

READING THE ARCHIVE: HISTORIANS AS EXPERT WITNESSES

TRISH LUKER[†]

I INTRODUCTION

What do historians contribute to law's understanding of the past when they act as expert witnesses in courts? Costas Douzinas argues that legal proceedings are unsuitable for clarifying the historical record.¹ Douzinas sees the call for law to judge historical injustices to be inspired by a nostalgic turn to collective memory, seeking redemptive history as part of national identity construction. He maintains that law cannot authenticate history because of the different temporal orientations of each discipline and the role each performs in narrating the nation.

Douzinas takes his cue from Hannah Arendt's treatise on the Eichmann trial,² in which Nazi war criminal Adolf Eichmann was tried for crimes against Jewish people and crimes against humanity.³ The trial is purported to be the first of its type in which an historian appeared to give evidence.⁴ Douzinas, following Arendt, argues that

[†] Lecturer, UTS Law, University of Technology Sydney. Thanks to the anonymous referees and Georgine Clarsen for helpful advice and suggestions.

¹ Costas Douzinas, 'History Trials: Can Law Decide History?' (2012) 8 *Annual Review of Law and Social Science* 273.

² Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press, 1963).

³ Eichmann was charged and tried in Israel under the Nazis and Nazi Collaborators (Punishment) Law of August 1, 1950. The transcript of the trial proceedings are available at: *The Trial of Adolf Eichman*, The Nizkor Project <www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/>.

⁴ Salo Baron, expert on Jewish history, was the only historian to give expert evidence in the trial: *The Trial of Adolf Eichman: Session 12*, The Nizkor Project <www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-012-04.html>.

criminal trials are inappropriate forums for judging what occurred in the past and should not be used for didactic purposes.⁵ However, in a study of the role of historians as expert witnesses in international criminal proceedings, including the Eichmann trial, Richard Ashby Wilson argues that ‘there is a compelling case for rethinking the long-standing view that the pursuit of justice and the writing of history are inherently irreconcilable’ and that there is ‘no evidence to support Arendt’s contention that historical discussions undermine due process and fairness’.⁶

Attention to the role of historians in legal proceedings has tended to focus on criminal trials. However, in Australia, historical evidence has most often been presented in civil proceedings, particularly involving Indigenous claimants in native title, stolen generations and cultural heritage jurisdictions. Important legal decisions, such as *Yorta Yorta*,⁷ the first case heard under the native title legislation, and *Cubillo*,⁸ the landmark action in relation to compensation for members of the stolen generations, demonstrate inconsistent judicial approaches to interpretation of historical knowledge and inadequate understanding of the way historians approach reading archival sources and writing histories. Historians examine archival and other sources as fragments that have survived the past and attempt to create narratives that have significance in the present to explain what happened in the past. Indigenous claims in relation to historical injustices demand recognition of responsibility for the past, in the present. As such, they necessitate an investigation into history.

Where historians have been commissioned to act as expert

⁵ Douzinas, above n 1, 283.

⁶ Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011) 19. Similarly, Lawrence Douglas argues that the necessity of legal judgment in a criminal trial does not preclude potential for open-ended historical inquiry: Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001).

⁷ *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [1998] FCA 1606 (18 December 1998) (*Yorta Yorta*).

⁸ *Cubillo v Commonwealth* (2000) 174 ALR 97 (*Cubillo*).

witnesses, they have often found it difficult to meet the expectations of legal counsel when preparing their reports because they take a different methodological approach to law.⁹ Historians sometimes find their expertise in reading and interpreting archival sources is not accorded sufficient weight and their evidence may be subjected to rigorous cross-examination. In a number of cases, judges have questioned whether historians actually have ‘specialised knowledge’ that entitles them to give admissible opinion evidence, reflecting an assumption that the court is already equipped with the skills necessary to interpret archival evidence.¹⁰ In other cases, judges have suggested that historians called as experts have failed sufficiently to distinguish between their opinions and the facts which form the basis of the opinions,¹¹ because they have not clearly exposed the reasoning which has led to the opinion.¹² In some cases, historians have been accused of displaying bias.¹³ Judges have also expressed concern that in the preparation of experts’ reports, there has been a failure to address the requirements for admissibility.¹⁴

Historians also participate as expert witnesses in legal claims in other settler colonial contexts, such as New Zealand and North America. In New Zealand, the involvement of historians has largely been in the context of Waitangi Tribunal hearings,¹⁵ where they perform an important role.¹⁶ Unlike Australian native title litigation, Waitangi Tribunal investigations are explicit inquiries into history through an inquisitorial process. There are extensive archival resources available for these inquiries because they date from the

⁹ Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press, 2008) 100-1.

¹⁰ *Harrington Smith v State of Western Australia (No 7)* [2003] FCA 893 (*Harrington-Smith*).

¹¹ *Ibid* [21].

¹² The law of evidence requires this distinction: *Evidence Act 1995* (Cth) s 97.

¹³ For example, *Risk v Northern Territory* (2006) FCA 404.

¹⁴ *Harrington Smith* [15]-[20].

¹⁵ The Waitangi Tribunal was established in 1975 to investigate claims brought by Maori individuals or groups, of contemporary breaches of the Treaty of Waitangi by the Crown. From 1985, its jurisdiction was expanded to include historical claims of injustice from the date of the Treaty signing in 1840.

¹⁶ Historians are employed to conduct the Tribunal’s own independent investigations and are included as members of the decision making body.

19th century, when documentation of colonial activities was prolific. It also includes sources written by Maori people. In the United States, the Indian Claims Commission, established in 1946 to investigate grievances of American Indian tribes against the federal government involved the participation of expert witnesses, largely ethno-historians who draw on anthropological and archaeological frameworks in the interpretation of documentary sources. In Canada, subsequent to the decision in *Calder v British Columbia*,¹⁷ which affirmed the existence of Aboriginal title held prior to colonisation, a series of significant cases involved historians as expert witnesses.¹⁸ One distinctive characteristic of the Canadian context is the existence of the extensive archive of the Hudson's Bay Company, a fur trading company dating from 1670, long before the establishment of the Dominion of Canada in 1867. The company established trading posts throughout North America where workers were tasked to keep daily personal records of observations of activities in the region.

