinary practices in fact-finding. ‘To enter the courtroom is to do many things, but it is not to do history’, observed medical historian David Rothman. ‘The essential attributes that [historians] treasure most about historical inquiry have to be left outside the door. The scope of analysis is narrowed.’<sup>2</sup> Meanwhile, on the bench, it appears that some judges take the view that, outside of the tendering of archival (and preferably documentary) primary evidence, there is little an historian can do in the courtroom that judges could not do for themselves: ‘I’m not entirely sure what the professional skills of historians bring to [the

<sup>1</sup> For the Australian literature alone, see, eg, Graeme Davison, ‘History on the Witness Stand: Interrogating the Past’ in Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, 2003) 53; Cathie Clement, ‘Historians and Native Title: A Personal Perspective’ (2000) 91 (December) *Australian Historical Association Bulletin* 86; Fiona Skyring, ‘History Wars: Debates about History in the Native Title Process’ [2003] (23) *Studies in Western Australian History* 71; Christine Choo, ‘Working as a Historian on the Miriuwung Gajerrong Native Title Claim’ in Sandy Toussaint (ed), *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title* (Melbourne University Press, 2004) 195 (‘Working as a Historian’); Christine Choo and Margaret O’Connell, ‘Historical Narrative and Proof of Native Title’ in Mandy Paul and Geoffrey Gray (eds), *Through a Smoky Mirror: History and Native Title* (Aboriginal Studies Press, 2002) 11. Further, consider the writings of lawyers: see, eg, Anne Carter, ‘The Definition and Discovery of Facts in Native Title: The Historian’s Contribution’ (2008) 36(3) *Federal Law Review* 301; Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press, 2008); Trish Luker, ‘Reading the Archive: Historians as Expert Witnesses’ (2016) 18(2) *Flinders Law Journal* 241; Helen Irving, ‘Constitutional Interpretation, the High Court, and the Discipline of History’ (2013) 41(1) *Federal Law Review* 95 (‘Constitutional Interpretation’); Helen Irving, ‘Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning’ (2015) 84(3) *Fordham Law Review* 957 (‘Outsourcing the Law’); Bradley Selway, ‘The Use of History and Other Facts in the Reasoning of the High Court of Australia’ (2001) 20(2) *University of Tasmania Law Review* 129; Michael Barker, ‘Working as a Barrister on the Miriuwung Gajerrong Native Title Claim’ in Sandy Toussaint (ed), *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title* (Melbourne University Press, 2004) 159.

<sup>2</sup> David J Rothman, ‘Serving Clio and Client: The Historian as Expert Witness’ (2003) 77(1) *Bulletin of the History of Medicine* 25, 44.

fact-finding] process, that a lawyer or judge himself or herself wouldn't be able to bring,' an Australian Federal Court judge remarked under the cloak of anonymity in 2008.<sup>3</sup> That view appeared to be not uncommon amongst some Australian judges sitting on native title cases in that period.<sup>4</sup>

Of course, using history in the courtroom is not new or novel in the Australian jurisdiction. The (then puisne) High Court Justice Sir Owen Dixon himself saw the need for recourse to historical expertise in certain questions of fact, remarking in *Australian Communist Party v Commonwealth* ('*Communist Party Case*')<sup>5</sup> that courts 'may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians' and 'for verification refer to standard works of literature and the like.'<sup>6</sup> Despite this directive, explicit reference to general historical works, or to the expert evidence of historians, has only taken on a greater prominence in constitutional litigation since the decision in *Cole v Whitfield* ('*Cole*')<sup>7</sup> in 1988, and in native title disputes since *Mabo v Queensland [No 2]* ('*Mabo*')<sup>8</sup> in 1992. This, of course, should be contrasted against the use of what I loosely call doctrinal historiography, which has enjoyed a long and perhaps almost uncritical adoption in the Australian courtroom — this will be briefly dealt with later in this article. The modest expansion in the use of 'history' in the Australian courtroom has brought with it some difficulties for both judge and historian — most particularly, how to treat the testimony of an historian as a fact-finder and interpreter of evidence, when those very tasks will inevitably be revisited by the judge as the ultimate fact-finder? If so, what special expertise does an historian offer?

<sup>3</sup> Curthoys, Genovese and Reilly (n 1) 53. See also the additional anonymous Federal Court judges' comments on that page and elsewhere in much the same vein: at 90.

<sup>4</sup> Ibid. See also *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1, 41 [105] (O'Loughlin J) ('*Cubillo*'), although it should be noted that this is a case on the Stolen Generations, rather than native title; *Harrington-Smith v Western Australia [No 7]* (2003) 130 FCR 424, 433 [42] (Lindgren J) ('*Harrington-Smith*'), discussed later in this article: see below nn 15–16 and accompanying text.

<sup>5</sup> (1951) 83 CLR 1 ('*Communist Party Case*').

<sup>6</sup> Ibid 196.

<sup>7</sup> (1988) 165 CLR 360 ('*Cole*').

<sup>8</sup> (1992) 175 CLR 1 ('*Mabo [No 2]*'). It is worth noting that questions relating to the use of 'historical' evidence are not limited to constitutional or native title cases — although rare, there are some private law cases that have touched upon these questions (defamation cases on denial of historical facts such as genocide, for instance: see, eg, *Toben v Nationwide News Pty Ltd* (2016) 93 NSWLR 639).

This article does not concern itself with the specific debates in constitutional democracies (including Australia) about the ‘dead hand’ of the law versus a ‘living tree’ perspective and the attendant questions about how history might be applied in both approaches. Instead, it focuses on the broader issue of how history *at large* is being used or cited in the Australian federal courts at present. It first examines the manner in which the federal judiciary treats the evidence of historians as expert witnesses (that is, experts that offer to the court, in Dixon’s terms, the ‘facts of history’), particularly in light of the flurry of critical attention given to judicial practices following the *Cubillo v Commonwealth [No 2]* (*‘Cubillo’*)<sup>9</sup> decision in 2000. The article then moves to evaluate how the High Court in particular treats general Australian *historiography*. In recent times, there has been increased public scrutiny of generalist Australian works of history, particularly in light of the ‘history wars’, a set of partisan stratagems that have been employed and re-employed regularly in public discourse since the late 1990s. I conclude here that lasting changes to public and political discourse in Australia in the last 30 years have taken their toll on the public perception of the courts and the practice of history, and that, as a result, early (but incomplete) evidence shows that the High Court displays great caution in citing general works of Australian history.

## II THE HISTORIAN AS EXPERT WITNESS AND THE ‘FACTS OF HISTORY’

### A *Disciplinary Tensions*

The aforementioned scepticism shared by historians and judges revolves around the tension between the expert witness historian as a provider of ‘historical fact’ to the court, and the trial judge as the ultimate fact finder. At a basal level, trial judges and historians undertake a comparable task in creating a narrative of events. In gathering the relevant data to undertake this task, and interpreting that data, however, the disciplinary practices of both historian and judge diverge. Judges’ work in fact-finding is shaped by the laws of admissibility and assessing evidence according to the relevant standard of proof. At a more practical level, their work is also circumscribed by time constraints and by limited access to wider resources (judges, or their tipstaves, are not able to visit archives or undertake a wider search for evidence; the Australian adversarial system obviously requires the judge to rely on evidence

<sup>9</sup> *Cubillo* (n 4).

presented to the court by the parties). Further, in the absence of living witnesses or a lack of physical 'data', as is often the case when a historical question arises for the court, a judge primarily relies on documentary evidence to find facts. This includes not only primary sources, but secondary sources. Quick and Garran would be the most obvious example of an oft-used, and rarely questioned, secondary source.<sup>10</sup> Finally, a judge's task is to *answer a legal question* in light of the evidence. Lacunae or uncertainties in evidence must be resolved and interpreted one way or the other to answer that question. An historian, on the other hand, would be regarded critically by their peers if their research was concluded by reference to a preponderance of secondary sources, while affording limited weight to non-documentary material (oral histories passed through the generations, for instance) or contemporaneous accounts in similar, but not identical, circumstances. Further, to view that evidence through a normative lens — to assemble evidence to buttress a decision being made in the present — is dimly regarded. Attwood has described it as 'juridical history';<sup>11</sup> but it is most often damningly described by historians as 'law-office history'.<sup>12</sup>

Many have argued that the task of historian and judge are epistemologically incompatible.<sup>13</sup> But it is not just the obvious disjuncture between disciplinary practices that is problematic in the courtroom; just as problematic is the demarcation dispute between judge and historian in circumstances where the historian is offering an interpretation of the (already circumscribed) documentary sources that are admitted into evidence. Opinion or interpretive evidence is generally inadmissible unless the witness offers a specialised knowledge in the relevant area.<sup>14</sup> Attempts by historians to synthesise and summarise voluminous data might be seen as an acceptable exercise of their expertise, but actual *interpretation* of the written word, or singular pieces of documentary evidence, is another matter entirely. As Lindgren J remarked in *Harrington-Smith v Western Australia* ('*Harrington-Smith*'),<sup>15</sup> '[t]here is ... a

<sup>10</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901). See also Irving, 'Constitutional Interpretation' (n 1) 114–15.

<sup>11</sup> Bain Attwood, 'The Law of the Land or the Law of the Land? History, Law and Narrative in a Settler Society' (2004) 2(1) *History Compass* 1, 2.

<sup>12</sup> See, eg, Alfred H Kelly, 'Clio and the Court: An Illicit Love Affair' [1965] *Supreme Court Review* 119, 144.

<sup>13</sup> See, eg, Curthoys, Genovese and Reilly (n 1) 137; Irving, 'Outsourcing the Law' (n 1) 958–61.

<sup>14</sup> *Evidence Act 1995* (Cth) s 79.

