



Chapter Title: The Tide of History

Book Title: Edward M. Curr and the Tide of History

Book Author(s): Samuel Furphy

Published by: ANU Press

Stable URL: <https://www.jstor.org/stable/j.ctt2jbksj.17>

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12. The Tide of History

The publication of *The Australian Race* was Curr's last major achievement. On 3 August 1889 he died at Alma House and was buried alongside his wife in the St Kilda Cemetery. He had retired from his position as Chief Inspector of Stock only a few days earlier. In appreciation of Curr's outstanding service to the colony's pastoral industry, the Victorian Parliament voted him nine months' salary. His estate was valued at over £2,600 and was bequeathed entirely to his eldest son.¹ Using these funds, E.M.V. Curr consolidated his property 'Murrumbogie', near Trundle, New South Wales – by 1890 he owned over 5,000 acres of freehold land, most of which remains in the Curr family's possession to this day.²

Following Curr's death lengthy obituaries appeared in several Australian newspapers.³ Unsurprisingly, they focussed on his professional achievements as Chief Inspector of Stock, hailing his successful program for eradicating scab from the Victorian flocks. His father's key role in achieving Victoria's separation from New South Wales also attracted considerable comment. One of the few observations about Curr's personal attributes appeared in the *Sydney Mail*: 'Those who knew him best regarded him as a good, earnest, honest man'.⁴ Of Curr's published works, *Pure Saddle Horses* and *The Australian Race* were viewed as the most significant, while *Recollections of Squatting in Victoria* attracted little comment. Similarly, in his 1888 survey of *Victoria and its Metropolis*, Andrew Sutherland reserved special praise for Curr's ethnological writings: he certainly recognised the value of *Recollections of Squatting in Victoria* and its 'graphic account of the life of the early pioneers', but described *The Australian Race* as 'the most complete and judicious account ever given to the world in reference to this fast-vanishing race'.⁵ Sutherland predicted that it would 'attain to an always increasing reputation'. As it turned out, Sutherland was wrong: in the fast-evolving discipline of anthropology Curr's ethnological work was quickly superseded. Increasingly, it was Curr's vast collection of ethnographic data that attracted the most praise, not his attempt to interpret this data.

As we have seen, *The Australian Race* created considerable controversy when it was first published, as ethnological rivals defended their own positions in response to Curr's bold criticisms. The most notable of these was A.W. Howitt, who responded to Curr in two articles, one of which was published in the

1 Edward M. Curr, Wills and Probate: PROV, VPRS 28/P2, Units 266, 494, Item 40/072; VPRS 7951/P2, Unit 150, Item 40/072.

2 Curr 1979: 69.

3 See, for example, *Australasian, Leader, Sydney Mail*, all on 10 August 1889.

4 Obituary: Edward M. Curr, *Sydney Mail*, 10 August 1889: 286.

5 Sutherland 1888: 502.

journal of the Anthropological Institute in London.⁶ It seems likely that Howitt's influence ensured *The Australian Race* was not reviewed in the institute's journal; alternatively, James Dawson's scathing letter to the secretary of the Aborigines Protection Society, which was forwarded to the institute, might have exerted an influence.⁷ A review of *The Australian Race* did appear in the journal of the Royal Geographical Society, written by the society's secretary John Scott Keltie, who briefly noted the value of Curr's work as an empirical resource: 'Mr. Curr states in his introduction that he has not made ethnology a study. There is, however, much fact (requiring sifting, no doubt) in these volumes, and little theory'.⁸ Like W.H. Flower of the Anthropological Institute, who had reviewed Curr's work before publication, Keltie saw Curr's contribution primarily as a fact-gatherer.

In 1899 Spencer and Gillen dedicated their landmark work on *The Native Tribes of Central Australia* to Howitt and Fison, 'who laid the foundation of our knowledge of Australian anthropology'. In it they disputed Curr's view that Aboriginal society lacked a meaningful form of government; otherwise, their only mention of Curr was his description of sub-incision as 'the Terrible Rite', a term they thought 'may well be discarded'.⁹ Five years later A.W. Howitt published *The Native Tribes of South-East Australia* (1904), in which he once again drew attention to Curr's errors regarding Aboriginal kinship terminology. He prefaced his comments with an observation of broader relevance to the difficulties of ethnological research:

In order to grasp the true nature and bearing of the classificatory system of relationships, it is necessary not only to free oneself from misconceptions, as to the universal use of our own system, but also to have such an acquaintance with the nature of a savage as to be able to put oneself mentally into his place, think with his thoughts, and reason with his mind; unless this be done, the classificatory system will be a delusion and a snare.

Howitt insisted that a prevalent ignorance of kinship systems was 'strongly brought out in the late Mr. E. M. Curr's work' and cautioned his reader to use *The Australian Race* with care: 'It greatly detracts from the usefulness and value of Mr. Curr's work that he did not make himself aware of the native system of relationships'.¹⁰

6 Howitt 1891: 30–104.

7 James Dawson to F.W. Chesson, Secretary of the Society for the Protection of Aborigines, 11 November 1887, State Library of New South Wales, MLDOC 1747.