This article is divided into two parts. In the first part, I will provide an overview of the law concerning historians as expert witnesses in Australian courts. I will argue that key cases have functioned as catalysts for trends in the involvement of historians in Australian litigation. While historians appeared rarely prior to the advent of the native title jurisdiction, after the *Mabo* decision, they were more often commissioned by parties and appeared routinely in native title cases. Some historians were motivated to become involved in litigation as a way of contributing to the political environment of reconciliation. This was accelerated in the wake of the decision in *Yorta Yorta*,¹⁹ the first case to be heard under the *Native Title Act 1993* (Cth). The increased participation of historians in litigation in Australia gave rise to important debates about the role of expert witnesses drawn from fields in the humanities.

However, research I have conducted indicates that a change

¹⁷ [1973] SCR. 313.

¹⁸ *R v Sparrow* [1990] 3 CNLR 160; *Delgamuukw v. British Columbia* [1997] 3 SCR 1010. DC; *R v Badger* [1996] 2 CNLR 77; *R v Van der Peet* [1996] 4 CNLR 177.

¹⁹ [1998] FCA 1606 (18 December 1998).

occurred in the early 2000s, particularly in the wake of the decision in *Cubillo*,²⁰ the landmark action in relation to the stolen generations. In the second part of the article, I will report on my research into cases heard in the Federal Court since the mid-2000s where historical evidence was tendered.²¹ This research indicates that while historians are occasionally commissioned by parties to research and write reports that may be tendered as evidence in legal actions, they have rarely appeared in person in court as witnesses. I will argue that courts have had difficulty accepting the expert evidence of historians, largely because legal and judicial subjects regard the interpretation of the past, specifically the hermeneutic processes involved in the interpretation of historical documents, as a skill in which they are already well versed.

The trend away from engagement with historians in Australian litigation is the product of a more general political climate in Australia, in operation since the 1990s, which has been hostile to historians, particularly those working in the area of settler colonial history. As a discipline, history has a particular relationship to the national imaginary, as the ‘history wars’ have demonstrated in Australia.²² As Mark McKenna argues, ‘[e]very nation is brought into being through the writing of history’.²³ He claims that during the ‘history wars’, ‘Australian history was being conscripted, either to justify or condemn the nation’.²⁴

I will suggest that the antagonism and scepticism towards historians expressed in the Australian history wars has had an impact on legal proceedings where historians appear as expert witnesses.

²⁰ (2000) 174 ALR 97.

²¹ This research has been conducted as part of a UTS Chancellor’s Postdoctoral Research Fellowship, University of Technology Sydney, called *Reading the Archive: Use of Historical Documents in Law* (2012-16).

²² Stuart Macintyre and Anna Clark, *The History Wars* (Melbourne University Press, 2003).

²³ Mark McKenna, ‘The History Anxiety’ in Alison Bashford and Stuart MacIntyre (eds), *The Cambridge History of Australia: Volume 2: The Commonwealth of Australia* (Cambridge University Press 2013) 561, 563.

²⁴ *Ibid* 577.

Furthermore, I will argue that debates within the disciplinary field gave rise to concerns about the potential ethical and methodological compromises involved in historical research conducted for the purpose of litigation.

II HISTORIANS AS EXPERT WITNESSES IN AUSTRALIAN COURTS

The admission of evidence by those who have expertise has a long history in the common law, yet the Australian High Court has rarely provided guidance on the principles regarding its admissibility.²⁵ Expert evidence is admissible under an exception to the rule which excludes opinion evidence, where the person has ‘specialised knowledge’ based on their ‘training, study and experience’.²⁶ ‘Specialised knowledge’ is knowledge of matters that is outside the knowledge or experience of ordinary persons; it must be sufficiently organised or recognised to be accepted as a reliable body of knowledge.²⁷ Expert evidence is admissible in legal proceedings on the basis that it is beyond the type of knowledge that people are likely to acquire in the course of their ordinary, general experience of life, and therefore potentially beyond the knowledge of the judge or members of the jury.²⁸ Expert witnesses must demonstrate that they have specialised knowledge based on their training, study or experience and the opinion expressed must be wholly or substantially based on that knowledge. The opinion evidence will be inadmissible if the court could itself make such an inference on the basis of the material considered by the expert.²⁹

²⁵ Where the High Court has considered the admissibility of expert evidence, it has concerned scientific knowledge, such as expertise in anatomy applied to analysis of CCTV footage for identification purposes in criminal matters, e.g. *Honeysett v R* [2014] HCA 29.

²⁶ *Evidence Act 1995* (Cth) s 79. The common law exception for ‘expert evidence’ is referred to as ‘opinions based on specialised knowledge’ under the uniform Evidence Act.

²⁷ *Veloski v R* (2002) 187 ALR 233, [82] (Gaudron J).

²⁸ *Evidence Act 1995* (Cth) s 79(1).

²⁹ *Quick v Stoland Pty Ltd* (1998) 87 FCR 371, 382 (Finkelstein J).

Research on the reception of expert opinion evidence in Australia and other common law jurisdictions has raised serious concerns about the admission in criminal proceedings of unreliable and speculative evidence from fields such as forensic science and medicine. Critics argue that courts have failed to adequately investigate the reliability of incriminating expert opinion evidence called by the prosecution, potentially leading to wrongful convictions and miscarriages of justice.³⁰ It has been suggested that the primary consideration has been the effectiveness of expert evidence in securing prosecutions.³¹

However, there has been limited scholarly attention to expert evidence from the fields in the humanities and social sciences, such as history, anthropology and linguistics, which is most often given in civil litigation.³² Anthropologists began appearing as expert witnesses in the 1970s as a result of the introduction of land rights legislation in the Northern Territory in Australia.³³ In the first significant decision dealing with admissibility of opinion evidence from an anthropologist, Justice Blackburn discussed whether the evidence presented was hearsay because it was based on what the anthropologist had been told by Indigenous informants. The judge concluded that: '[t]he anthropologist should be able to give his opinion based on his investigation by processes normal to his field of study, just as any other expert does'.³⁴ Since then, Australian courts

³⁰ For example, Gary Edmond, Simon Cole, Emma Cunliffe and Andrew Roberts, 'Admissibility Compared: The Reception of Incriminating Expert Evidence (i.e., forensic science) in Four Adversarial Jurisdictions' (2013) 3 *University of Denver Criminal Law Review* 31.

³¹ *Ibid* 91.