<sup>15</sup> *Harrington-Smith* (n 4).

question as to how much [of historians' expert evidence] is admissible as evidence of expert opinion as distinct from *submission* as to the interpretation *I* should place on historical data.<sup>16</sup> In other words: does the historian have a particular expertise that renders their skills of interpretation so specialised that they offer something 'above' what a judge might do? As Irving has observed, history is not a closed field: 'There are ... shared disciplinary parameters and common ways of practicing [sic] the craft [between historians], but there are no accreditation tests'.<sup>17</sup>

It is true that anyone can *do* history, but this is not to say that anyone can do rigorous history, or be regarded as having expertise in history. One does not qualify as an expert historian after following defined professional steps, as a lawyer or judge might — but this is not to say that historical professional expertise remains undefined. Regardless of whether an historian is a professional consultant, independent historian, or academic, their expertise is gained much in the same way as other social scientists: by devoting a career to historical research; by making complex choices as to methodology and being able to justify those choices; by working in the archive<sup>18</sup> and developing breadth of knowledge about the relevant period; by disseminating their research through a variety of 'outputs'; and by their work being received, evaluated and critiqued by clients, and public or academic audiences. There is much that an expert historian can offer in the way of interpretive skill where the historian is familiar with the type of evidence put before the court. This is especially so when the historian has already reviewed every other piece that accompanies the relevant evidence in the archive (often a painstaking task). An informed historian will also be able to identify the lacunae in the web of

<sup>16</sup> Ibid 433 [42] (emphasis added). It should be noted that, in this case, the parties had cast doubt upon written reports of historical experts on both sides as being prepared without sufficient references and citations: at 430 [28]. Further, there were some doubts as to the specific subject matter expertise and tertiary qualifications of some experts: at 427 [16], 430 [32]. It is in this context that Lindgren J expressed concern about the interpretations of individual documents provided in some of the written reports. Despite this, as no party objected to the admissibility of the reports, Lindgren J (somewhat reluctantly) admitted them, leaving questions of the admissibility of specific 'interpretation' passages to be decided at a later point in proceedings: at 432–3 [40]–[42]. Lindgren J later alleviated this problem by ordering a conference of the historical experts, and the subsequent group report produced by those experts appears to have been taken into consideration by the judge: *Harrington-Smith v Western Australia* [No 9] (2007) 238 ALR 1, 117–19 [433]–[445] (Federal Court).

<sup>17</sup> Irving, 'Outsourcing the Law' (n 1) 959.

<sup>18</sup> It is worth stating here, too, that I use the term 'archive' broadly: historical evidence is not just found in institutional repositories. It may be held by private individuals, or by associations and corporations; it may be natural evidence that is physically present on private or public land — the list goes on.

evidence. Whose accounts are missing, for instance? How might the expression used in documentary evidence be typical of a style widely used at the time — or differ from it? As Carter puts it, the historian's work in the courtroom might be regarded as assisting the judge with questions of inferential proof: both by providing a broad vision of the prevailing period, and by suggesting which inferences from the evidence may be reasonably drawn.<sup>19</sup> This still leaves the judge in the position of choosing between a range of interpretations, but those interpretations will have been informed and refined by the historian's expertise.

Given these tensions, there is a very real question of whether a litigant's request for expert assistance is an attractive prospect for an Australian historian — even if that historian is sympathetic to, or interested in, the litigation in question.<sup>20</sup> One of the most discussed and analysed witness experiences is that of Professor Ann McGrath, a highly respected historian of Indigenous relations, who appeared on behalf of the plaintiffs in *Cubillo* — the Stolen Generations case.<sup>21</sup> The plaintiffs in that case were making claims in tort and private law against the Commonwealth. The issues at hand touched on the historical treatment of Indigenous youth under the Commonwealth's longstanding assimilation policy. McGrath's entire expert report was excluded from evidence. Opposing counsel's treatment of McGrath while on the witness stand, and the trial judge's utilisation of McGrath's testimony, is illustrative of the difficulty historians may face in the courtroom. McGrath's experience was also, according to Luker, a turning point in the engagement of historians as expert witnesses: there has been, she argues, a downturn in historians giving testimony in Australian courts since.<sup>22</sup> It is worth examining McGrath's experience in detail.

<sup>19</sup> Carter (n 1) 331.

<sup>20</sup> See generally Davison (n 1); Clement (n 1); Choo, 'Working as a Historian' (n 1); Barker (n 1).

<sup>21</sup> *Cubillo* (n 4). For a detailed summary of the proceedings and Professor McGrath's role in the litigation, see Curthoys, Genovese and Reilly (n 1) 146–55. Note also that this was not McGrath's first experience as an expert on the witness stand. She has written of how she was 'outraged' in a previous case at having her evidence objected to by opposing counsel on the grounds of hearsay: Ann McGrath, "'Stories for Country': Aboriginal History, Oral History and Land Claims" in Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (Australian Academy of the Humanities, 2003) 251, 251.

<sup>22</sup> Luker (n 1) 244–5.

### B McGrath in Cubillo

In *Cubillo*, the plaintiffs sought to prove, inter alia, a breach of fiduciary duty and of a duty of care in tort on the part of the Commonwealth in its decision to remove the plaintiffs from their families under the *Aboriginals Ordinance 1918* (NT). In the course of interlocutory proceedings, the trial judge, O'Loughlin J, made it clear to the plaintiffs that historical evidence would be required to be submitted at trial: that is, data that addressed the question of whether the administrators of the Ordinance acted according to the relevant standard of care.<sup>23</sup> Evidence would need to be furnished to determine a (mid-century) standard of care in relation to maintaining the welfare of younger Indigenous Australians. McGrath's brief from the plaintiffs was thus to comment on the prevailing attitudes towards child removal in the period 1945 to 1963;<sup>24</sup> to do this, her report introduced not only primary documentary evidence but also patrol officers' accounts; unpublished theses on relevant topics; a photograph depicting white nurses 'training' Aboriginal mothers on how to care for infants; and depictions of young Indigenous subjects in contemporaneous popular literature and film.<sup>25</sup> In short, McGrath prepared a narrative with a breadth of resources, as expected of a professional historian. This narrative sought to challenge the orthodox assumption that the policy of child removal was 'acceptable' by the standards of the time.

The Commonwealth objected to McGrath's report on the basis of relevance or, in the alternative, the inability of the report to clearly demarcate McGrath's opinion (or commentary) from historical 'fact'.<sup>26</sup> McGrath was deridingly described by counsel for the Commonwealth as an academic specialising in 'post-modernist analysis', which apparently led her to preference imagery and language to the 'exclusion of objective truth'.<sup>27</sup> The inclusion of the photograph appeared to cause particular consternation. Some might find counsel's appeal to 'objective truth' jarring in a dispute where even the *documentary* evidence available was clearly deficient, leaving the trial judge with a difficulty in determining the specific reasons for which plaintiff Cubillo was removed from her family.<sup>28</sup> Of course, the spectre of 'post-modern analysis', that

<sup>23</sup> *Cubillo* (n 4) 12 [3]–[5].

<sup>24</sup> *Ibid* 84–5 [232].

<sup>25</sup> Curthoys, Genovese and Reilly (n 1) 150–1.

<sup>26</sup> *Ibid* 152–3.

<sup>27</sup> Luker (n 1) 260, quoting from the transcript of proceedings.

<sup>28</sup> Consider the statements made by the judge in the opening, summary paragraphs of the decision: *Cubillo* (n 4) 13–14 [7]–[10] (O'Loughlin J).



intellectual bogeyman so feared by counsel for the Commonwealth, might also be described simply as McGrath practising in a discipline that has for decades acknowledged the indeterminacy of its work and of the search for truth — but, as Davison has pointed out, the legal industry has been far more reticent to acknowledge ‘relativising influences’ than academic historians.<sup>29</sup>

Further, counsel for the Commonwealth argued that to accept an historian’s interpretation of any documentary evidence would, in effect, supplant the role of the judge as interpreter.<sup>30</sup> O’Loughlin J ultimately accepted the Commonwealth’s arguments and ruled McGrath’s report inadmissible, but allowed McGrath to be examined as a witness.<sup>31</sup> Her evidence, including her opinion evidence, was then accepted by the trial judge in his written reasons,<sup>32</sup> but O’Loughlin J’s judgment ultimately ruled against the plaintiffs. What is interesting to note is that although most expert witnesses will be put through rigorous cross-examination to probe both their expertise and the strength of their analysis, in McGrath’s case, it was the very *discipline* of her expertise that appeared to be under examination (or, indeed, under attack), on the Commonwealth’s assumption that, outside of the gathering of written data for the Court to review, McGrath as an historian could not ‘read’ the documentary evidence with any more sophistication than the judge.

Another judge spoke anonymously, some time after the case, with little confidence of the historian’s role in such circumstances gaining significance over time: ‘It may be that there are aspects of that historical method that enable the historian to forward an interpretation that a non-specialist may not be able to. It’s not obvious to me at the moment what that would be, but perhaps it could happen.’<sup>33</sup>

### *C Recent Cases: A Downturn in the Use of History? Judicial Hubris? History Wars?*

In the early 2000s, there was flourishing critical interest in the role of historians in the Australian courtroom, particularly in light of decisions such as *Cubillo* and *Harrington-Smith*.<sup>34</sup> In 2016, Luker re-appraised the landscape in

<sup>29</sup> Davison (n 1) 54.

<sup>30</sup> Curthoys, Genovese and Reilly (n 1) summarise the Commonwealth’s submissions on the issue: at 154–5.

<sup>31</sup> Ibid 154.

<sup>32</sup> *Cubillo* (n 4) 84–5 [232].

<sup>33</sup> Curthoys, Genovese and Reilly (n 1) 53.