8 Keltie 1888: 254.

9 Spencer and Gillen 1899: 15, 263.

10 Howitt 1904: 157–158.

Not all of Curr's Australian contemporaries were so critical. In *Eaglehawk and Crow* (1899) John Mathew significantly revised Curr's theories regarding both Aboriginal racial origins and routes of migration, but he explained that he had been 'compelled by the logic of facts' to reject the conclusions of '[his] friend Mr. Curr'. He stressed that he was 'specially indebted' to Curr's work and referred often to *The Australian Race* in mounting his own theories.¹¹ As noted, Curr had published Mathew's account of the Kabi in *The Australian Race*, but had prefaced it with a back-handed compliment that attributed its fullness to Mathew's 'love of ethnological studies' rather than the 'ripe knowledge which results from long experience'.¹² Nevertheless, Mathew clearly retained some respect for Curr, who had mentored him during his early ethnological studies, and with whom he shared an interest in comparative philology.¹³ The prolific anthropologist R.H. Mathews was also less critical than Howitt or Spencer. In an article in the *Journal of the Anthropological Institute* in 1896 he described *The Australia Race* as a 'valuable work', while two years later in *American Anthropologist* he quoted Curr regularly and with a level of trust not shared by some of his contemporaries.¹⁴

An ambivalent attitude to Curr is also evident in the international scholarly networks of the early twentieth century. The German ethnologist Fritz Graebner, who was interned in Australia during World War I, considered *The Australian Race* to be 'so worthless a book' that he chastised the sociologist Edward Westermarck for even quoting it. Westermarck resisted such prejudice, deferring to the assessment of his student Bronislaw Malinowski that Curr had 'especially good opportunities' to observe Aboriginal custom first hand. In his 1913 study of *The Family Among the Australian Aborigines*, Malinowski often cited Curr; in fact, he expressed more suspicion regarding the work of Howitt and Spencer, who, he suggested, did not adequately explain 'the way in which they obtained their information'.¹⁵

For much of the twentieth century the discipline of anthropology in Australia was associated with A.P. Elkin, who occupied the chair of anthropology at the University of Sydney from 1933. Elkin's assessment of Curr is worth considering in some detail. In *The Australian Aborigines* (1938) Elkin did not cite Curr directly, but he included *The Australian Race* in a recommended reading list at the back of his volume. Significantly, however, Curr was grouped in the category 'Older Books: Compilations' along with such contemporaries as Smyth and Taplin. In contrast, Howitt, Spencer and Mathew were included in

11 Mathew 1899: ix–x.

12 Curr 1886, vol 3: 120–121.

13 Prentis 1998: 76–77.

14 Mathews 1896: 145–163; Mathews 1898: 325–343.

15 Westermarck 1921: 13; Malinowski 1913: 22–23.

the category 'Older Books: The Classics'.¹⁶ Ronald and Catherine Berndt later followed Elkin's lead, suggesting that Curr's key contribution was the wealth of material he compiled.¹⁷ In 1938 Elkin had also edited a volume titled *Studies in Australian Linguistics*, in which he assessed the collected vocabularies of Curr and Smyth: 'Careful sieving reveals some material of value, but they are very inadequate. They tell us so little about the language, and almost nothing about its part in the culture as a whole'.¹⁸ The pioneering Australian linguist A.A. Capell was similarly ambivalent, noting Curr's significant early contribution but stressing that he had 'no phonetic system at all'.¹⁹ In the middle part of his career Elkin apparently placed little value on Curr's interpretive ability. Shortly after his retirement, however, Elkin moderated this stance and concluded that Curr deserved a more prominent place in the history of his discipline. During a presidential address to the Anthropological Society of New South Wales in 1958, Elkin insisted that Curr and similar contemporaries 'were not merely collators and editors', but contributed their own views and theories and (importantly) had 'gathered some of their information at first hand'.²⁰

In his eighties Elkin published a two-part article in *Oceania*, the main purpose of which was to grant the prolific R.H. Mathews due credit for his remarkable but often-overlooked career.²¹ Significantly, however, Elkin also included Curr in his list of the ten 'founders of social anthropology in Australia'. Elkin expressed gratitude that Curr had collected ethnographic data on such a broad scale, as 'most of the tribes concerned were already dying out in the 1880s'. More significantly, however, he added that Curr deserved recognition for 'his ethnological and theoretical study of the Aborigines, their language, culture and origin'. Although Elkin disputed Curr's narrow assumptions regarding cultural diffusion, he nonetheless took Curr's contribution seriously. Moreover, he praised Curr's 'critical discussion of marriage rules' and applauded his critique of Fison's theoretical approach to Aboriginal marriage custom. Describing Fison's research as 'positive and stimulating, but ... of the arm-chair variety', Elkin saw value in the fact that Curr personally collected at least some of his data. Moreover, Curr's preference for facts over theory had exposed many flaws in Fison's analysis. Elkin noted that Curr 'like many non-academics, was biased against such theorising', but insisted that Curr's critique was not superficial: 'We cannot but appreciate Curr's insight'. Following Malinowski, Elkin commended Curr's 'arithmetical proof' that James Dawson could not be correct in his assertions regarding 'the tribal chief and the number of his wives, children and attendants'. Finally, Elkin concluded that Curr 'had greater personal experience and sound observation