³² See, however, Mandy Paul and Geoffrey Gray (eds), *Through a Smoky Mirror: History and Native Title*, Native Title Research Series, (Aboriginal Studies Press, nd); Christine Choo and Shawn Hollbach (eds), *History and Native Title*, Special Issue (2003) 23 *Studies in Western Australian History*; Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (The Australian Academy of the Humanities, 2003); Curthoys, Genovese and Reilly, above n 9; Anne Carter, 'The Definition and Discovery of Facts in Native Title: The Historian's Contribution' (2008) 36(3) *Federal Law Review* 299.

³³ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

³⁴ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 161.

have largely been prepared to accept the evidence of anthropologists as expert opinion evidence not strictly subject to hearsay objections.

Similar objections were also made initially in relation to the evidence of historians. Courts drew a distinction between the ‘facts’ of history and historical analysis based on textual sources and delivered as opinion, which was designated as hearsay evidence. In a decision which has attained authority, Justice Young distinguished between the ‘basal facts’ of history ‘such as when a particular war broke out or other matters of record from reputable histories’ and analyses as to ‘why certain things happened and generally how people behaved’, which he concluded was not a matter which can be proved by the evidence of people who were not there.³⁵

As a result of the strict application of the hearsay rule, historians appeared rarely in Australian courts until the introduction of land rights legislation. Outside of Indigenous claims, historians have appeared in the Federal Court primarily in administrative law matters such as veteran’s affairs; and in State courts in a limited range of matters in the areas of environmental planning and assessment; defamation; and negligence.

A *Native Title Jurisprudence*

From the early 1990s, the development of native title jurisprudence, as well as other areas for Indigenous claims, including litigation concerning the legality of genocide,³⁶ cultural heritage claims³⁷ and

³⁵ *Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd* (1998) 43 NSWLR 364, 371. On appeal, the historian was found to have ‘specialised knowledge’ based on her ‘training, study and experience’ as an historian, but her report was rejected because it was not ‘wholly or substantially based’ on her ‘specialised knowledge’, because her opinions did not ‘flow from the material relied on’: *Tomark Pty Ltd v Bellevue Crescent Pty Ltd* [1999] NSWCA 347 [42]-[43]. See also *Jones v Scully* [2002] FCA 1080.

³⁶ *Kruger v Commonwealth* (1997) CLR 1; *Buzzacott v Hill* [1999] FCA 639; *Nulyarimma v Thompson* [1999] FCA 1192.

³⁷ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106; *Kartinyeri v Commonwealth* [1998] 195 CLR 337.

compensation by members of the stolen generations,³⁸ resulted in more attention to historical knowledge in Australian courtrooms.³⁹ In *Mabo (No 2)*,⁴⁰ the case that defined native title in Australia, it was undoubtedly the impact of the published work of historians, including Henry Reynolds, which ultimately influenced the outcome in the High Court.⁴¹ A number of the justices cited Reynolds' book *The Law of the Land* in their decisions.⁴² *Mabo* is considered the case that tested the nation on historical knowledge — it begged the question of what narrative we were to construct about what happened in the past — yet the role of historians as experts in the proceedings was not contested. Robert van Krieken claims that while historical evidence had previously been excluded in Australian courts, after the High Court's decision in *Mabo*, law developed 'cognitive openness' to historical evidence, largely as a result of the impact of Reynolds' scholarship.⁴³ Reynolds' work was also cited in the *Wik* decision, the second leading case on native title.⁴⁴

These cases demonstrate the influence of Indigenous activism and developments in Australian historical scholarship on judicial decisions. They also incited indignation among conservatives, including some historians, because they challenged the 'sustaining national narrative' that had dominated historical scholarship since

³⁸ *Cubillo* (2000) 174 ALR 97.

³⁹ In the trial case heard by Justice Moynihan in the Queensland Supreme Court, as part of the *Mabo* litigation, the respondent, the State of Queensland called an historian, Dr Ruth Kerr, as a witness: B A Keon-Cohen, 'The *Mabo* Litigation: A Personal and Procedural Account' (2000) 24 *Melbourne University Law Review* 893, 927.

⁴⁰ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*).

⁴¹ For example, Deane and Gaudron JJ stated that they had 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 the areas in to which this judgment has necessarily ventured'. *Mabo* (1992) 175 CLR 1 [78].

⁴² Henry Reynolds, *The Law of the Land* (Penguin, 1987), cited in *Mabo* (1992) 175 CLR 1 (Deane, Gaudron and Toohey JJ).

⁴³ Robert van Krieken, 'Law's Autonomy in Action: Anthropology and History in Court' (2006) 15(4) *Social and Legal Studies* 574.

⁴⁴ *Wik Peoples v Queensland* (1996) 187 CLR 1.

the nineteenth century.⁴⁵ As Stuart Macintyre and Anna Clark point out, while Indigenous dispossession would seem to be an indisputable historical fact resulting from settler colonial pastoralism, farming and mining, it was the formal recognition of this fact through land rights legislation and High Court recognition of native title that triggered conservative resistance, including allegations of judicial activism.⁴⁶ The conservative resistance also resulted in considerable compromise in the drafting of native title legislation, making it a far more restrictive regime than what had been available under land rights legislation.

Under the *Native Title Act 1993* (Cth), claimants are required to meet a legal, as well as an historical, burden of proof to establish the existence of native title: they must provide evidence that they possess communal, group or individual rights and interests in relation to land or waters under traditional laws and customs.⁴⁷ This is an onerous burden of proof, requiring that claimants demonstrate on-going connection to the land in question, dating back to the assertion of colonial sovereignty. In this sense, it is an historical inquiry requiring proof of historical facts. Expert evidence may be given from a range of disciplinary fields, including history, anthropology, linguistics and archaeology.⁴⁸ However, such evidence is received largely at the discretion of the trial judge.⁴⁹

Where a historian is commissioned by a party to conduct research and provide evidence, they are contributing to the process of proving the material facts concerning the claimants' connection to the land in question under Indigenous traditional laws and customs. The oral

⁴⁵ Paul Ashton and Anna Clark, 'Introduction: Rethinking Australian History' in Paul Ashton and Anna Clark (eds), *Australian History Now* (NewSouth Publishing, 2013) 17.

⁴⁶ Stuart Macintyre and Anna Clark, *The History Wars* (Melbourne University Press, 2003) 149.

⁴⁷ *Native Title Act 1993* (Cth) s 223. *Western Australia v Ward* (2000) 99 FCR 316 [114]-[117] (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 1425; *Harrington Smith v State of Western Australia (No 7)* [2003] FCA 893.

⁴⁸ *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [951].