<sup>34</sup> See above n 1 and accompanying text.

an article in the *Flinders Law Journal*, perceiving a downturn in the use of historians as expert witnesses since the *Cubillo* decision.<sup>35</sup> (A full statistical assessment of the use of historians in, for instance, the Native Title Tribunal ('Tribunal'), or the Federal Court of Australia, is yet to be undertaken — and would require a full examination of court files, as members and judges do not always make explicit reference to expert historians in their written reasons.) Luker made a number of suggestions as to how this state of affairs had eventuated: exclusionary practices on the part of judges or counsel with respect to the examination of historians on the stand;<sup>36</sup> the chilling effect of the history wars on the courts and the profession;<sup>37</sup> and the judiciary's perception that it could evaluate historical evidence without the need for historians.<sup>38</sup>

I have conducted some preliminary research into how historians have appeared as experts in the last decade in Federal Court, Full Federal Court and High Court matters so as to examine some of these issues further.<sup>39</sup> To the best of my knowledge, there have been only 29 proceedings in those three courts in the last 10 years in which an interlocutory or final judgment refers to an historian as an expert witness.<sup>40</sup> Twenty-eight of those proceedings

<sup>35</sup> See above n 22 and accompanying text.

<sup>36</sup> See Luker (n 1) 259–60.

<sup>37</sup> *Ibid* 258–60.

<sup>38</sup> *Ibid* 245, 262.

<sup>39</sup> This was undertaken via a full-text search of the *AustLII* databases of all Federal Court, Full Federal Court and High Court decisions from 1 July 2009 to 10 August 2019. The method was to search for the terms 'historian', 'professor of history' and 'historical expert' (alternatively) in order to capture those judgments in which a judge made explicit reference to such expert evidence. Ninety-three hits resulted, and I reviewed each of these. Most cases were ultimately excluded because the reference was to the ability of a lay witness to be an accurate 'historian' of events; other cases were excluded as the relevant reference was to an historian as a secondary source, rather than as a witness. I should add here that a fuller investigation would include state courts; I would expect that, for instance, in some negligence or defamation actions, historical evidence at the trial level might be required. Further, it should be acknowledged that this is a somewhat rudimentary form of search: a more complete study would require full case files to be viewed to determine whether an historian was called as an expert, even if not referred to in a judgment.

<sup>40</sup> This includes judgments in which the judge refers to an historian who appeared in a case below as an expert witness. The cases are: *Murray v Western Australia* [No 5] [2016] FCA 752, [169] (McKerracher J) ('*Murray*'); *CG v Western Australia* [2015] FCA 204, [42] (Barker J) ('*CG*'); *Akiba v Queensland* [No 3] (2010) 204 FCR 1, 41 [102] (Finn J) ('*Akiba*'); *Manado v Western Australia* [2017] FCA 1367, [144] (North J) ('*Manado*'); *AD v Western Australia* [No 2] [2013] FCA 1000, [9] (McKerracher J) ('*AD*'); *Sandy v Queensland* [No 2] (2015) 325 ALR 583, 590 [18] (Jessup J) (Federal Court) ('*Sandy* [No 2]'); *Sandy v Queensland* [No 3] [2015] FCA 210, [26]–[27] (Jessup J); *Sandy v Queensland* [2017] FCAFC 108,

involved Indigenous applicants — 27 proceedings related to native title, and one to racial discrimination.<sup>41</sup> The remaining proceeding was brought by an ex-serviceman seeking compensation from the Repatriation Commission, requiring him to prove he had been interned in wartime Germany under the meaning of the relevant compensation legislation.<sup>42</sup> Interestingly, it appears that not a single expert historian was referred to in the reasons for judgment in a constitutional case. Of the 17 historians referred to by name in the identified proceedings, 12 had doctoral qualifications in history, one had a doctoral qualification in education and one had an MA in history. Six of the experts were academic historians; five were in-house historians for a litigating party.<sup>43</sup> Others were consultant historians, sometimes in combination with their academic or in-house roles. Some of the historians cited were called upon in more than one proceeding, usually on a repeat basis for the state, or for the applicants, in the native title matters.

[72]–[73] (Reeves, Barker and White JJ) (*'Sandy (Full Court)'*); *Western Bundjalung People v A-G (NSW)* [2017] FCA 992, [42] (Jagot J) (*'Western Bundjalung People'*); *Starkey v South Australia* (2018) 261 FCR 183, 192 [4], 193 [6]–[7] (Reeves, Jagot and White JJ) (*'Starkey'*); *Dodd v South Australia* [2012] FCA 519, [19] (Finn J) (*'Dodd v SA'*); *Dodd v Queensland [No 3]* [2014] FCA 231, [25] (Logan J) (*'Dodd v Queensland'*); *Bullen v Western Australia* [2014] FCA 197, [15] (McKerracher J) (*'Bullen'*); *Agius v South Australia [No 4]* [2017] FCA 361, [34] (Mortimer J); *Rose v Victoria* (2010) 268 ALR 47, 61 [63] (North J) (Federal Court) (*'Rose'*); *Bandjalung People No 1 and No 2 v A-G (NSW)* [2013] FCA 1278, [18] (Jagot J) (*'Bandjalung People'*); *Nicholls v A-G (NSW)* [2019] FCA 527, [25] (Robertson J); *Banjima People v Western Australia [No 2]* (2013) 305 ALR 1, 11 [28], 12 [35] (Barker J) (Federal Court) (*'Banjima People'*); *Collett v Repatriation Commission* (2009) 178 FCR 39, 43–4 [17] (Logan J) (*'Collett'*); *Hill v Queensland* [2011] FCA 472, [3], [9] (Logan J); *Murgha v Queensland* [2011] FCA 1511, [12] (Dowsett J); *Doyle v Queensland [No 3]* [2011] FCA 1466, [5]–[7] (Dowsett J) (*'Doyle [No 3]'*); *Mullett v Victoria* [2010] FCA 1144, [21] (North J); *Murphy v Queensland* [2012] FCA 1285, [12] (Reeves J) (*'Murphy'*); *Kelly v A-G (NSW)* [2017] FCA 1459, [58] (Collier J); *Graham v Western Australia* [2017] FCA 795, [12] (Griffiths J) (*'Graham'*); *Wotton v Queensland [No 5]* (2016) 352 ALR 146, 159 [23], 254 [447] (Mortimer J) (Federal Court) (*'Wotton'*); *Lake Torrens Overlap Proceedings [No 3]* [2016] FCA 899, [71] (Mansfield J) (*'Lake Torrens'*); *Doyle v Queensland* (2016) 335 ALR 201, 205 [17], 206 [24] (Reeves J) (Federal Court) (*'Doyle'*); *Sambo v Western Australia* [2015] FCA 954, [59] (Barker J) (*'Sambo'*); *Lampton v Queensland* [2015] FCA 609, [16] (Rares J); *Far West Coast Native Title Claim v South Australia [No 7]* [2013] FCA 1285, [31]–[33] (Mansfield J).

<sup>41</sup> The racial discrimination case was *Wotton* (n 40).

<sup>42</sup> *Collett* (n 40).

<sup>43</sup> The 17 named experts are Dr Sue Wesson, Dr Fiona Skyring, Dr Michael Bennett, Michael Flynn, Dr Debra Fletcher, Dr Rosalind Kidd, Dr Neville Green, Val Donovan, Dr Jonathan Richards, Professor Anna Haebich, Dr Christine Choo, Tom Gara, Vikki Plant, Professor Steve Mullins, Dr Peter Gifford, Dr Rod Fisher and Dr Craig Muller. Note that not all of the data related to the experts' qualifications has been gathered from the reasons for judgment in each case, but rather, from a search for the expert's curriculum vitae online.

In 24 of the 29 proceedings, some indication was given in the judgment of how the historical evidence was treated. In 18 cases, the historian's (or historians') reports were admitted into evidence; in one case, a report was admitted in heavily redacted fashion due to the historian's inability to attend for cross-examination.<sup>44</sup> Of those reports, 10 were explicitly cited (and cited approvingly) by the judge; two reports presented at the tribunal level were also referred to.<sup>45</sup> In only four cases was there an indication that cross-examination of the historian had occurred;<sup>46</sup> in three cases, the judge made it explicit that the opposing party had not sought to cross-examine.<sup>47</sup>

What can be made of this data? First: there is little suggestion of judges explicitly rejecting expert reports, or portions of those reports, for containing mere opinion or for making reference to evidence other than documentary evidence. Indeed, other than a judge making reference to some inaccuracies in a report in a single case,<sup>48</sup> the 10 cases in which reports were explicitly cited were those in which the judge quoted from, or adopted, the historian's narrative. This does not mean that the judges had not disregarded mere opinion from the historians, but if the judges had done so, that expurgation had not been made visible — perhaps the critical academic literature from the early 2000s had caused some judges to re-evaluate their approach.<sup>49</sup> Second: similarly to the trends identified by Luker,<sup>50</sup> it seems to be relatively rare for an historian to be called upon to be cross-examined. I am reluctant to attribute this to marginalisation on the part of judge or counsel. If a party files the historian's affidavit, annexing their expert report, and the opposing party

<sup>44</sup> *Doyle* [No 3] (n 40); *Murray* (n 40); *CG* (n 40); *Akiba* (n 40); *Manado* (n 40); *AD* (n 40); *Dodd v SA* (n 40); *Western Bundjalung People* (n 40); *Bullen* (n 40); *Wotton* (n 40); *Collett* (n 40); *Murphy* (n 40); *Banjima People* (n 40); *Rose* (n 40); *Graham* (n 40); *Doyle* (n 40); *Sambo* (n 40); *Lake Torrens* (n 40). *Sandy* [No 2] (n 40).

<sup>45</sup> *CG* (n 40) [74] (Barker J); *Akiba* (n 40) 25 [30] (Finn J); *Manado* (n 40) [182] (North J); *Western Bundjalung People* (n 40) [47] (Jagot J); *Wotton* (n 40) 264 [447] (Mortimer J); *Collett* (n 40) 43 [17] (Logan J); *Murphy* (n 40) [17] (Reeves J); *Banjima People* (n 40) 114 [683] (Barker J); *Rose* (n 40) 86 [185] (North J); *Doyle* (n 40) 205 [18] (Reeves J). The cases in which judges referred to reports presented at a tribunal level were: *Collett* (n 40) 43 [17] (Logan J); *Sambo* (n 40) [59] (Barker J).