16 Elkin 1938b: 389.

17 Berndt and Berndt 1964: 537.

18 Elkin 1938a: 9.

19 Capell 1963: 151.

20 Elkin 1958: 226.

21 Elkin 1975; Thomas 2011: 83.

[of Aboriginal society] than possibly any other investigator up to his time'. One might speculate that nearly two decades after his retirement Elkin thought it was time to give proper recognition to the important early role of untrained amateurs like Curr, even if their influence was not as great as the towering figures of Howitt and Spencer.²²

A Sympathetic Observer?

The republication of *Recollections of Squatting in Victoria* in 1965 introduced Curr's engaging prose to a new generation of readers and scholars in a period when interest in Australian history was growing. Widely available in libraries and written in accessible and lucid language, Curr's memoir quickly became a standard source, prompting the historian Marie Fels to describe it as 'almost a sacred text, with considerable power over the present'.²³ A common assumption in this period was that Curr was unusually sympathetic to Aboriginal people. This view derived from several nostalgic passages in Curr's own memoir, but certainly overlooked his prominent role in Aboriginal administration, where he pursued a policy of strict discipline for 'childlike' Aborigines. In his introduction to the 1965 abridged edition of *Recollections of Squatting in Victoria*, the schoolteacher and local historian Harley W. Forster wrote that Curr was 'one of the more sensitive participators in the birth of a colony'.²⁴ Reviewing Curr's memoir the following year, Russel Ward took a similar view, arguing that 'our ancestors were not uniquely wicked – or ignorant'.²⁵ To demonstrate his point, Ward quoted a passage from Curr's memoir:

But notwithstanding many differences between the Black and the White man, their sympathies, likes, and dislikes were very much what ours would have been if similarly situated; so that a very limited experience enabled both parties to understand and appreciate the position of the other. This fact only gradually dawned on me, as I had somehow started with the idea that I should find the Blacks as different from the White man in mind as they are in colour.²⁶

Ward not unreasonably concluded that Curr showed more empathy than many of his contemporaries, but by implying a marked sympathy for Aboriginal people he painted a simplistic picture. The same is true of Harley Forster's

22 Elkin 1975: 12–15.

23 Fels 1988: 159.

24 Forster 1965a: vii.

25 Russel Ward, 'An early study of Black and White', *Sydney Morning Herald*, 15 January 1966.

26 Curr 1883: 93 quoted in Ward 1966.

1969 entry for Curr in the *Australian Dictionary of Biography* (ADB), which has undoubtedly bolstered the credibility of Curr's writings on Aboriginal people. Forster's account featured the following conclusion regarding Curr's legacy:

His portrayal of station life in the western Goulburn Valley and his work on the Aboriginals of Victoria are of merit. His approach to these people, now almost extinct, and to his fellow squatters reveals sympathetic understanding, and his writings increase the knowledge of early Victoria.²⁷

By neglecting to mention Curr's role in Aboriginal administration, Forster and the ADB certainly missed an opportunity to provide a fuller account of his attitude to Aboriginal people.²⁸ Biographical dictionaries are an important resource for scholars engaged on broader projects: they have the potential to shape dominant views of individuals and to influence how significant historical texts are interpreted. This certainly seems to have been the case with Curr's entry in the *Australian Dictionary of Biography*, as many have accepted its broad conclusion regarding Curr's sympathetic understanding of Aboriginal people. As recently as 2004 the *Oxford Dictionary of National Biography* published a new account of Curr's life written by the historical geographer J.M. Powell, who further exaggerated Curr's concern for Aborigines: 'His later works are highly valued for their atypically sympathetic approach to the indigenous peoples'.²⁹

Curr's role in Aboriginal administration suggests that his reputation for sympathy towards Aboriginal people requires reassessment and careful qualification. A related and arguably more important consideration is the extent of Curr's authority as an observer of Aboriginal custom. In *Triumph of the Nomads* (1975) Geoffrey Blainey described Curr as 'one of the sharpest observers of tribal life'.³⁰ With the rise in popularity of Aboriginal history in the 1980s a more complicated picture began to emerge. Some scholars continued to see considerable value in Curr's work, particularly his ethnological magnum opus *The Australian Race*. Henry Reynolds, for example, praised Curr's general overview of frontier violence, while Noel Butlin admired Curr's theories about Aboriginal population decline.³¹ Meanwhile, the anthropologist and pioneer of Aboriginal history Diane Barwick began to pay closer attention to Curr's forgotten role in Aboriginal administration. She identified his leading part in the attempt of the Board for the Protection of Aborigines to close the Coranderrk

27 Forster 1969: 508.

28 It should be noted that the editor of the *Australian Dictionary of Biography* altered Forster's conclusion prior to its publication. An earlier draft read: 'The approach to his fellow squatters and to the aborigines shown in his writings was *generally* one of sympathetic understanding' (emphasis added). See the ADB file for Curr: 'Curr, Edward (1820–1889)', Australian National University Archives, ANU A 312, Box 153.