⁴⁹ *Native Title Act 1993* (Cth) s 82(1).

testimony of claimants is crucial to this process because they can offer first-hand accounts.⁵⁰ However, in most parts of Australia, this requires evidence that precedes the collective memory of living witnesses.⁵¹ Historians may be able to contribute to the process through examination of archival records. They are able to offer broad contextual knowledge based on their expertise and can draw on that knowledge to attribute meaning to the material traces of evidence available. Historians have particular skills to offer to this process based on their knowledge of working with colonial archives.

Public records are the basis of this form of historical analysis and the colonial venture in Australia amassed an enormous archive of documentation relating to the regulation of Aboriginal people. Bureaucratic record keeping is a well-established technology of control and colonial nations produce administrative records for national purposes in the affirmation of settler sovereignty. Colonial archives are therefore an unreliable source of historical authority because they largely reflect the perspective of the settler-colonial administration. However, as native title barrister, Tina Jowett, argues, in native title proceedings, historians can offer particular skills, firstly, in locating, reading, collating and distilling voluminous primary source documents, and secondly, using their knowledge of theories of historiography and epistemology to assist the court in interpreting those documents by examining the subjective perspectives of the authors and contextualising the observations for the court.⁵² Historians have particular skills in

⁵⁰ Evidence of an opinion expressed by a member of an Aboriginal and Torres Strait Islander group about the existence or content of the traditional laws and customs of the group may be given as an exception to the opinion rule: *Evidence Act 1995* (Cth) s 78A. This section was introduced under the *Evidence Amendment Act 2008* (Cth), subsequent to the recommendations of the Australian Law Reform Commission, *Uniform Evidence Law: Report* (No 102). It also exists in the NSW Act and in the more recent Uniform Evidence Law Acts in other jurisdictions.

⁵¹ Vance Hughston and Tina Jowett, 'In the Native Title "Hot Tub": Expert Conferences and Concurrent Expert Evidence in Native Title' (2014) 6 *Land, Rights, Laws: Issues of Native Title* 1.

⁵² Tina Jowett, 'Does an Historian have "specialised knowledge" to provide expert evidence in native title proceedings: Some recent issues' (Paper presented to AIATSIS Native Title Conference, Cairns, June 2007).

reading textual sources ‘against the grain’, including identifying silences, biases, contradictions and lies in the already problematic documentary trail of colonial history.⁵³

In the first case to be heard under native title legislation,⁵⁴ *Yorta Yorta*,⁵⁵ historiography was crucial to the outcome. The respondent, the State of Victoria, called two historians, Dr Marie Fels and Ms Susan Priestley and the applicants called anthropologist, Mr Rod Hagen, to present both historical and anthropological evidence. However, in his decision, Justice Olney relied to a large extent on his own interpretation of historical sources, namely, the published writings of a pastoral squatter and amateur ethnographer, Edward Curr, and the recorded observations of Chief Protector George Robinson. Justice Olney found the claimants’ oral testimony acceptable only where it was supported by the documentary evidence; this resulted in the decision that native title had been extinguished. In this way, he accepted on face value the observations of the colonists with a direct interest in dispossession of the Yorta Yorta people and used it as the standard for assessment of all other evidence. Justice Olney also drew inferences from an 1881 petition for land, submitted to the Governor of New South Wales, by 42 Indigenous people who had been dispossessed as a result of increasing use of the land for pastoral purposes, to find that the Yorta Yorta were ‘no longer in possession of their tribal lands and had ... ceased to observe those laws and customs based on tradition’.⁵⁶ In this way, Justice Olney performed the role of historian in interpreting the colonial archive, but failed to subject it to critical evaluation and to contextualise it in light of other evidence available. The approach taken by Justice Olney prompted an outcry

⁵³ For example, Bruce Pascoe has recently argued that, contrary to the accepted historical account of hunter-gatherer nomadic life style, Aboriginal people were actually engaged in agricultural and aqua-cultural methods and lived in permanent dwellings at the time settler colonists appeared in Australia. He claims that by examining the journals and diaries of explorers and colonists with a new historical perspective, ‘we see a vastly different world from the same window’: Bruce Pascoe, *Dark Emu* (Magabala Books, 2014) 12.

⁵⁴ *Native Title Act 1993* (Cth).

⁵⁵ [1998] FCA 1606 (18 December 1998).

⁵⁶ *Ibid* [121].

by historians and was described by Chief Justice Black, in minority on appeal, as erroneously adopting a ‘frozen in time’ approach.⁵⁷

The decision in *Yorta Yorta* established the evidentiary threshold for proof of the existence of native title, where Indigenous claimants are required to demonstrate that their ancestors were the original occupiers of the land in question and that they have maintained ongoing connection to country subsequent to European colonisation. Furthermore, in 1998, amendments were made to the *Native Title Act*, requiring the Federal Court to be bound by the rules of evidence when hearing native title claims, ‘except to the extent that the court otherwise orders’.⁵⁸ Prior to this amendment, s 82(3) of the *Native Title Act* provided that the court hearing native title claims ‘was not bound by technicalities, legal forms, or rules of evidence’. However, the Federal Court has rarely used its discretion to suspend the rules of evidence in native title hearings. In a 2005 review of the operation of evidence law, the Australian Law Reform Commission reported that evidence rules were applied inconsistently in native title cases, and how they were applied depended on counsel, judges and ‘improvised solutions’.⁵⁹

Justice Olney’s treatment of the historical evidence led to increased involvement of professional historians as expert witnesses in Indigenous claims. In a number of native title cases subsequent to *Yorta Yorta*, historians were commissioned by the parties to prepare reports and called as expert witnesses to give evidence. For example, in *Ward* (1998),⁶⁰ the applicants called Dr Christine Choo and Dr Bruce Shaw; the State of Western Australia called Dr Neville Green and the Northern Territory called Dr Cathie Clement. Each of these historians was briefed to provide reports, and gave evidence as

⁵⁷ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45, [64]-[76].

⁵⁸ *Native Title Amendment Act 1998* (Cth), inserting new s 82.

⁵⁹ Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2005) [19.68].