<sup>46</sup> *Murray* (n 40) [205] (McKerracher J); *Manado* (n 40) [155] (North J); *Wotton* (n 40) 263 [442] (Mortimer J); *Graham* (n 40) [12] (Griffiths J).

<sup>47</sup> *CG* (n 40) [43] (Barker J); *Akiba* (n 40) 42–3 [110] (Finn J); *Lake Torrens* (n 40) [71] (Mansfield J).

<sup>48</sup> Mortimer J took issue with some elements of Dr Rosalind Kidd's evidence in *Wotton* (n 40) 263–4 [442]–[446].

<sup>49</sup> See above n 1 and accompanying text.

<sup>50</sup> Luker (n 1) 258, 263.

chooses not to cross-examine, then that is a statement as to litigating strategy, rather than a slight on the historian. (Perhaps the opposing party does not see any lack of rigour in the report that is worth pursuing on the stand). I tentatively suggest that there is not much to be read into a judge's unwillingness to intervene in this regard.

Luker attributed the downturn in the use of historians as experts to two factors. The first is provocative: she suggested that courts have had difficulty in accepting historians as expert witnesses because judges already see themselves as authorities in the interpretation of historical documents<sup>51</sup> — historians by another name, perhaps. Luker here may have been adverting at large to perceived 'hubris' of some that hold judicial office. Degrees of hubris aside, there are many Australian judges who have studied history, who practice history, and who take on historical projects off the bench. Might an argument be made that some judges are happy to 'do history' in the courtroom (or, at the least, place less emphasis on the expert evidence of historians in preference to their own historical interpretations) because they consider themselves sufficiently qualified?

The second factor to which Luker ascribes the declining participation of historians in the courtroom is the chilling effect of the history wars.<sup>52</sup> I will later suggest that the history wars have had a chilling effect on how judges are willing to *cite* historical evidence. As Luker also implies, it is plausible that some academic historians may have become reluctant to act as expert witnesses in light of the political climate,<sup>53</sup> though this may not concern consultant historians in the same way. I am yet to find data on *litigating parties* preferring to call experts from other disciplines to the exclusion of history on the basis of partisan disputes occurring outside the courtroom. In each of the cases above, the historians were called alongside anthropologists, linguists, and on one occasion, an ethnobotanist.<sup>54</sup> Further research needs to be undertaken to determine how many cases, particularly in the native title

<sup>51</sup> Ibid 245. The late Bradley Selway, who appeared as counsel in *Cole* (n 7), wrote (before he was appointed to the Bench) that 'it is one of the conceits of the legal profession that its members are necessarily good historians. Experience shows that this is not true even of all historians. There is no obvious reason why it should be true of lawyers': Selway (n 1) 129.

<sup>52</sup> Luker (n 1) 245.

<sup>53</sup> Ibid 258. The history wars, in the early stages, seemingly impugned academic historians as embracing a wholesale 'black armband' view of Australian history: at 257. Those that challenged that view were allegedly relegated to the fringes. Academic historians, in this context, were often denigrated as 'leftist' and elitist on this basis: see generally Stuart Macintyre and Anna Clark, *The History Wars* (Melbourne University Press, rev ed, 2004).

<sup>54</sup> *Harrington-Smith* (n 4) 425 [1].

jurisdiction, proceed without the engagement of any historians, and, in these cases, the reasons for which certain historical evidence, if utilised, remains in the realm of pure submission.

There is one further observation that can be made in relation to the use of historians as expert witnesses that may also go towards explaining their relatively infrequent appearance in the Australian courtroom, at least compared to jurisdictions in which historical evidence is burgeoning — for instance, the United States or New Zealand. The issue is predominantly one of scale — there is a relatively limited opportunity for historians to participate in litigation in our jurisdiction. (Contrast this against the American experience, in which originalist approaches (and some methods of statutory interpretation) adopted by certain judges necessitate a tranche of historical data being presented to the court,<sup>55</sup> or New Zealand, where historians are not only engaged by the claimants at Waitangi Tribunal hearings, but the Members of the panels may also be historians).<sup>56</sup> In Australia, as can be seen from the statistics above, the main jurisdiction employing the use of historical evidence is the native title jurisdiction — a jurisdiction that, at the tribunal level, makes less than a hundred determinations a year,<sup>57</sup> with similar figures in the Federal Court.<sup>58</sup> Within this jurisdiction, while historical evidence is obviously in demand, the legislative requirements to prove Indigenous claimants' continuing cultural connection to the land tend to lend themselves to an investigation of anthropological and linguistic evidence as well. It is for this reason that a litigating party may not engage a multiplicity of historians to prove their case,

<sup>55</sup> For examples of American historians' personal involvement in the drafting of Supreme Court briefs, see Tomiko Brown-Nagin, Linda Gordon and Kenneth Mack, 'Historians in Court: A Roundtable', *The American Historian* (online, November 2017) <<https://www.oah.org/tah/issues/2017/november/historians-in-court-a-roundtable/>>, archived at <<https://perma.cc/Z7SG-QL3L>>.

<sup>56</sup> 'Members of the Waitangi Tribunal', *Waitangi Tribunal* (Web Page, 23 April 2020) <<https://waitangitribunal.govt.nz/about-waitangi-tribunal/members-of-the-waitangi-tribunal/>>, archived at <<https://perma.cc/6U7T-KEYT>>.

<sup>57</sup> A search of the National Native Title Tribunal Database on *AustLII* reveals that the Tribunal made 60 determinations in 2016, 76 in 2017, and 81 in 2018: 'National Native Title Tribunal of Australia', *AustLII* (Web Page, 9 May 2020) <<https://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/NNTTA/>>, archived at <<https://perma.cc/2CBE-W4XP>>.

<sup>58</sup> The Federal Court produced 67 native title judgments in 2016, 81 in 2017, and 77 in 2018. This was ascertained using a catchwords search of the Court's own database, using the term 'native title': 'Judgments Search', *Federal Court of Australia* (Web Page), archived at <<https://perma.cc/ZBE9-7CPG>>.

particularly at the expense of engaging other experts.<sup>59</sup> What is curious from the data is the lack of political or social historians appearing as witnesses in Australian constitutional cases — even in the form of *amici curiae*. This can again be contrasted to, say, the United States, where expert historians, including academic historians, are not only called upon as witnesses by the parties, but are often kept on retainer by the parties to conduct research on discrete questions during the course of litigation. Further, some academic historians in the United States see it as an important part of their scholarly duty to file *amicus curiae* briefs in cases in which the court is likely to require assistance in the area of the historian's specialisation.<sup>60</sup>

<sup>59</sup> As to the benefit of anthropological evidence in such cases, see *Western Australia v Willis* (2015) 239 FCR 175, 229 [167] (Barker J):

Other evidence typically led by claimants (and often respondents) in a claimant proceeding is from experts, such as anthropologists, historians and linguists. Their evidence, especially that of the anthropologists, invariably bears on the present, and past, social anthropology of a claimant group, and brings forward relevant ethnographic studies that enable the claimants to prove what the laws and customs of the group were at sovereignty, as well as whether those laws and customs, giving rise to claimed rights and interests, have been acknowledged and observed by the claimant group over the intervening period to the present.

<sup>60</sup> The Pulitzer Prize-winning historian and Stanford professor Jack Rakove gave in 2002 a personal insight into what prompts his decision to become involved in litigation and to testify in United States congressional impeachment inquiries:

For many historians, becoming professionally involved in a partisan conflict ... or in litigation ... risks crossing the line between scholar and advocate. Professional historians should have no problem in admitting ambiguity or uncertainty in our findings, but political and legal disputes leave little room for scholarly hemming and hawing ... I felt, with characteristic immodesty, that my work on the origins of the Constitution offered a perspective on the Impeachment Clauses that only a handful of scholars were qualified to present. Legal scholars aplenty would be testifying, but they are used to adversarial argument, and cavalierly happy to deploy whatever materials serve the cause they favor without the historian's due regard for the limits and ambiguities of the evidence. I had spent more than a decade developing a model or method for conducting inquiries into the original meaning of the Constitution, with due respect for the rules of using historical evidence, and this was too good an opportunity to pass up. Moreover, I felt then, and still believe now, that historians have a civic obligation to bring their knowledge to bear, even if it involves taking sides in a partisan dispute. Obviously it would be better to do so in a more balanced, less partisan forum. But if that is all that is available, why should we forego the opportunity, challenge, and obligation? The test has to be whether what one is prepared to argue in this public role is consistent with what one has written as a scholar.

Jack Rakove, 'The Clinton Impeachment: Dr Clio Goes to Washington' (2002) 2(4) *Commonplace: The Journal of Early American Life* (Web Page) <<https://commonplace.online/article/the-clinton-impeachment-dr-clio-goes-to-washington/>>, archived at <<https://perma.cc/Z76G-48QP>>.

In sum, there have undoubtedly been tensions in the adoption of historians' expert evidence in recent decades, particularly in the native title jurisdiction. Some of that tension, I would suggest, is insurmountable: the methodologies of 'doing' law and history will not and cannot converge, and rightly so. But this does not mean that historians' interpretive skill is not relevant in the courtroom; nor does it mean that an historian's expert report should be limited to the summarisation of written, documentary primary sources; and nor does it mean that an historian with a keen appreciation of the indeterminacy of certain facts should be derided as a postmodernist of limited utility. The relative annual paucity of relevant cases may mean that those seeking to assess how judges have used the expertise of historians in the post-*Cubillo* era may be waiting a while yet for meaningful data; but, given the statistics I have provided here, and the practice of adopting expert reports in a number of cases, there may be less cause for concern than initially anticipated.