29 Powell 2004.

30 Blainey 1975: 97.

31 Reynolds 1982: 50; Butlin 1983: 129.

reserve and relocate its discontented residents. In particular, she drew attention to the evidence Curr gave to a Royal Commission on Aborigines in 1877 and a parliamentary inquiry in 1881, when he likened Aboriginal people to children or lunatics.³²

Unlike earlier critics, Barwick identified the political and ideological dimensions of Curr's work.³³ Drawing a link between his ethnographic writings and the repressive regimes he advocated for Aboriginal people, she encouraged a more critical view of Curr than had previously been common. Others in the field of Aboriginal history, such as Marie Hansen Fels, soon expressed similar reservations about Curr's influence.³⁴ As a postcolonial view of Australia's past became more common, scholars increasingly began to question the underlying motives of those who wrote about Aboriginal people. This all came to a head following the *Yorta Yorta* native title case, when anthropologists, historians and legal scholars mounted a sustained scholarly critique, both of Curr writings on Aboriginal people, and of the way these writings were utilised in the *Yorta Yorta* case.

Edward M. Curr and the Yorta Yorta Case

The *Yorta Yorta* native title case was one of the first to be heard by the Federal Court of Australia following the landmark *Mabo* judgement of 1992 and the *Native Title Act* of 1993. It was an important test case for native title law. Commencing in October 1996, the court sat for 114 days and heard from 211 witnesses. On 18 December 1998 Justice Howard Olney concluded that 'the tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs'.³⁵ Many critics quickly disparaged Justice Olney's choice of words: one asked, 'Tide of History or Tsunami?'; while others suggested that the unsuccessful claimants were 'Awash in Colonialism'.³⁶ David Ritter has traced the genealogy of the 'tide of history' metaphor, noting its prevalence in religious, philosophical and historical discourse. In the Australian context, he cites A.W. Howitt as a notable proponent, who wrote of the 'tide' of settlement 'breaking the native tribes with its first waves and overwhelming their wrecks with its floods'.³⁷ For a similar metaphorical representation of the apparently inexorable process of

32 Barwick 1984: 100–131; Barwick 1998.

33 Barwick 1984: 103; Barwick 1998.

34 Fels 1988: 159.

35 *Members of the Yorta Yorta Aboriginal Community v Victoria* (1998) FCA 1606, [129].

36 Case 1998: 17–19; Kerruish and Perrin 1999: 3–8.

37 A.W. Howitt, quoted in Ritter 2004: 114.

colonisation, Ritter might also have looked to Edward M. Curr, who lamented the destruction of Aboriginal society in his 1883 memoir: 'our civilisation has rolled over thee ... somewhat rudely since those times'.³⁸

The *Yorta Yorta* case demonstrated the important role of historical inquiry within the native title process: to establish the nature of the traditional laws and customs in which native title rights reside; and to decide if claimants have appropriately and continuously exercised those rights. As Ritter astutely observed, 'if applicants do not "win the historiography," they will lose the case'.³⁹ Consequently, historical methodology underpins many of the fundamental debates surrounding native title. A significant theme in these debates is the extent to which legal and historiographical standards diverge. This has led to a wealth of scholarship inquiring into the relationship between history and the law, and indeed, other relevant disciplines.⁴⁰ Edward M. Curr has loomed large in many of these discussions. During a cross-disciplinary conference of native title practitioners held in 2000, Curr's posthumous role in the *Yorta Yorta* case was a common point of reference in the wider debate.⁴¹

Many critics noted the extent to which the *Yorta Yorta* judgement privileged written evidence.⁴² Ben Golder, for example, characterised Justice Olney's historiographical technique as 'prioritising the specious neutrality of the written word over the tendentious malleability of the oral'.⁴³ Justice Olney had argued that 'evidence based on oral tradition passed down from generation to generation does not gain in strength or credit through embellishment by the recipients of the tradition'. Moreover, he stated that an 'unfortunate aspect' of the *Yorta Yorta* evidence in the case was 'frequent, and in some instances, prolonged, outbursts of what can only be regarded as ... righteous indignation'. In contrast he concluded that Curr 'clearly established a degree of rapport with the local Aboriginal people and subsequently published two valuable works dealing with his experiences'. Following this reasoning, Justice Olney concluded that 'less weight should be accorded to [Yorta Yorta oral evidence] than to the information recorded by Curr'.⁴⁴ Although the judge's scepticism of oral history is not entirely misplaced, it must equally be recognised that written accounts such as Curr's, when republished or cited in historical articles and books, neither 'gain in strength or credit' as a result. Intelligent and nuanced