⁶⁰ *Ward on behalf of Miriuwung and Gajerrong People and Others v State of Western Australia and Others* (1998) 159 ALR 483.

experts. In *Daniel* (2003),⁶¹ the first applicant called two historians, Dr Christine Choo and Mr Tom Gara, and the first respondents called historian Dr Neville Green. In *De Rose* (2002),⁶² Dr Robert Foster gave expert evidence as an historian on behalf of the applicants on a variety of historical documents that he had been asked to examine and also wrote two reports. In *Neowarra* (2003),⁶³ Dr Fiona Skyring, an historian employed by the Kimberley Land Council, provided three written reports and gave oral evidence for the applicants and Dr Neville Green prepared a report for the State.

When a historian is commissioned by a party to conduct research and provide evidence, this is likely to be based upon analysis of archival documents held in government archives, such as a State Records Office or the National Archives of Australia, and archives of other agencies, such as religious or commercial enterprises; secondary sources in the form of local and family histories; witness statements and transcripts of evidence given as evidence in the proceedings; as well as books and other publications written by individuals who may have lived or worked in and around the claim area.

Anne Carter argues that historians can assist the legal process with two stages of inferential proof: firstly, by taking a ‘broad snapshot’ they can influence how courts assess what evidence is considered relevant. Secondly, their experience in interpreting the colonial archive can inform the types of inferences that can be drawn. Carter suggests that the requirement for inferential leaps in relation to the legal proof of facts in historical claims provides an opportunity for historians to contribute to the process because of their skills and experience in uncovering and understanding the evidentiary archive.⁶⁴ Furthermore, historians can offer their theoretical understanding of settler colonialism as part of the context of what remains as historical evidence.

⁶¹ *Daniel v State of Western Australia* [2003] FCA 666.

⁶² *De Rose v South Australia* [2002] FCA 1342.

⁶³ *Neowara v Western Australia* [2003] FCA 1402 (8 December 2003).

⁶⁴ Carter, above n 32.

However, the experience of historians as expert witnesses in native title litigation gave rise to contentions about the role of the experts from fields in the humanities. Debates focussed on the different approaches taken by lawyers and historians to questions of historical validation, particularly the way law and history define their relationship to the contested terms of evidence, truth and inference.⁶⁵ For centuries, law and history were seen to be closely related disciplines, and the traditional methodological approach of the historian and the judge were regarded as analogous, based on a shared commitment to common sense empiricism, processes of forensic inquiry,⁶⁶ and positivist conceptualisations of the notion of proof and its relationship to truth. However, there have been a number of important influences on the discipline of history over recent decades, including the cultural or linguistic turn in humanities scholarship through the influence of postmodernism, resulting in critiques of the universality of truth. Indigenous activism has also forced non-Indigenous historians to rethink the narratives they tell, leading to a burgeoning interest in oral and outsider histories. These developments have had a profound impact on the Australian settler colonial historiography.⁶⁷ However, law has been far less receptive to these theoretical developments, particularly in the context of legal practice and litigation. Practising lawyers and judges argue that legal proceedings are not about seeking access to the truth, but are rather a search for the facts.⁶⁸ Such an understanding is at odds with the epistemological framework of less empirical fields in the humanities, where inquiry is conducted in an interpretative manner, moral judgments are inextricable from the process and knowledge is always open to contestation. As Greg Lehman argues:

⁶⁵ McCalman and McGrath, above n 32; Paul and Gray, above n 32; Choo and Hollbach, above n 32.

⁶⁶ Carlo Ginzberg, 'Checking the Evidence: The Judge and the Historian' in Arnold I Davidson, James Chandler, and Harry Harootunian (eds), *Questions of Evidence: Proof, Practice and Persuasion Across the Disciplines* (University of Chicago Press, 1994) 291.

⁶⁷ Ann Curthoys and John Docker, *Is History Fiction?* (UNSW Press, 2006).

⁶⁸ Hal Wooten, 'Conflicting Imperatives: Pursuing Truth in the Courts' in Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (The Australian Academy of the Humanities, 2003), 16; Geoff Gray, 'Historians in the Courtroom: A Brief Consideration of Some Issues' in Mandy Paul and Geoffrey Gray (eds), *Through a Smoky Mirror: History and Native Title*, Native Title Research Series, (Aboriginal Studies Press, nd) 24.

[t]he historic event, which contains real acts, the archaeological site, containing real artefacts, the human life, containing real experience, are just snapshots in history. They are in themselves meaningless. Without an observer or an interpreter, they have no life, no implication for the present and no wisdom for the future. The space between the snapshots is a vacuum that necessarily fills — drawing interpretation from often competing and contradictory sources.⁶⁹

Mark Dreyfus, one of the counsel in the *Cubillo* case, argues that the difference between historiography and legal methodologies is that ‘historians construct narratives’ and that they are required to ‘select and order material’ and to offer interpretation, that ‘[d]ifferent historians will offer different narratives of the same set of events’, whereas in law ‘the document speaks for itself’.⁷⁰ He concludes that as a result of these different approaches, the law is ‘essentially unreceptive’ to historical methodology, a situation which he claims to be possibly ‘unresolvable’.⁷¹ Graeme Davison points out that it is only when history is argued as if it were law that law appears able to accommodate historical reasoning.⁷² In some instances, lawyers have accused historians of misunderstanding the role of the law and misconceiving its potential to address historical wrongs.⁷³ On the other hand, many historians have come to the conclusion that the legal process is unresponsive to the nuanced interpretation of historical sources that they are able to offer because of their professional skills. They argue that law employs a narrow, empirically based account that lacks contextual analysis. For example, historians acting as expert witnesses point out that they are often required to substantiate their conclusions with direct reference to identifiable passages in primary sources and to distinguish between ‘analysis, synthesis and summary of factual material on the

⁶⁹ Greg Lehman, ‘Telling Us True’ in Robert Manne (ed), *Whitewash: On Keith Windschuttle’s Fabrication of Aboriginal History* (Black Inc, 2003) 174, 176.

⁷⁰ Mark Dreyfus, ‘Historians in Court’ in Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (The Australian Academy of the Humanities, 2003), 79.

⁷¹ *Ibid* 78-9.

⁷² Graeme Davison, ‘History on the Witness Stand: Interrogating the Past’ in Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist as Expert* (The Australian Academy of the Humanities, 2003), 59.