### III JUDGES 'DOING HISTORY' AND THE 'ACCEPTED WRITINGS OF SERIOUS HISTORIANS'

#### *A Doctrinal Historiography versus General Historiography*

Not all cases that touch upon questions of history involve the engagement of historians as expert witnesses. In fact, it is far more common for a court to refer instead to the previously published work of historians (or, in other words, secondary sources) in setting out what Dixon J described as the 'general facts of history'.<sup>61</sup> It is worth making a crucial distinction in the purposes for which judges use secondary sources. In some cases, judges will need to undertake a detailed investigation of the common law or equitable origins of a particular doctrine in order to justify its operation or expansion in a present-day dispute. Such an investigation, particularly if it requires an evaluation of obscure (usually English) sources, is usually achieved by recourse to secondary sources: that is, the work of eminent legal historians. I describe these sources as 'doctrinal historiography' to make the distinction between these works and the focus of the rest of this article (that is, the courts' reference to Dixonian 'general facts', and general Australian historiography). This use of doctrinal historiography is a practice internal to law, and the authors of those secondary sources, as historians with legal training, engage in a study which operates within the parameters of law as a discipline. The primary means by which the legal historian will trace the origins of a particu-

<sup>61</sup> *Communist Party Case* (n 5) 196.



lar doctrine is by searching for and reconciling historical reports and judgments, fragmentary as they may be. References to doctrinal historiography by Australian courts — particularly superior courts — is not new or novel. Further, there is a generally accepted canon of works which are seemingly unimpeachable when cited: consider, for instance, the works of FW Maitland (cited by the High Court in no less than 20 cases in the last decade alone); Sir William Holdsworth (also cited in 20 cases in the last decade); or Sir Matthew Hale (cited in 10 High Court cases in the last decade).<sup>62</sup> A most popular local source, though not purely focused on doctrinal developments, would be the late Professor Alex Castles' *An Australian Legal History* (cited 14 times in the last decade).<sup>63</sup> The use of doctrinal history is not regarded as related to a question of fact, and is therefore not subject to the rules of evidence.<sup>64</sup>

It is worth making only one observation here, and in general terms only, before moving to a discussion of general historiography: that Australian judges, when engaging with doctrinal historiography, are usually highly reverential of the historians that undertake to write these works, in contrast to the view taken of historians, for instance, in *Harrington-Smith*.<sup>65</sup> By way of example, in *Australian Crime Commission v Stoddart*,<sup>66</sup> the High Court made what seemed to be an inward exhortation about the necessity of relying on legal historians' expertise in complex matters: 'It is generally not safe to embark on an examination of pre-nineteenth century authorities in the law of evidence without the assistance of modern legal historians.'<sup>67</sup> Such an exhortation is yet to be seen in recent judgments in relation to general Australian history.

<sup>62</sup> Results obtained via full-text search on *AustLII* (a copy is on file with the author). There is a notable exception, however, in the case of *PGA v The Queen* (2012) 245 CLR 355: both majority and minority opinions in this case examined whether one of Hale's assertions was directly supported by case law, especially in the context of his text being published posthumously and being subject to publishing practices of the time (particularly with regard to citations).

<sup>63</sup> Results obtained via full-text search on *AustLII* (a copy is on file with the author). Bruce Kercher, another pre-eminent generalist legal historian of Australia, has been cited twice: *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 606 [247] n 481 (Kirby J); *Wu v The Queen* (1999) 199 CLR 99, 112 [42] n 35 (Kirby J).

<sup>64</sup> Selway (n 1) 146–7.

<sup>65</sup> See above nn 15–16 and accompanying text.

<sup>66</sup> (2011) 244 CLR 554.

<sup>67</sup> *Ibid* 580 [70] (Heydon J).

### B General Historiography and Judges 'Doing' History

It is relatively well settled that Australian judges may take judicial notice of general historical facts, and that this may be done by reference to authoritative secondary sources.<sup>68</sup> There is limited case law, however, on what might constitute a general fact or an authoritative source. 'Matters of public record', such as the date upon which war broke out, may be regarded as such facts; but polemical material,<sup>69</sup> 'analyses as to why certain things happened and generally how people behaved',<sup>70</sup> and a history or memoir about the establishment of a hotel have all been ruled to fall outside this category.<sup>71</sup> It may be possible, too, to invoke a hearsay exception to allow the admittance of historical fact.<sup>72</sup> As for the question of what might be considered an authoritative secondary source, there is little guidance at all in the cases. Differential treatment is afforded, too, to the use of historical fact in the interpretation of the *Constitution*.<sup>73</sup> *Cole* opened the door to the direct citation of the Convention Debates as primary evidence in interpreting the *Constitution*, although the High Court was careful to note that this would be limited to the 'contemporary meaning' of the expression in those Debates as directed towards the 'nature and objectives of the movement towards federation'.<sup>74</sup>

General fact or constitutional fact notwithstanding, there is much to be said about the responsibilities of judges who are either required, or choose, to take up questions of history in their judgments. First, there is a question of whether judges should only make use of those historical materials submitted to them in the course of argument, or whether judges may make their own research enquiries. It may be that where the reasoning in the case does not turn on the historical 'fact' found by the judge in their post-hearing researches, then the matter is of limited concern to the litigating parties. But, even if we assume a general acquiescence to judges finding inconsequential types of

<sup>68</sup> See, eg, Dixon J's statement in the *Communist Party Case* (n 5) 196. See also JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2015) 175 [3040] (citations omitted): 'In two states [South Australia and Western Australia], statute permits the court to refer in matters of public history to works of authority. The same is true at common law.'

<sup>69</sup> *Communist Party Case* (n 5) 196 (Dixon J); Heydon (n 68) 176 [3040].

<sup>70</sup> *Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd* (1998) 43 NSWLR 364, 371 (Young J).

<sup>71</sup> *Ritz Hotel Ltd v Charles of the Ritz Ltd [Nos 15 and 16]* (1988) 14 NSWLR 107, 112–13 (McLelland J).

<sup>72</sup> Heydon (n 68) 1278 [33845].

<sup>73</sup> The use of history is relevant to the judge's reasoning, and therefore is removed from the realm of evidence altogether. The constitutional 'fact' is not in issue: Selway (n 1) 146–7.

<sup>74</sup> *Cole* (n 7) 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

'facts' from their own research endeavours,<sup>75</sup> a further question nevertheless arises. If a judge intends to consider (or even rely upon) historical evidence that has not been put by the parties, should this evidence be flagged during the course of argument so that the parties have an opportunity to respond — to put further evidence, or to call upon an historian as an expert? Further complicating this scenario is that the judge may only discover the material from which they wish to draw *after* having had the benefit of oral argument, leaving limited opportunity for a further hearing to ventilate these issues.

Finally, one might ask a practical question: has the history research that has been undertaken independently by the judge in such a situation been prepared satisfactorily? Has the judge's choice of sources indicated that they are cognisant of most, if not all, of the evidentiary material available relating to the said 'fact'? Further, has the interpretation they have made of that material been reasonable, again appreciating that in the discipline of history, there may be more than one reasonable interpretation of a primary source? Irving made a study of the High Court's practices from 1988 (the year of the decision in *Cole*) to 2012 in citing historical material, including both primary and secondary sources, when coming to conclusions on the general facts of constitutional history.<sup>76</sup> Her appraisal was that the Court's members had performed 'not brilliantly' as historians.<sup>77</sup> She found examples of various practices that would be regarded as undesirable within the historical profession: the citation of primary sources through secondary sources rather than by citing the primary source directly (this included references to the Convention Debates in secondary sources); assertions made without a reference to any historical sources; incorrect page reference pinpoints; and, most troublingly, a practice that Irving described as 'post-hoc election.' The latter practice involves citing almost exclusively from, and placing much significance on, the remarks made in the course of the Constitutional Conventions by those five delegates who went on to become Justices of the High Court (Barton, Griffith, O'Connor, Isaacs and Higgins) — to the exclusion of other delegates, who in some cases were relegated to 'non-entities' in the Court's précis of particular passages.<sup>78</sup> The five 'post-hoc notables' were repeatedly

<sup>75</sup> See, eg, Selway (n 1) 130–1, discussing McHugh J's dissenting judgment in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 477–8 [62]–[63].

<sup>76</sup> Irving, 'Constitutional Interpretation' (n 1).

<sup>77</sup> *Ibid* 109.

<sup>78</sup> *Ibid* 110–11, 116–17. I am cognisant of the fact that I, too, engage in one of the very practices that Irving singles out in her critique of the High Court — in this article, I also self-consciously cite some primary sources through secondary sources: see above n 27.

privileged at the expense of these other delegates, who arguably might have been regarded as closer to, and therefore giving a better expression to, the views of the wider popular movement for federation.<sup>79</sup> The secondary sources relied upon were also few and far between: Quick and Garran,<sup>80</sup> and La Nauze,<sup>81</sup> were the primary authoritative authors relied upon by the judges.<sup>82</sup>

Outside of questions of constitutional fact, there appears to be relatively scant reference in the High Court to what might be regarded as the authoritative generalist texts on Australian history. A survey of the current state of affairs can be undertaken by examining references to some of the best-known historians of Australian history, each one of whom held, or holds, an academic post in history and has written a magnum opus charting Australia's history: Keith Hancock, Manning Clark, Geoffrey Blainey, Ernest Scott and Stuart Macintyre.<sup>83</sup> Each of these historians is or was a notable, and influential, figure in Australian public life although, as shall be discussed later, some of these historians have been publicly denigrated in recent years in the context of the history wars. In order to provide some parallel data to Irving's figures, an attempt has been made to examine the citation practices of the High Court in relation to these eminent historians for the last 40 years (until the time of writing, 10 August 2019). The results make short reading. Blainey and Hancock have not been cited at all, and Clark only once.<sup>84</sup> Ernest Scott's *A*

<sup>79</sup> Ibid 116, 118.