38 Curr 1883: 435–436.

39 Ritter 2002: 81.

40 Paul and Gray 2002; Toussaint 2004; Curthoys, Genovese and Reilly 2008.

41 Toussaint 2004: 3.

42 Pitty 1998: (41)–61; Finlayson 1998: 85–98; Kerruish and Perrin 1999; Choo 2004: 198.

43 Golder 2004: 51.

44 *Yorta Yorta v Victoria* (1998), [14, 21, 53, 106].

historical inquiry requires an appreciation of the strengths and weaknesses of oral history; similarly, however, a healthy scepticism of written evidence will help avoid the naïve simplicity of narrow-minded empiricism.

Edward M. Curr's written works fitted neatly into the particular historiographical framework with which Justice Olney was familiar. In *Rights and Redemption: History, Law and Indigenous Peoples*, Ann Curthoys, Ann Genovese and Alexander Reilly describe in detail the discipline of 'legal history' and identify its key points of divergence from wider historiographical practice.⁴⁵ They astutely observe that the law has not only a particular view of how historians study the past, but also 'an autonomous historical methodology of its own'. Legal history is 'a specific genre of history writing', routinely taught in law schools and pervasive in its influence on how lawyers perceive history more generally. The purview of legal history is circumscribed; it maps the development of sovereign law using the written sources that constitute its canon. Furthermore, the relationship between sovereign law and the society it governs are outside the scope of traditional legal history, which is 'internal' in its focus. The legitimate evidence of traditional legal history is thus both abundant and contained, in stark contrast to the diverse and sparse historical evidence often presented in native title cases. Curthoys, Genovese and Reilly explore the implications of this 'juridical frame' on various cases involving Indigenous peoples. They suggest that despite fruitful inter-disciplinary collaboration in the native title era the decisions of Australia's major courts continue to promote a narrow view of historiography that is typical of traditional legal history. They also report a pervasive mistrust of the historian as an expert witness, which has hampered a meaningful dialogue between history and the law surrounding the evidence used in native title courts. The role of Curr in the *Yorta Yorta* case is a clear example of how this common judicial approach to history differs from wider historiographical practice, particularly as it concerns Indigenous peoples.

Justice Olney's Use of Curr

Justice Olney assumed that Curr's written account was largely free from the bias he attributed to the oral testimony of the Yorta Yorta people. He stated that he was 'conscious of the need to avoid assuming the role of historian' but also rejected the contribution of various expert witnesses, whose evidence he found unhelpful.⁴⁶ As a result he concluded that 'the Court must have resort to

45 Curthoys, Genovese and Reilly 2008: 138–143.

46 *Yorta Yorta v Victoria* (1998), [26].

such credible primary evidence as is available and apply the normal processes of analysis and reason'.⁴⁷ These 'normal processes' appear, however, to be a poor guarantee of historical truth.

Justice Olney's most obvious error was his inadequate recognition of the lapse of time between Curr's years as a squatter and the publication of his memoir. For example, he misleadingly equated 'the recorded observations' of Curr and the Chief Protector of Aborigines, George Robinson.⁴⁸ There are fundamental differences between the written works of these two men: Robinson wrote his diaries in the 1840s and, in Justice Olney's own words, 'made no attempt to collate or interpret' the 'many details' that he recorded; in contrast, Curr wrote his book nearly four decades later, when he compiled a nostalgic memoir for the general entertainment of a British colonial readership. For Justice Olney, Robinson's journal was 'extremely hard to decipher', while Curr 'published two valuable works dealing with his experiences'.⁴⁹ It is clear that Justice Olney gauged the relative value of Curr and Robinson's writings by their clarity of written expression, rather than their likely accuracy. As a result, he readily accepted the nostalgic recollections of a squatter who had dispossessed the claimants, while shunning the unedited, day-to-day journal of a man whose job it was to observe Aborigines and to record ethnographic details.⁵⁰ Although Justice Olney recognised that Curr was 'not averse to a degree of speculation', he was confident he could distinguish Curr's speculation from 'his record of his own observations' simply by analysing the texts presented to him.⁵¹ He did this, however, without the aid of historical and biographical context, which would have helped him to identify those moments when Curr's recollections distort the truth through selective presentation of material, through a failing memory, through nostalgia, not to mention through cultural bias.

In part, Justice Olney's reliance on Curr was motivated by a belief that he was sympathetic to the Aboriginal people he encountered. This view has been pervasive in Australian historiography, as we have seen, but by characterising Curr as a sympathetic pastoralist, Justice Olney glossed over Curr's status as a primary dispossessor of the Yorta Yorta people. For example, he wrote in his judgement: 'Even Curr, who generally enjoyed a good relationship with the indigenous people, on establishing an outstation on the northern side of the Murray had his shepherds attacked and sheep driven off'.⁵² This is a curiously one-sided reference to an extended conflict between Curr and the Bangerang people in 1842–43, which resulted in the spearing of 200 of Curr's sheep,

47 *Yorta Yorta v Victoria* (1998), [62].