⁷³ *Ibid* 65.

one hand, and the drawing of inferences on the other'.⁷⁴

Directions such as these have proven difficult for historians to satisfy. Fiona Skyring, who was employed by the Kimberley Land Council and provided expert evidence in four Kimberley native title claims in the Federal Court, has argued that attempts by legal counsel to limit or distort the contested nature of historiography and seek expert witness reports that are devoid of critical analysis risks damaging the reputation of history as a discipline. She suggests that the type of history that has been generated by the native title process is producing its own branch of historiography, which bears little relationship to historical scholarship because it often does no more than reproduce archival files without critical analysis.⁷⁵

III DISCIPLINARY CONFLICTS

It was during the early 1990s that the debate about Australian historiography became particularly polarised. In 1993, conservative historian, Geoffrey Blainey, delivered the Latham Lecture in which he coined phrases to describe the 'three cheers view of history', contrasting it with the 'black armband view'.⁷⁶ These expressions entered the Australian lexicon and, as Anna Clark points out, from this time, 'the increasing politicisation of Australia's past fundamentally changed the way history was perceived and

⁷⁴ *Harrington Smith (No 7)* [2003] FCA 893 at [40]. Subsequently, in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, historical reports were prepared by Mr Craig Muller and Mr Chris Stronach. In some cases, anthropologists' reports have also been subjected to judicial criticism for not clearly exposing the reasoning leading to the opinions arrived at and failing to meet the requirements of the Evidence Act. For example, in *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, expert reports of two anthropologists were subject to over 1000 objections.

⁷⁵ Fiona Skyring, 'History Wars: Debates about History in the Native Title Process' (2003) 23 *Studies in Western Australian History* 71.

⁷⁶ Geoffrey Blainey, 'Drawing up a Balance Sheet of Our History' (1993) 37(7-8) *Quadrant* 10.

employed'.⁷⁷

However, the work of Reynolds and other historians who were motivated to become involved in legal claims in support of Indigenous rights was not only criticised by conservative public commentators. They were also taken to task by academic historians on the grounds of their disciplinary methodology. Some characterised the approach as 'juridical history' — 'a kind of historical work that seeks to present past events in such a way as to enable a court of law or some such legal tribunal to address and redress historical processes in which the law has been historically implicated'.⁷⁸ Legal history, on the other hand, the critics argued, may be characterised as a dispassionate inquiry into the past in order to understand it, rather than pass judgement on it. These criticisms from the disciplinary field fed into the debates about the compatibility of historical scholarship to legal processes. I would argue that they contributed to historians' reticence to act as expert witnesses in legal proceedings.

The polarised and polemical disputes about Australia's settler colonial history extended well outside the academy to mainstream politics and media, and had profound effect on the history profession. It also inevitably extended to legal arenas, where historians claimed that they were having 'a hard time'⁷⁹ when appearing as expert witnesses and that they were required to defend their claims against stringent attack with specific reference to their disciplinary methodology.

For example, in *Risk* (2006),⁸⁰ Justice Mansfield held that the

⁷⁷ Anna Clark, 'The History Wars' in Paul Ashton and Anna Clark (eds), *Australian History Now* (NewSouth Publishing, 2013) 153.

⁷⁸ Bain Attwood, 'Returning to the Past: The South Australian Colonisation Commission, the Colonial Office and Aboriginal Title' (2013) 34 (1) *The Journal of Legal History* 50, 51.

⁷⁹ Curthoys, Genovese and Reilly, above n 9; McCalman and McGrath, above n 32, 83.

⁸⁰ *Risk v Northern Territory* (2006) FCA 404 (*Risk*).

historian, Dr Samantha Wells, ‘was not a dispassionate witness’ because she ‘clearly firmly believed in the reliability of the views she had expressed, and was anxious to persuade as to their accuracy’.⁸¹ Dr Wells provided expert evidence for the applicants, the Larrakia people, in relation to the absence of historical record. She appeared for three days, during which time she was examined and cross-examined as to the contents of her report and her methodology. Justice Mansfield described Dr Wells as someone ‘whose views are so firmly held’ that their evidence must be regarded ‘with some circumspection’ because of ‘the limitations on the material she had referred to, and that she had on occasions inferred a background or context to certain historical materials to understand them as consistent with her view’.⁸²

A watershed moment occurred in the treatment of historians as expert witnesses in Australian courts in the landmark action in relation to the stolen generations. In *Cubillo v Commonwealth*,⁸³ a number of historians were commissioned to conduct research and write reports and some were called as witnesses. Professor Ann McGrath was commissioned by the applicants to prepare a written report and was called to appear as an expert witness. Dr Peter Read was also commissioned by the applicants to conduct research and write a report, although he was not called as a witness. The respondent, the Commonwealth, called the historian Dr Neville Green.

In *Cubillo*, the respondents opposed the evidence of McGrath in its ‘entirety’, objecting to the ‘authenticity of a historian giving evidence in court’,⁸⁴ arguing that the role of the historian was ‘not dissimilar’ to that of the judge. McGrath’s written report was not received into evidence. She was, however, permitted to give oral testimony, on the basis of her report and any assertions she made were required to be substantiated through the presentation of her

⁸¹ Ibid [132].

⁸² Ibid [133].

⁸³ (2000) 174 ALR 97.

⁸⁴ Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O’Loughlin J, 21 September 1999) 3083.

documentary sources, so that the objectivity of her opinion could be evaluated by the court. She was subjected to vociferous and punctilious challenge under cross-examination, being asked to support each element in her reports with reference to textual extracts from primary source materials. During the final addresses, 85 pages of written submissions were tendered in objection to the evidence of McGrath and a further half-day was devoted to criticising her evidence during which counsel for the respondent argued that McGrath is a historian who utilises a ‘post-modernist analysis’ which placed ‘great emphasis on the significance of images, signs and language’, to the ‘exclusion of objective truth’.⁸⁵ Her evidence received cursory acknowledgment in Justice O’Loughlin’s decision.

The experience of McGrath in the *Cubillo* trial highlighted the challenge presented to law by the influence of postmodernism in humanities scholarship, including the writing of history. In history, the cultural turn resulted in greater acknowledgment of the unstable and partial nature of historical truth. However, as Davison points out, ‘[p]racticing lawyers have probably been much more resistant to these relativising influences than academic historians’.⁸⁶ Leigh Boucher argues that in the Australian context, ‘the history wars made the linguistic and cultural turns in academic Australian historical writing look historically and ethically suspect’.⁸⁷

Within these debates, it was therefore not uncommon for historians to be called upon to ‘play by the lawyers’ rules’,⁸⁸ and to be accused of a misconceived understanding of the role of the law. Practising lawyers and judges argued that the trial is not about seeking access to the truth, but is rather a search for the facts. Hal Wooten, for example, argued that ‘[h]umanists sometimes assume

⁸⁵ Transcript of Proceedings, *Cubillo v Commonwealth* (Federal Court, O’Loughlin J, 21 February 2000) 6494 (Meagher).