<sup>80</sup> Quick and Garran (n 10).

<sup>81</sup> JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

<sup>82</sup> Irving, 'Constitutional Interpretation' (n 1) 114–15. John La Nauze is perhaps the most popular example of the High Court's selection of a 'serious historian' (La Nauze being a professor of history at ANU, and before that, Ernest Scott Chair of History at the University of Melbourne). Neither Sir John Quick nor Sir Robert Garran were historians: the former was a Convention delegate, politician and lawyer; the latter was a lawyer who attended the 1897–98 Convention as a secretary, and who later became a public servant.

<sup>83</sup> These scholars have been selected on the basis that, given their reputations, Dixon J (even if his Honour might have baulked at Clark's style) might well have regarded them as the 'serious historians' on which the Court could rely: *Communist Party Case* (n 5) 196. I should emphasise here also that I am very much aware that my selection of historians is not diverse by any means. Rather, the point is to make some relatively 'conventional' choices: that is, historians who have a significant readership, are published by the large printing houses, and have produced monographs attempting to cover the full sweep of Australian history.

<sup>84</sup> *Coe v Commonwealth* (1979) 53 ALJR 403, 412 (Murphy J), citing CMH Clark, *A History of Australia* (Melbourne University Press, 1962) vol 1. An edited work of Clark's was also cited by Murphy J in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 150.

*Short History of Australia* has only been cited twice in that period.<sup>85</sup> Stuart Macintyre was only directly cited in one case, and it was not for either of his monographs on Australia at large.<sup>86</sup> Casting the net a little wider, Russel Ward's *The Australian Legend* was not cited. Geoffrey Serle appeared three times, but two were in the capacity of editor rather than author.<sup>87</sup> Even the gold standard encyclopaedic resource on Australian history, *The Oxford Companion to Australian History*, only received four citations.<sup>88</sup>

This is by no means an exhaustive examination of the use of the work of generalist historians in the High Court, but if, for the sake of argument, it suffices as a snapshot of the landscape, then there are four possible explanations for the paucity of references to generalist Australian sources: either that the High Court rarely has need to make observations about a historical state of affairs in Australia (which admittedly seems unlikely — there are several sitting judges who characteristically commence their reasons with a historical

<sup>85</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 110 [340] n 339 (Crennan J), citing Ernest Scott, *A Short History of Australia* (Oxford University Press, 4<sup>th</sup> ed, 1925); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 172 [51] n 135 (French CJ, Gummow and Crennan JJ), citing Ernest Scott, *A Short History of Australia* (Oxford University Press, 7<sup>th</sup> ed, 1947).

<sup>86</sup> It is, instead, for his monograph on the Australian Communist Party: Stuart Macintyre, *The Reds: The Communist Party of Australia from Origins to Illegality* (Allen & Unwin, 1998), cited in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 270 [260] nn 353–4 (Kirby J). Works that have been edited by Macintyre have been cited in other judgments: see, eg, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 518 [47] n 39 (French CJ and Crennan J) ('*Bendigo Institute*'), citing Richard Mitchell, 'State Systems of Conciliation and Arbitration: The Legal Origins of the Australasian Model' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890–1914* (Oxford University Press, 1989) 74.

<sup>87</sup> *Ward v The Queen* (1980) 142 CLR 308, 335 (Stephen J), citing Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851–1861* (Melbourne University Press, 1963); *New South Wales v Commonwealth* (2006) 229 CLR 1, 288 [713] n 956, 291–2 [718] n 964, 292 [719] n 966 (Callinan J) ('*WorkChoices*'), citing Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1966–2012) vols 8–9, 11; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 208–9 [598] n 787 (Heydon J), citing Bede Nairn and Geoffrey Serle (n 87) vol 10.

<sup>88</sup> *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576, 579 [2] n 25 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), citing Graeme Davison, John Hirst and Stuart Macintyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, rev ed, 2001) ('*Oxford Companion Revised Edition*'); *Bendigo Institute* (n 86) 518 [47] n 39 (French CJ and Crennan J), citing Graeme Davison, John Hirst and Stuart Macintyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, 1998); *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 456 [25] n 119 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ), citing Davison, Hirst and Macintyre, *Oxford Companion Revised Edition* (n 88); *WorkChoices* (n 87) 217 [520] n 749 (Kirby J).

flourish of obiter dicta); that the High Court prefers to cite subject-specific rather than generalist secondary sources; that the High Court is particularly mindful to cite primary sources in preference to secondary sources; or that the High Court has made the *choice* to avoid citing the (sometimes controversial) public figures that are listed above. In fact, the latter explanation may also serve as an explanation for the second and third, but this warrants further investigation. Might there be a reason for the High Court avoiding making reference to influential public historians?

### C *The History Wars*

Much has been written about the ‘history wars’ in Australia, but much less about the impact that this partisan conflict has had on the courts. In 2017, I argued that the public campaign against the High Court’s supposed ‘judicial activism’ from the mid-1990s onwards largely emerged from this discourse, in effect imposing an American critique of judicial methodology on a jurisdiction in which many of those critiques were inapplicable.<sup>89</sup> In that study, I examined some of the ways in which the members of the High Court had responded to the judicial activism ‘debate’ in an extra-curial capacity. In the remaining part of this article, I want to examine more specifically how judges engaged with the history wars disputes in particular (as distinct from the accusations of activism), and to make some tentative observations about how this variety of partisan conflict has taken its toll on the High Court in particular.

The Australian history wars are a subset of a wider partisan battle, often described as the culture wars, which have been at play in Australia since the 1980s. During that period a group of Australian social conservatives, amongst them the historian Geoffrey Blainey, mining executive Hugh Morgan, and National Party Senator John Stone, became vociferous public critics of the Hawke Labor government’s multicultural policies (as stifling discussions on race and immigration); its treatment of Australia’s Bicentennial celebrations (as playing down the British and Christian contribution to Australia); and its commitment to constitutional change (as failing to appreciate the benefits of federalism).<sup>90</sup> These concerns were later taken up by the Liberal National

<sup>89</sup> Tanya Josev, *The Campaign against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017).

<sup>90</sup> *Ibid* 126–9. See also Stuart Macintyre and Anna Clark, *The History Wars* (Melbourne University Press, 2004); Mark McKenna, ‘The History Anxiety’ in Alison Bashford and Stuart

coalition as part of their highly successful political strategy in the mid-1990s: they argued that the incumbent Keating Labor government had become captured by boutique interests and minority groups, as championed by a cosmopolitan (urban, tertiary-educated) elite, with little regard to working class Australians and their economic needs.<sup>91</sup> The new elites were conceived of not as the wealthy capitalist powerbrokers of old, but as the teachers, academics, lawyers, social workers and health professionals largely in the keep of the public purse, and with overearnest social consciences.<sup>92</sup>

The history wars, as a limb of the wider culture wars, has ebbed and flowed in political discourse for nearly 30 years, but had its origins in the rancour surrounding the 1988 Bicentennial celebrations. The Bicentennial Authority's decision to direct funding towards projects including an encyclopedia of multicultural Australia and the staging of 'Manning Clark's History of Australia: The Musical', while discouraging a full-scale re-enactment of the arrival of the First Fleet, led to accusations by social conservatives that a 'guilt industry' had emerged, keen on emphasising the facts of Indigenous dispossession in Australian history, rather than the achievements of British settlement.<sup>93</sup> More emphasis needed to be placed on, for instance, the lasting effect of the Anzac spirit on Australian nationhood,<sup>94</sup> rather than on collective shame for the circumstances in which that nationhood came into being. Academic historians, schooled in the supposed excesses of postmodern theory, were under particular assault as supporting the Bicentennial Authority's self-righteous crusade to 'expiate [the nation's] sins' against the Indigenous

Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 2, 561, 575–80.

<sup>91</sup> See, eg, Anne Henderson, 'John Howard, "Doctors' Wives" and Empathy' [2008] (33) *Sydney Institute Quarterly* 3, 3.

<sup>92</sup> See Carol Johnson, 'Anti-Elitist Discourse in Australia: International Influences and Comparisons' in Marian Sawer and Barry Hindess (eds), *Us and Them: Anti-Elitism in Australia* (API Network, 2004) 117. This construction of middle-class urban professionals as the 'elite' was largely based on the literature of the early neo-conservatives Irving Kristol and Norman Podhoretz, who identified what they saw as a 'new class' of progressive political influence in the United States in the 1960s and 1970s: Irving Kristol, *Two Cheers for Capitalism* (Basic Books, 1978) ch 2.

<sup>93</sup> Mark Davis and Nick Sharman, "'Strange Times": Anti-Elite Discourse, the Bicentenary, and the *IPA Review*' (2015) 48(2) *Communication, Politics and Culture* 78, 91, quoting Hugh Morgan, 'The Guilt Industry' (1988) 42(1) *IPA Review* 17, 17.