48 *Yorta Yorta v Victoria* (1998), [54].

49 *Yorta Yorta v Victoria* (1998), [53].

50 Pitty 1998: 48–49.

51 *Yorta Yorta v Victoria* (1998), [106].

52 *Yorta Yorta v Victoria* (1998), [34].

the arbitrary murder by border police of a Bangerang man, the wounding of Captain Dana (Commander of the Native Police Corps) during a reprisal raid, and the subsequent imprisonment and farcical trial of the supposed Aboriginal 'ringleader'. In the 1880s Curr recounted this tale with some regret, but also with humour and irony.⁵³ As has been shown, however, the contemporary record paints a clearer picture of the dispute over land that was at the heart of the conflict.

Having judged Curr 'the most credible source of information concerning the traditional laws and customs' of the Yorta Yorta people, he proceeded to present a literal reading of several passages from *Recollections of Squatting in Victoria*.⁵⁴ In a discussion of 'Traditional Laws and Customs', for example, Justice Olney quoted in full Curr's recollection of 'purchasing' a portion of country from a young boy for a stick of tobacco:

I recollect, on one occasion, a certain portion of country being pointed out to me as belonging exclusively to a boy who formed one of the party with which I was out hunting at the time. As the announcement was made to me with some little pride and ceremony by the boy's elder brother, ... I not only complimented the proprietor on his estate, *on which my sheep were daily feeding*, but, as I was always prone to fall in with the views of my sable neighbours when possible, I offered him on the spot, with the most serious face, a stick of tobacco for the fee-simple of his patrimonial property, which, after a short consultation with his elders, was accepted and paid. (Emphasis in original)⁵⁵

In writing this passage, Curr aimed to amuse his readers by belittling the system of land tenure of his 'sable neighbours'. It reveals, first and foremost, a confident man armed with an Enlightenment discourse that justified (in his eyes) the theft of Indigenous land. For Justice Olney, Curr's passage constituted an important source of evidence regarding the nature of traditional Yorta Yorta land ownership: as the judge strangely put it, 'a useful basis from which to proceed'.⁵⁶

Justice Olney quoted several more passages from Curr's memoir, which portray Aboriginal people in a predictably stereotypical way, but which the judge viewed as transparent evidence of traditional Yorta Yorta custom. He accepted at face value Curr's assertions regarding traditional gender roles: that the Bangerang man was 'despotic in his own mia-mia or hut' and closely controlled

53 Curr 1883: 193–206.

54 *Yorta Yorta v Victoria* (1998), [106].

55 Curr 1883: 243–244; quoted in *Yorta Yorta v Victoria* (1998), [111].

56 *Yorta Yorta v Victoria* (1998), [110].

the lives of his wife and daughters.⁵⁷ Indigenous women have condemned this deference to Curr: Monica Morgan observed that Justice Olney ‘determined from a one liner from Curr that we were patrilineal’; similarly, Marcia Langton argued that the *Yorta Yorta* judgement perpetuated the gender bias inherent in Curr’s account.⁵⁸ A more sophisticated analysis would recognise that Curr was writing in a gentlemanly genre, which routinely justified white bourgeois male privilege by pointing to the apparent delicacy of British gender relations compared to the ‘savage’ natives. Thus Curr’s assertion of gender subservience among Bangerang women served implicitly to justify British patriarchy and, indeed, the colonial project itself.⁵⁹

Portraying Aborigines as feckless and wasteful was another common way of justifying colonial invasion. In a crucial part of his judgement, Justice Olney quoted a passage from Curr’s book, which suggested that traditional Yorta Yorta people were profligate in their use of natural resources:

It is a noteworthy fact connected with the Bangerang, ... that as they neither sowed nor reaped, so they never abstained from eating the whole of any food they had got with a view to the wants of the morrow. ... So, also, they never spared a young animal with a view to its growing bigger. ... I have often seen them, as an instance, land large quantities of fish with their nets and leave all the small ones to die within a yard of the water.⁶⁰

After quoting this passage Justice Olney contrasted a modern Yorta Yorta practice with the wastefulness Curr described. Several Yorta Yorta witnesses had explained that conservation of food resources was ‘consistent with traditional laws and customs’ and that ‘only such food as is necessary for immediate consumption’ was taken from the land. In relation to these claims, Justice Olney concluded: ‘This practice, commendable as it is, is not one which, according to Curr’s observations, was adopted by the Aboriginal people with whom he came into contact and cannot be regarded as the continuation of a traditional custom’.⁶¹

The judge’s reasoning on this issue helps create the view that evolution in Indigenous custom undermines native title in law. Even if Curr’s charge of wastefulness is accepted as an accurate account of Bangerang custom during the 1840s, it remains perfectly believable that Yorta Yorta tradition later evolved to include conservation measures. Curr himself noted the abundant food supply

57 *Yorta Yorta v Victoria* (1998), [114]; see also Curr 1883: 247–249.