⁸⁶ Davison, above n 72, 54.

⁸⁷ Leigh Boucher, ‘New Cultural History and Australia’s Colonial Past’ in Paul Ashton and Anna Clark (eds), *Australian History Now* (NewSouth Publishing, 2013) 290.

⁸⁸ Davison, above n 72, 65.

... that courts are established for the purpose of ascertaining truth',⁸⁹ while 'others might talk of ascertaining the truth, lawyers usually talk of ascertaining "the facts"'.⁹⁰ Geoff Gray similarly argued that historians were displaying naivety in assuming that the 'court is concerned to discover the "truth"'.⁹¹ However, an empirical approach is inadequate to provide accounts of Indigenous history that draws on sources other than archival documents. As Indigenous historian Greg Lehman explains: 'For us, the truth is made up of countless contradictory, ironic and provocative elements, woven together into an allegorical, sometimes fictive documentation of what it is to live our lives'.⁹² Deborah Bird Rose described the experience of historians as expert witnesses as a collision between scholarship and adversarial cross-examination, which 'all too often ... failed to honour either the integrity of scholarship or the integrity of the system of justice that underwrote the whole process'.⁹³

In a pivotal study into the relationship between law and history in Australian jurisprudence, covering the period up until the early-2000s,⁹⁴ Ann Curthoys, Ann Genovese and Alexander Reilly found that courts may acknowledge that historians have particular skills in identifying relevant evidence in archival sources, but they have generally been resistant to the idea that they bring special interpretative skills to litigation. The authors of this study examined a number of cases where historical evidence was in contestation.⁹⁵

⁸⁹ Wooten, above n 68, 16.

⁹⁰ Ibid 18.

⁹¹ Gray, above n 68, 24.

⁹² Lehman, above n 69, 175.

⁹³ Deborah Bird Rose, 'Reflections on the use of Historical Evidence in the *Yorta Yorta* Case' in Mandy Paul and Geoffrey Gray (eds), *Through a Smoky Mirror: History and Native Title*, Native Title Research Series, (Aboriginal Studies Press, nd) 35.

⁹⁴ Curthoys, Genovese and Reilly, above n 9, 81-107.

⁹⁵ The cases covered in detail this study include: *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Yarmirr v The Northern Territory of Australia* (No 1) [1998] 771 FCA; *Yorta Yorta Aboriginal Community v State of Victoria* [1998] 1606 FCA; *Ward on behalf of the Miriuwung and Gajerrong People v State of Western Australia* (1998) 159 ALR 483; *Shaw v Wolf* (1998) 83 FCR 113; *Daniels v State of Western Australia* [2000] FCA 858; *Daniels v State of Western Australia* [2003] FCA 666; *De Rose v South Australia* [2002] FCA 1342; *Harrington Smith v Western Australia (No 7)* (2003) 130 FCR 424; *Risk*

They concluded that expert evidence from historians is most readily acceptable to law if it is methodologically antiquarian, delivering factual information about historical events based on documentary sources, and producing history that ‘reifies interpretative text over context’.⁹⁶ The more hermeneutic role of historiography, however, such as one that seeks to articulate a ‘redemptive Indigenous history’ is not acceptable because it is seen to encroach on the interpretative role of the legal decision-maker.

A *Historians out of the courtroom*

A number of developments have occurred in relation to the role of historians as experts in the decade since the study by Curthoys, Genovese and Reilly. My research examining cases heard in the Federal Court since this time indicates that the collision that occurred between historians and the law in Australian courts has now resulted in an *impasse*. In the decade post-*Mabo* until the early 2000s, historians were routinely called upon to participate in litigation as expert witnesses in native title and other Indigenous claims; however, this is no longer the case.⁹⁷ I suggest that this trend to exclude historians as expert witnesses indicates that Australian courts are generally resistant to the critical methodological approach to historical analysis employed by many scholarly historians. Within the discipline of Australian history, many historians, particularly those who work in good faith with Indigenous people, have been forced to rethink the theoretical terms and assumptions of history. Minoru Hokari argued that Australian Aboriginal historiography can be described as a process that has involved approaches ‘moving as close as possible to Aboriginal pasts’.⁹⁸ Across generations,

v Northern Territory [2006] FCA 404; *Cubillo v Commonwealth* (2000) 174 ALR 97.

⁹⁶ Curthoys, Genovese and Reilly, above n 9, 137.

⁹⁷ Nevertheless, anthropologists have continued to appear regularly in native title litigation, sometimes providing their opinions based on historical evidence. For example, in *Alyawarr, Kaytetye, Warumungu, Wakay Native title Claim Group v Northern Territory of Australia* [2004] FCA 472 an historical report was prepared by Dr Petronella Vaarzon-Morel, an anthropologist.

⁹⁸ Minoru Hokari, *Gurindji Journey: A Japanese History in the Outback* (UNSW Press 2011) 244.

historians have pursued methodologies which have resulted in less essentialising approach to Aboriginal history. However, throughout these theoretical movements, law practiced in courts has maintained a preference for empirical, positivist historical evidence that is readily incorporated into the common law, subject to legal rules and the process of judicial assessment.⁹⁹

There are occasions during this period where historians have been commissioned to produce written reports based on archival research that has been subsequently admitted into evidence and drawn upon in judicial assessment. These research reports often take the form of compendiums of information drawn directly from archival sources and may therefore lack the form of contextual interpretation that is central to history. Historical documents do not ‘speak for themselves’ and cannot be used as a solid basis for objective knowledge. Judges may not necessarily grasp their meaning and implications because they may overlook the extent to which they are created by individuals and are therefore ‘just as subjective and contingent as other forms of evidence’.¹⁰⁰ Furthermore, documents alone do not provide narrative coherence, which some argue is necessary in legal discourse. When historians do not participate directly in litigation, they are not able to offer their skills in contextual reading of archives and drawing inferences. Nor are they subjected to examination and cross-examination.

For example, in *Akiba* (2010),¹⁰¹ a native title claim over an area of the Torres Strait, the applicant tendered reports prepared by seven

⁹⁹ Interestingly, Ashby Wilson has also found, in the context of international criminal courts, that there has been a shift in the way expert witness historians have been employed. Initially, historians were asked to give ‘compendious and generalizing histories’ about the background leading to war crimes. Later, prosecutors reverted to a more ‘cautious and limited role for historical reports and expert testimony’: Ashby Wilson, above n 6.