<sup>94</sup> McKenna (n 90) 579.

people.<sup>95</sup> As time went on, and as social conservatives sought to wrest back ground perceived as taken up by ‘black armband’ historians,<sup>96</sup> the battlegrounds grew. The national history curriculum in schools, the National Museum in Canberra, and even the courts were under intense invigilation from conservative commentators for any apparent concession to the ‘guilt industry.’ In later years, new dimensions appeared to the history wars. Historical research on the extent of Indigenous dispossession, and the level of violence on the frontiers, was challenged from outside the academy.<sup>97</sup> More recently, the decision by the Morrison federal government to direct \$500 million from the federal budget to the Australian War Memorial raised the ire of those awaiting memorialisation of the frontier wars.<sup>98</sup>

The High Court, somewhat unwittingly, became involved in the history wars in 1992, the year in which the landmark *Mabo [No 2]* native title case was heard. The facts of the case hardly need rehearsing, but of particular interest for present purposes was the Court’s use of historiography in the course of reasoning. The majority, Deane, Gaudron and Toohey JJ, cited the work of Henry Reynolds, then an Associate Professor at James Cook University and the author of the 1987 book, *The Law of the Land*, in the course of their reasoning to determine that pre-existing native title could continue to subsist after the reception of the common law in Australia.<sup>99</sup> Dawson J, in sole dissent, also referred to Reynolds’ research.<sup>100</sup> Reynolds had not tendered a report to the Court; he had not been called as an expert witness. His own recounting of the *Mabo* litigation reveals he had little to do with the case as it progressed, and that his work was utilised by counsel in preparing submis-

<sup>95</sup> John Stone, ‘Invitation Letter of 5 May, 1992’ in Samuel Griffith Society, *Proceedings of the Samuel Griffith Society Inaugural Conference, Hilton-on-the-Park, Melbourne, 24–26 July 1992* (Samuel Griffith Society, 1992) vol 1, app 2.

<sup>96</sup> See, eg, McKenna (n 90) 575–6.

<sup>97</sup> See, eg, Keith Windschuttle, *The Fabrication of Aboriginal History: Volume One, Van Diemen’s Land 1803–1847* (Macleay Press, 2002); Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Macleay Press, 2005).

<sup>98</sup> See, eg, Paul Daley, ‘A \$500M Expansion of the War Memorial Is a Reckless Waste of Money’, *The Guardian* (online, 9 April 2018) <<https://www.theguardian.com/australia-news/postcolonial-blog/2018/apr/09/a-500m-expansion-of-the-war-memorial-is-a-reckless-waste-of-money>>, archived at <<https://perma.cc/F5CL-6CWV>>.

<sup>99</sup> *Mabo [No 2]* (n 8) 107 nn 13, 17 (Deane and Gaudron JJ), 181 n 79 (Toohey J), citing Henry Reynolds, *The Law of the Land* (Penguin Books, 1987).

<sup>100</sup> *Mabo [No 2]* (n 8) 142 n 5.



sions, but had not been specifically attributed to him.<sup>101</sup> The Justices, it seemed, had conducted their own research into Reynolds' work, if not nudged in that direction by Mabo's counsel.

Despite not being involved in the litigation, Reynolds was friendly with the plaintiff Mabo and had assisted him with historical research in the years prior to litigation. *The Law of the Land* could be seen as having been written for the Court, with its liberal-positivist outlook and emphasis on the morality of each actor's conduct.<sup>102</sup> Reynolds was no postmodernist — he decried the relativism of some of his colleagues. Later, he wrote that he was hopeful of the demise of postmodern theory, as modern times required the 'great value and virtue' of 'old-fashioned history and truth'.<sup>103</sup> This was not enough to endear him to the conservative pundits in the history wars, however, as his moralistic style of writing did not sit well with their concerns.<sup>104</sup> Some academic colleagues, too, saw Reynolds' methodology as erring dangerously close to 'law-office history'.<sup>105</sup>

Although the Court made reference to Reynolds' work, this was not done in any extensive fashion. Deane and Gaudron JJ cited some primary sources through Reynolds' work.<sup>106</sup> Toohey J, perhaps more controversially, appeared in one paragraph to take up Reynolds' assertion (which was, therefore, opinion evidence) about the inapplicability of the terra nullius doctrine to Australia.<sup>107</sup> Unlike Toohey J, however, Deane and Gaudron JJ chose unusually emotive language in remarking on the British settlers' actions that had caused the current proceedings to come about: that is, the 'conflagration of oppression and conflict which was ... to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a *national legacy of unutterable shame*'.<sup>108</sup> It was *this* choice of language that played straight into the concerns of the conservative protagonists of the history

<sup>101</sup> Henry Reynolds, *Why Weren't We Told? A Personal Search for the Truth about Our History* (Viking, 1999) 191. See also Bryan Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title, A Memoir* (Chancery Bold, 2011) vol 2, 155 n 57.

<sup>102</sup> Josev (n 89) 125. See also Attwood (n 11); David Ritter, 'Tilting at Doctrine in a Changing World: The Three Editions of Henry Reynolds' *The Law of the Land*' (2008) 32(3) *Journal of Australian Studies* 393.

<sup>103</sup> As quoted in Mark McKenna, 'Silence Shattered with a Whisper to the Heart', *The Australian Literary Review, The Australian* (Sydney, 4 March 2009) 14.

<sup>104</sup> See, eg, Peter Cochrane, 'Hunting Not Travelling' (October 1998) *Eureka Street* 34–5.

<sup>105</sup> See above nn 11–12 and accompanying text.

<sup>106</sup> *Mabo* (n 8) 107 nn 13, 17.

<sup>107</sup> *Ibid* 181 n 79 and accompanying text.

<sup>108</sup> *Ibid* 104 (emphasis added).

wars,<sup>109</sup> and led to speculation about the extent to which the judges relied on Reynolds' research.

Of course, it would be incorrect to suggest that conservative commentators' anger over the decision in *Mabo [No 2]* was only directed towards the Court's recourse to secondary sources. That anger was also directed towards the implications of the judgment on pastoralists and those with commercial interests in affected land; concerns arose from some within the legal arena about the supposed sudden dislocation of some of the central tenets of the common law of property.<sup>110</sup> Nevertheless, one wonders whether Deane and Gaudron JJ pre-empted the inevitable criticism of their impassioned language, and attempted to defend it via reference to history and to Reynolds' research, in this passage at the conclusion of their judgment:

[W]e are conscious of the fact that, in those parts of this judgment which deal with the dispossession of Australian Aborigines, we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt. ... [I]n the writing of this judgment, we have been assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in [these] areas ...<sup>111</sup>

These judges, I suggest, were more than likely aware of the flaming of the history wars in public discourse — although their statement did little to prevent the onslaught of criticism that the Court was then to receive from certain sections of the commentariat. Leading the charge was Blainey again, who declared that he was perturbed, 'as an Australian ... that the highest court in the land, in its majority judgment, denied the legitimacy of this country'.<sup>112</sup> Morgan described it as an exercise in 'naïve adventurism' from judges that seemed 'ashamed to be Australian';<sup>113</sup> Dame Leonie Kramer

<sup>109</sup> For a summary of the early critiques of the *Mabo [No 2]* judgment, see Josev (n 89) 126–35. For the media treatment of the *Mabo [No 2]* case, see Department of the Parliamentary Library, 'Mabo Papers' (Subject Collection No 1, Parliamentary Research Service, Parliament of Australia, 1994) 174.

<sup>110</sup> See Josev (n 89) 130–6.

<sup>111</sup> *Mabo [No 2]* (n 8) 120.

<sup>112</sup> Richard Evans, 'The Blainey View: Geoffrey Blainey Ponders *Mabo*, the High Court and Democracy' (1995) 69(3) *Law Institute Journal* 203, 203.

<sup>113</sup> Keon-Cohen (n 101) 562.

agreed;<sup>114</sup> and the anthropologist Ron Brunton, from the Institute of Public Affairs' Environmental Policy Unit suggested that the Court risked engaging in 'cultural relativism' in adopting historical evidence in its decision.<sup>115</sup> Other commentators later declared the decision as fundamentally flawed because it had relied on bogus research that had been invented by Reynolds.<sup>116</sup> Deane J, in the aftermath of *Mabo [No 2]*, also appeared to inflame tensions further by personally sending a copy of the decision to Reynolds, a fact which became known publicly; but his Honour has since sought to make clear that he only wished to indicate to Reynolds that his work

had been of the assistance indicated by the (two) relevant footnotes to the judgment. ... Certainly, I did not intend to convey the slightest suggestion that the judgment, which was essentially based on legal reasoning and precedent, was somehow the result of Henry Reynolds's historical writing.<sup>117</sup>

His Honour's defensiveness is telling.

Former Justice Deane was not the only judge to publicly distance himself from the suggestion that Reynolds' work had swayed the Court. Former Chief Justice Sir Anthony Mason, who did not cite Reynolds in his judgment in *Mabo [No 2]* and yet who was still facing media questions about the historian's influence some 14 years later, remarked:

Anti-Maboians [have] always said the court fell under the influence of Henry Reynolds, and Henry Reynolds was wrong. Now, I see this as a means of historians getting into the debate. They see references to Henry Reynolds, they make it a big issue as to whether Henry Reynolds is right, and they say here's this man, he had misrepresented the position and he's caused the High Court to go off on a false trail. But I'd be astonished if the members of the court were influenced by Henry Reynolds. I must say, as far as Henry Reynolds is concerned,

<sup>114</sup> 'Mabo Papers' (n 109) 173.

<sup>115</sup> *Ibid* 150.

<sup>116</sup> Deborah Hope, 'Smokescreen Nullius', *The Weekend Australian* (Sydney, 25 February 2006) 22, discussing Connor (n 97). Michael Connor is a contributing editor at *Quadrant*; his book, cited here, has found little favour amongst academic historians.

<sup>117</sup> McKenna (n 103) 14. Interestingly, the *Mabo* decision may have made the majority judges notorious in some circles, but their brief references to Reynolds seemingly enhanced the historian's already considerable reputation. Prime Minister Paul Keating's speechwriter, Don Watson, often subsequently called on Reynolds regularly for advice; the songwriter Paul Kelly dedicated music to him; *The Australian* newspaper in 1999 listed him as one of the nation's greatest achievers; and in the *Bulletin* magazine's list of the 125 moments that 'changed' Australia, the *Mabo* decision was featured and described as being supported by Reynolds' research.