58 Morgan and Muir 2002: 9; Langton 1998: 109.

59 See Grimshaw and May 1994: 94.

60 Curr 1883: 262–263; quoted in *Yorta Yorta v Victoria* (1998), [115].

61 *Yorta Yorta v Victoria* (1998), [123].

enjoyed by the Bangerang in the early 1840s.⁶² He also described the subsequent decimation of traditional food resources brought about by pastoralism.⁶³ In other words, Curr described a compelling motive for changes to Indigenous custom, which might explain the apparent disjuncture between the customs described by Curr and those of the Yorta Yorta claimants. If a tradition of sustainable environmental management evolved after (and in response to) British invasion, it is no less valid a tradition. Moreover, a literal reading of Curr's claim of fecklessness is problematic in itself. Deborah Bird Rose has argued that 'the evolutionary theory that the savage is only partially separated from nature ... runs through Curr's work in a way that is so predictable as to be laughable'.⁶⁴ She rightly suggests that taking every word of Curr's book at face value is a dangerous historiographical approach.

Justice Olney's uncritical acceptance of Curr's writings indicates the extent to which the written word, granted special status as legal evidence, creates particularly devastating effects in native title proceedings. In his *Yorta Yorta* judgement Justice Olney posited Curr as the only acceptable evidence regarding the nature of traditional Yorta Yorta culture in the 1840s; he then consulted written evidence from the missionary Daniel Matthews as to the nature of local Indigenous culture in the 1870s. He concluded: 'The evidence is silent concerning the continued observance in Matthews' time of those aspects of traditional lifestyle to which reference is made in the passages quoted from Curr'.⁶⁵ The judge erred by viewing the writings of Curr and Matthews as transparent windows on historical reality. Moreover, he formed concrete conclusions about historical change based on highly selective and narrowly focussed documentary evidence. He presented two accounts of Yorta Yorta custom, both written by white men, and observed a disjuncture. It is a remarkably unimaginative and empirically flawed historical methodology, which has had a significant impact on subsequent native title jurisprudence.

The Appeal Courts

The Yorta Yorta claimants twice appealed the result of their native title claim, but both the full bench of the Federal Court and the High Court upheld Justice Olney's decision.⁶⁶ A key argument of the claimants was that Justice Olney had

62 Curr 1883: 240.

63 Curr 1886, vol 1: 103.

64 Rose 2002: 41.

65 *Yorta Yorta v Victoria* (1998), [118].

66 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 (FCA Black CJ, Branson and Katz JJ), Black CJ dissenting. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 442; 194 ALR 538; 77 ALJR 356 (HCA Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ), Gaudron and Kirby JJ dissenting.

applied a 'frozen in time' test to Yorta Yorta tradition: that he had required present day Yorta Yorta tradition remain largely unchanged from pre-colonial times for native title to survive. Pursuing this line of argument Ron Castan QC told the Federal Court in 1999: 'There is no image of the Aborigine standing on the hill with a spear against the sunset that conditions the exercise of the native title jurisdiction'.⁶⁷ When making this remark, Castan might easily have had in mind one of Curr's nostalgic recollections of his 'sable companions'.⁶⁸

Although the appeal courts rejected the 'frozen in time' argument, the dissenting judge in the first appeal case, Chief Justice Black, engaged in a meaningful way with pertinent issues of historical methodology. He recognised that to discern evolution in traditional law during a period of great change a broad view of history is necessary, warning that 'danger lies in what might be termed the historical snapshot of adventitious content, which may in any event reveal little or nothing of a process of adaptation and change then taking place'.⁶⁹ Chief Justice Black also defended the value of oral evidence and stressed the need 'to take fully into account the potential richness and strength of orally-based traditions as well as the inherent difficulties'. Moreover, he emphasised the danger of relying too strongly on written accounts such as Curr's *Recollections of Squatting in Victoria*:

It is necessary too, to bear in mind the particular difficulties and limitations of historical assessments, not least those made by untrained observers, writing from their own cultural viewpoint and with their own cultural preconceptions and for their own purposes.⁷⁰

Chief Justice Black was clearly looking for a way to accommodate Indigenous perspectives within the native title framework, but his views found little support at the High Court. In a joint judgement, Justices Gleeson, Gummow and Hayne rejected the view that Justice Olney implicitly privileged written evidence, arguing that he 'no doubt took account of the emphasis given and reliance placed by the claimants on the writings of Curr'.⁷¹ In a separate judgement, Justice Callinan explicitly rejected Chief Justice Black's criticism and noted that the Yorta Yorta were disadvantaged by their 'lack of a written language'.⁷² Justice Callinan also reasserted Justice Olney's suspicion of Yorta Yorta oral testimony:

67 Ron Castan QC, 19 August 1999, *Yorta Yorta v Victoria*, Full Court Appeal, quoted in Seidel 2004: 72.

68 See, for example, Curr 1883: 435–436.

69 *Yorta Yorta v Victoria* (2001), Black CJ, [59].