¹⁰⁰ Ibid 216.

¹⁰¹ *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643. Also, in *Lardil Peoples v Queensland*, the applicants relied upon historical evidence provided by Dr Fiona Skyring who prepared two reports received in evidence: [2004] FCA 298, [642]-[718].

experts, including one historian, Dr Steve Mullins. A conference of anthropological experts was ordered, two reports prepared and three anthropologists appeared as witnesses. However, while Justice Finn described the historian's report as 'a very useful aid', Mullins was not called as a witness to speak to his report, nor subjected to cross-examination. This is despite the fact that the judge described the case as uncharacteristically one in which there was an uncommonly large and informative historical record and one in which the opinions of experts is valuable. Justice Finn devoted considerable attention in his judgment to the evidence presented in Mullins' report. Importantly, the historical account of the occupation of the Torres Strait provided in summary the judgment, drawn from Mullins' report and based on historical archival and secondary scholarly sources is preserved in the common law. As Alexander Reilly points out, as a result of native title litigation, history is being interrogated in new ways and is resulting in historiography in the form of summaries of historical evidence.¹⁰²

In *Gale* (2004),¹⁰³ two historians, one pre-history expert, and two anthropologists prepared reports for the applicants and one historian and one anthropologist prepared reports for the respondent, however, none of these experts were called to give testimony.¹⁰⁴ Nevertheless, the court relied upon the evidence of the historians to a significant extent. Almost the entire judgment is based on material adduced by the historians, both for the applicants and the State. In his decision, Justice Madgwick commented on the inability to test the evidence of the experts in the proceedings.

However, in *CG (Deceased) on behalf of the Badimia People v State of WA*,¹⁰⁵ the historian Dr Christine Choo prepared two reports for the applicants. In her first report, she drew on primary archival

¹⁰² Alexander Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453, 454.

¹⁰³ *Gale v Minister for Land & Water Conservation for the State of New South Wales* [2004] FCA 374.

¹⁰⁴ Dr James Kohen, Mr Jack Brook and Ms Waters for the applicants and Professor Ward for the respondent.

¹⁰⁵ [2015] FCA 204.

documents held in the State Records Office of WA and Commonwealth archives, files generated by the Aborigines Protection Board, the Aboriginal Department and policy department files, primary archival documents held in private archives and secondary sources in the form of local and family histories. Importantly, in her report, Choo pointed out that there is a paucity of secondary sources on the claim area apart from local and family histories to commemorate events of significance to European settlers and that as such the documents are highly Eurocentric in content and approach. However, Choo was able to provide evidence of Aboriginal occupation of the claim area through a careful reading of primary sources and the drawing of inferences. Her reports were discussed and relied upon substantially by Justice Barker to determine that the claimants were descendants of ancestors who had rights and interests in the claim area.

Graeme Davison points out that it is only when history is argued as if it were law that law appears able to accommodate historical reasoning.¹⁰⁶ In this way, historical evidence is only accepted by law when it can be subsumed *into* law, so that law can claim history as itself. The propensity for law to regard legal history, that is, the history of legal doctrine and the rules of precedent, as the only valid source of history, or historiography, in the courtroom, reveals the way law conceptualises both itself and the past. By privileging forms of rational knowledge as expertise, the laws of evidence are seen to emulate scientific models of proof. The exclusion of other forms of knowledge, such as history, serves to negate law's own interpretative, hermeneutic practices.

IV CONCLUSION

Douzinas may be correct to argue that legal claims concerning historical injustices seek a form of redemptive history. However, in settler colonial contexts such as Australia, there is an obligation to respond to such claims because there is continued benefit derived

¹⁰⁶ Davison, above n 72, 59.

from the original violence of colonisation. This necessarily involves an investigation into what happened in the past, with a view to understanding what it means in the present. This is a process that is greatly assisted by the skills offered by historians.

In the early 1990s, Indigenous native title claims, compensation to members of the stolen generations and actions in cultural heritage provided opportunities for historians to act as expert witnesses. While initially, courts appeared receptive to evidence from historians, the research reported upon here indicates that this situation has not been sustained. Historians often found that their particular expertise in reading and interpreting archival sources was not accorded sufficient weight. Judicial officers, on the other hand, sometimes raised concerns about the inability of historians to distinguish their opinions from the facts that form the basis of their opinions, a requirement of evidence law.

During this time, the ‘history wars’ emerged in Australian political discourse. It is not a coincidence that the emergence of native title jurisprudence during the 1990s coincided with public debates about the role of history and historians in the national imaginary and with renewed approaches to Australian historiography. It also coincided with disputes about Australian history and a public campaign to discredit Australian historians who had provided critical accounts of settler colonial history that were at odds with the celebratory and nationalistic accounts which had dominated the popular imaginary. Some historians were accused of fabricating and misrepresenting historical evidence and of advocating political positions, ‘of colluding to deface the past’,¹⁰⁷ rather than adhering to factual evidence found in archival sources.¹⁰⁸ These debates, and the way in which they were deployed for political gain, had a profound impact on public perceptions of the role of historians in narrating the nation.

¹⁰⁷ Stuart MacIntyre (ed), *The Historian’s Conscience: Australian Historians on the Ethics of HIStory* (Melbourne University Press, 2004) 2.

¹⁰⁸ MacIntyre and Clark, above n 22.

The research presented in this paper suggests that the antagonism and scepticism towards historians expressed in the Australian history wars has had an impact on legal proceedings where historians appear as expert witnesses. From the early 1990s, in the wake of the *Mabo* decision, historians began appearing in Indigenous claims for native title and reparatory justice. However, these interdisciplinary encounters, where humanists appeared in legal proceedings, provoked anxiety about the role of historians, and reflected debates occurring in the mainstream in Australia as part of the history wars. This has resulted in a diminished role for historians, who, since the early 2000s, have rarely appeared in Australian legal proceedings. As Anna Clark points out, the history wars highlight a paradox — ‘the tension between collective remembering and establishing a national legacy for the future’ — which demonstrates that their impact is not simply about contrasting interpretations of the past, but also about the utility of that history.¹⁰⁹ It is unfortunate that one of the ramifications of the history wars has been the retreat of historians as expert witnesses from legal proceedings.

¹⁰⁹ Clark, above n 77, 161.