I've never read his books. I think we were referred to some passages in his books in the course of argument in the materials, and I remember reading two or three pages, but I wasn't very impressed by Henry Reynolds.<sup>118</sup>

Former Chief Justice Mason also accepted an offer to write the foreword of Stuart Macintyre's account of the history wars in 2003, taking the opportunity to castigate its primary protagonists.<sup>119</sup> The fact that former Chief Justice Mason, like former Justice Deane, felt compelled to make such public statements suggests that the Court was acutely aware, albeit subsequently, of the problems it faced if it were to be impugned in the history wars. Certainly, the indeterminacy of historical research, and the inevitable development of alternative interpretations of Reynolds' sources, would invite critique of the Court's decision — just as it would invite critique of Reynolds' work. This was to be expected, as it would be on any occasion when the Court found itself dealing with questions of history. That critique would usually take place in academic journals and conferences, perhaps the occasional literary journal; it would be bound by the usual customs of scholarly dialogue. But the history wars had added a new dimension to this critique: this was a highly partisan, public debate, and each successive round was taken up with zeal by commentators and political strategists alike. In this context, judges, in adopting Reynolds' work, had now been associated with the ranks of the socially liberal elites so decried by the Coalition in the wider culture wars. The judges were now perceived as “basket-weavers”; ‘purveyors of “intellectual dishonesty”’, and ‘a “pathetic ... self-appointed [group of] Kings and Queens”’.<sup>120</sup> It is revealing that, even in *Wik Peoples v Queensland*,<sup>121</sup> handed down in 1996, Gummow J self-consciously remarked: ‘There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms.’<sup>122</sup> That taxonomy is still yet to be decided, and, I

<sup>118</sup> Hope (n 116).

<sup>119</sup> Macintyre and Clark (n 90) viii:

The revelation of the past by historians ... is an on-going process. So, as time passes, we may acquire a more detailed knowledge of the European settlement of Indigenous lands in Australia. That knowledge will be sharpened by scholarly debate and discussion which, it is to be hoped, will not be accompanied by the invective and verbal violence that has given prominence to the History Wars.

<sup>120</sup> Justice Michael Kirby, ‘Attacks on Judges: A Universal Phenomenon’ (1998) 72(8) *Australian Law Journal* 599, 601 (citations omitted).

<sup>121</sup> (1996) 187 CLR 1.

<sup>122</sup> *Ibid* 182. Kirby J, writing separately, cited Reynolds four times: at 207 n 775, 214 n 800, 226 n 843, 230 n 860.

suspect, the Court is in no great haste to revisit the matter. The Court, if the rudimentary statistics in the preceding section are indicative of a trend, has shied away from citing works of popular history. Justice Crennan, herself also a historian by training,<sup>123</sup> seemingly recognised this problem when she remarked in 2010 that

[in *Mabo [No 2]* and *Wik*] the courts perforce relied upon historical material. Subsequently, there has been some debate about the correctness of the historical information on which the Court acted. In one sense, that problem might be said to arise in the evidence of expert witnesses generally, but it is plainly undesirable that courts should be drawn into what are sometimes called culture wars about highly contested and freighted periods in our history.<sup>124</sup>

There is an additional discourse on the horizon, too, which may add a further layer of complexity to this state of affairs. In the United States, where politics is becoming increasingly polarised, a new language of ‘alternative facts’ has emerged to justify, and attempt to legitimise, particulars that are either inaccurate, or are incapable of verification.<sup>125</sup> This includes questions about the events of the past. Less sinister, but equally unhelpful, has been the emergence of the expression of a person telling ‘*their truth*,’<sup>126</sup> which, perhaps contrary to intention, can be interpreted as the speaker revealing only selected facts to the listener. Despite the language, it appears that speaking one’s truth means to offer an unorthodox account that the speaker is already aware will be contested.<sup>127</sup> Neither of these developments should be construed as

<sup>123</sup> Justice Crennan completed a postgraduate diploma in Australian history at the University of Melbourne.

<sup>124</sup> Justice Susan Crennan, ‘Varieties of History and the Law’ (Speech, Lincoln’s Inn, 31 January 2010) 2–3, archived at <<https://perma.cc/AUH8-NQPA>>.

<sup>125</sup> The phrase was first used (and later rephrased) by counselor to the President of the United States, Kellyanne Conway, during a television interview: NBC News, ‘Kellyanne Conway: Press Secretary Sean Spicer Gave “Alternative Facts”’ (YouTube, 22 January 2017) <<https://www.youtube.com/watch?v=VSrEEDQgFc8>>, archived at <<https://perma.cc/6NW3-A75X>>. See also ‘Alternative Facts’, *Wikipedia: The Free Encyclopedia* (Web Page, 6 May 2020) <[https://en.wikipedia.org/wiki/Alternative\\_facts](https://en.wikipedia.org/wiki/Alternative_facts)>, archived at <<https://perma.cc/YCE8-X9R2>>.

<sup>126</sup> See, eg, Connor Friedersdorf, ‘The Difference between Speaking “Your Truth” and “the Truth”’, *The Atlantic* (online, 8 January 2018) <<https://www.theatlantic.com/politics/archive/2018/01/the-power-and-perils-of-speaking-your-truth/549968>>, archived at <<https://perma.cc/AH6J-3U3M>>.

<sup>127</sup> *Ibid.* Many public figures in the United States — from Oprah Winfrey, to members of the #MeToo movement, to members of the Kardashian family — have used this language: Alicia DeSantis et al (eds), ‘How Saying #MeToo Changed Their Lives’, *The New York Times* (online, 28 June, 2018) <<https://www.nytimes.com/interactive/2018/06/28/arts/metoo-movement->

constituting a nuanced popular interest in relativism, or as illustrating a robust understanding of the ambiguity of certain forms of evidence. However, should this language reach Australian shores, a new host of difficulties may arise for the Court when citing historical ‘fact’. These difficulties have nothing to do with judicial methodology, but all to do with the potential for intemperate and ill-informed commentary on the courts when they make findings on highly contested facts in a case that has captured popular interest. Justice Gageler has already anticipated these developments, delivering a public lecture on how the Australian court system might deal with alternative facts ‘in a post-truth era.’<sup>128</sup> He concluded that ‘[p]olarisation is the antithesis of impartiality; and impartiality is the hallmark of justice.’<sup>129</sup> As a former associate of former Chief Justice Mason, he might be thought to be well placed to grasp the contours of aggressive public criticism of the courts. It may well be that his lecture will be called upon in future, should the language of ‘alternative facts’ or the history wars reach the Court’s door again.

#### IV CONCLUSION

History and law may be described as intellectual cousins, but the substantial differences between the disciplines inevitably make courtroom encounters involving questions of history challenging. The use of historians as expert witnesses in Australia, especially in native title disputes, was regarded as particularly fraught in the early 2000s, as some judges failed to appreciate that the historian’s specialised skills might usefully inform the court in duties beyond the mere assemblage and précising of documents. In recent years, although there have been only a limited number of occasions in which historians have been called to act as experts, there appears to be more of a willingness not only to accept their reports (including commentary) into evidence, but also to tentatively draw upon that evidence in reasons for judgment.

The citation of works of ‘serious historians’ remains another matter. The High Court has a long institutional memory, even if its personnel has changed

stories.html>, archived at <<https://perma.cc/K3N4-Y49N>>; Jackie Willis, ‘Khloe Kardashian Tells Her “Truth” after She’s Accused of Cheating with Tristan Thompson’, *ET* (online, 12 June, 2019) <<https://www.etonline.com/khloe-kardashian-tells-her-truth-after-shes-accused-of-cheating-with-tristan-thompson-126884>>, archived at <<https://perma.cc/2W45-CU3T>>.

<sup>128</sup> Justice Stephen Gageler, ‘Alternative Facts in the Courts’ (2019) 93(7) *Australian Law Journal* 585, 586.

<sup>129</sup> *Ibid* 593.

in recent decades. The *Mabo [No 2]* judgment was handed down nearly 30 years ago, but the lessons learned from the citation of Henry Reynolds seem to remain live, perhaps due to the history wars continuing in various forms across the theatres of the culture wars. Virtually none of Australia's recent popular historians have emerged unscathed from these wars: Blainey, Reynolds, Clark, Macintyre and countless others have been assailed, rightfully or otherwise, as hopelessly partisan.<sup>130</sup> The great tragedy of the history wars for the courts, then, is that general historical works that might be valuable in the process of fact-finding are relegated to the sidelines, being more trouble than they are worth to cite directly. The reading public, too, may suffer a kind of deprivation resulting from the continued prosecution of the history wars. One of the by-products of the history wars — that is, the potential chilling of the High Court's citation practices — may ultimately result in the judges leaving their choice of source material hidden, thus leaving their influences to the idle speculation of the reader.

<sup>130</sup> See generally Macintyre and Clark (n 90). Macintyre himself, since the publication of *The History Wars*, has been subject to intemperate critique and assailed as a communist, a 'polemicist' and the 'godfather of Australian history': Keith Windschuttle, 'Stuart Macintyre and the Blainey Affair', *Quadrant Online* (online, 8 October 2008) <<https://quadrant.org.au/magazine/2008/10/stuart-mcintyre-and-the-blainey-affair/>>, archived at <<https://perma.cc/EX9W-6DAH>>; Greg Melleuish, 'Book Review: *The History Wars* by Stuart Macintyre and Anna Clark' (2004) 19(4) *Policy* 54, 54; Shane Green, 'Victoria's Heritage: History's Godfather Accepts an Offer He Couldn't Refuse', *The Age* (online, 30 July 2015) <<https://www.theage.com.au/national/victoria/victorias-heritage-historys-godfather-accepts-an-offer-he-couldnt-refuse-20150730-ginjll.html>>, archived at <<https://perma.cc/H7T4-FDSB>>; Dan Harrison, 'Changes Ahead for History', *The Sydney Morning Herald* (online, 20 September 2008) <<https://www.smh.com.au/national/changes-ahead-for-history-20080919-4k8m.html>>, archived at <<https://perma.cc/KUR2-SK5W>>.