70 *Yorta Yorta v Victoria* (2001), Black CJ, [55].

71 *Yorta Yorta v Victoria* (2002), Gleeson CJ, Gummow and Hayne JJ, [63]. Lawyer for the Yorta Yorta Peter Seidel has disputed this view, arguing that Justice Olney favoured written evidence both 'explicitly' and 'inferentially'; see Seidel 2004: 73.

72 *Yorta Yorta v Victoria* (2002), Callinan J, [190].

human experience knows, [it] is at risk of being influenced and distorted in transmission through the generations, by, for example, fragility of recollection, intentional and unintentional exaggeration, embellishment, wishful thinking, justifiable sense of grievance, embroidery and self-interest.⁷³

Clearly, the potential sources of corruption outlined above by Justice Callinan apply equally well to Curr's written text, with the possible exception of a 'justifiable sense of grievance'. Despite this, Justice Callinan strongly defended Justice Olney's reliance on Curr, and pointed to 'four relevant advantages' in Curr's account, one of which was the absurd claim that Curr had 'nothing to gain from his accounts' of Aboriginal people.⁷⁴ Curr's descriptions of Aboriginal people are deeply imbedded in a genre of colonial observation that contrasts the primitive 'savage' with the civilised British invader; they provide a philosophical justification for the theft of Aboriginal land and a rationale for the repressive colonial regimes that Curr championed as an Aboriginal administrator. In essence, Justice Callinan argued that Curr had 'nothing to gain' and simultaneously pointed to the 'self-interest' of the Yorta Yorta claimants; this is an overtly discriminatory approach, which also reveals a clear inability to interpret historical sources.

All of this leads to the conclusion that the decision of the courts in the *Yorta Yorta* case rests on a deeply flawed historiography. As the first native title case to go to court, the *Yorta Yorta* case was a major challenge – not only for the judiciary, but for all those involved in the native title process. Furthermore, the claim was characterised by an engagement between lawyers and historians, which was previously uncommon. Ultimately, the role of Curr in the *Yorta Yorta* case is symptomatic of fundamental differences between legal and historiographical approaches to studying the past.

History and Native Title

Following Justice Olney's *Yorta Yorta* judgement, many scholars advocated a more prominent role for historians as expert witnesses in native title cases.⁷⁵ It seemed clear to many, however, that the native title courts could not wholly accommodate the historian's craft. The situation was summarised nicely by Deborah Bird Rose, who argued that in the *Yorta Yorta* case 'scholarship collided with adversarial cross examination'.⁷⁶ It is perhaps inevitable that historical and

73 *Yorta Yorta v Victoria* (2002), Callinan J, [143].

74 *Yorta Yorta v Victoria* (2002), Callinan J, [155].

75 Ritter 1998: 7–8; Finlayson and Curthoys 1997.

76 Rose 2002: 35.

legal discourses will clash in this way. For several decades most historians have embraced the complexity and ambiguity that surrounds their scholarly pursuits. Conversely, lawyers and judges are wary of historical theories that undermine certainty, simply because the legal system is predicated on a commitment to factual findings. Curthoys, Genovese and Reilly described this disjuncture eloquently: 'where the courts must decide on one account being true, historians can and do live with alternative possible and competing accounts'.⁷⁷

The historiographical flaws in the *Yorta Yorta* judgements might be seen as mirroring a more general malaise in the native title process of the early twenty-first century; specifically, the difficulties of reconciling ambiguity in historical understanding with strict legalism. Reilly and Genovese have argued that 'the law suffers from the illusion of a determinate past', which can be accessed objectively by consulting 'reliable' evidence.⁷⁸ Such a view presents a difficult dilemma regarding the usefulness of historians to the native title process, but it also has potential implications for the practice of history more generally. David Ritter has noted the 'reductionist' effect of native title on Aboriginal history: 'If the historiography is reduced to "they have it or they don't," then a more nuanced historiography, self-critically exploring the ambiguities of the past, will not develop'.⁷⁹ Importantly, such an environment affects not only the study of Aboriginal history, but also militates against a nuanced reading of Edward M. Curr's life. Sophisticated historical inquiry might, therefore, be irretrievably incompatible with the discourse of native title. Curr's role in the *Yorta Yorta* case revealed that the courts were reluctant to approach historical evidence critically, preferring to consider the written text as akin to a witness and, as Rose puts it, 'to find the truth but without the aid of cross-examination'.⁸⁰ Such an approach will always favour the written word over an oral account; this in turn promotes a deeply problematic view of the past and greatly disadvantages the majority of claimants in native title cases.

77 Curthoys, Genovese and Reilly 2008: 17.

78 Reilly and Genovese 2004: 36.

79 Ritter 2002: 81.

80 Rose 2002: 37.