Law is Story: Indigeneity and Narrative Jurisprudence in Australia after *Mabo*

Steven de Haer  
B.A (Hons.)

This thesis is presented for the degree of Doctor of Philosophy of the University of Western Australia  
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I, Steven de Haer, certify that:

This thesis has been substantially accomplished during enrolment in the degree.

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This thesis uses a theoretical framework drawn from ‘law and literature’ studies to explore the intersections between law, narrative and race in post-
Mabo Australia. It does this by analysing six texts: the reports of two quasi-judicial inquiries and four fictional narratives by Indigenous novelists. The key context for its enquiry is the Mabo case, a landmark decision of the High Court which recast the law’s understanding of Australia’s ‘foundation narrative’ through its recognition of the survival of an Indigenous proprietary interest in the land – a ‘native title’. By examining the intersections of law and literature in these texts, the thesis reflects on the operation of narrative and considers its “inseparability” from the law. Although this approach – the drawing together of law and story – is generally understood as unorthodox in the Western legal tradition, in the context of Indigenous Australia it reflects, according to Christine Black, “a return to the storytelling tradition in which Indigenous jurisprudence is found.”

Chapters One and Two of the thesis examine the Human Rights and Equal Opportunity Commission’s Bringing Them Home Report (1997) and the Report of the Hindmarsh Island Bridge Royal Commission (1995) through the prism of ‘law as literature’, a mode of analysis that involves the use of the methods of literary criticism in the interpretation of legal texts. By adopting this approach in relation to these texts, the thesis seeks to establish a clearer understanding of the role of language in the law – in particular, to recognise the way that it is used to persuade, the effect of its gaps, silences and evasions, and how it enfranchises and disenfranchises Indigenous voices and experience. By centering its analysis in these chapters on official texts, the thesis is also able to reflect upon contrasting approaches to the intervention of narrative in the dominant society’s legal system. It shows that, where Bringing Them Home identified a role for story in the ‘healing’ of the nation (its inquiry was established to trace the laws and practices which had facilitated the removal of Indigenous children from their families), the
Hindmarsh Island Bridge Royal Commission, by contrast, resisted this possibility and instead framed its investigation – which sought to uncover whether claims about the existence of secret ‘women’s business’ had been “fabricated” by a group of Ngarrindjeri women – in adversarial and positivist terms.

The second half of the thesis considers the way that Indigenous novelists have used literature to critique native title law, to participate in important political debates, and to advance their own stories and narrative jurisprudence. By exploring the nature of the relationship between law and narrative, the thesis highlights the potential for literature to recast ideas of justice – particularly from the perspective of those whose voices have been historically suppressed. In Chapter Three, I argue that Larissa Behrendt’s novel, Home (2004), re-envisioned Australia’s legal history by challenging the fiction of terra nullius, and by re-integrating its Indigenous protagonist within a tradition of Aboriginal legal-storytelling. Chapter Four examines Terri Janke’s novel, Butterfly Song (2005), and suggests that it uses the story of the claim for the return of a pearl brooch in order to return to questions of property raised by the Mabo case, and as a way to imagine possibilities for reshaping law and legal process. In Chapter Five, I analyse the way that the story of a failed native title claim is used by Nicole Watson in The Boundary (2011) to critique aspects of native title law, and to invoke “blackfella business” as an alternative system of justice. Chapter Six examines Melissa Lucashenko’s novel, Mullumbimby (2013), and argues that, through its rejection of native title, the narrative contemplates a kind of ‘creative custodianship’ based in the private ownership of land. By engaging critically with these texts, the thesis seeks to highlight the way that Indigenous storytellers use narrative in post-Mabo Australia to articulate aspirations for legal change, and to introduce an Indigenous jurisprudence based in an Indigenous cosmological worldview.
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Introduction

This thesis uses a theoretical framework drawn from ‘law and literature’ studies – an inter-disciplinary movement that emerged out of the cultural turn and which emphasises the interrelationships between law and narrative – in order to explore the intersection of law, narrative and race in post-*Mabo* Australia. At the centre of its enquiry is the *Mabo* case, a landmark decision of the High Court which effectively recast the law’s understanding of Australia’s ‘foundation narrative’ through its recognition of the survival of an Indigenous proprietary interest in the land.\(^1\) Although considerable scholarly attention has been paid to the cultural consequences of the *Mabo* judgment,\(^2\) much less has been said about how ‘law and literature’ might present opportunities for expanding on this discussion, or its role in developing a knowledge of Indigenous narrative jurisprudence. This thesis takes up the insights of the scholars whose work has engaged with native title and the ‘stolen generations’ through the prism of ‘law and literature’, and attempts to broaden what they have had to say by identifying gaps for further analysis, and by applying the methods of ‘law and literature’ to a new set of literary texts. Although this approach – the drawing together of law and story – is generally understood as unorthodox in the Western legal tradition, in the context of Indigenous Australia it reflects, according to Christine Black, “a return to the storytelling tradition in which Indigenous jurisprudence is found.”\(^3\)

This introduction begins by providing an outline of the thesis’ theoretical approach – that of ‘law and literature’ – before laying out (and defining) important contextual markers, including *terra nullius, Mabo* and native title.

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1. This thesis refers repeatedly to *Mabo* (in italics) as a shorthand descriptor for the *Mabo and Others v Queensland (No. 2)* case. Since 1992, the term has taken on a wider range of meaning, and is now generally understood to imply native title, dispossession, land rights and land justice, reconciliation and restitution. See: *Mabo v Queensland (No 2) [1992]; HCA 23; 175 CLR 1 (3 June 1992).*
After introducing the concepts of narrative jurisprudence and critical race theory, and explaining the ways that they are invoked in this thesis, the chapter ends with an introductory analysis of the topic of (post-\textit{Mabo}) Aboriginal writing, and summaries of each of the texts under consideration in the thesis.

\textbf{Part One: ‘Law and Literature’}

\textit{“The idea that somehow law is a ‘truth’, which stands in stark contrast to storytelling, is a false dichotomy, even to the Western legal tradition.”}^{4}

Since its emergence as an area of academic focus in the early 1970s, ‘law and literature’ has been the source of significant and innovative scholarship in the areas of legal and cultural studies. Claiming to offer a new lens through which to engage with legal texts and events, ‘law and literature’ studies question the disciplinary boundaries which have separated law from language (where one is understood as a science\textsuperscript{5} and the other as a subject of the imagination) and seek to draw a bridge between the two traditions.

The field’s key exponent, James Boyd White, argued in his pioneering text, \textit{The Legal Imagination}, that the lawyer is “at heart” a writer, “one who lives by the power of his imagination.”\textsuperscript{6} White was influenced in his thinking by the noted jurist Benjamin Cardozo, who had reflected nearly half a century earlier on the relationship between law and language.\textsuperscript{7} ‘Law and literature’ scholars

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\begin{itemize}
  \item [5] This is particularly so in the positivist legal tradition, which asserts that law is ‘held’ in the empirical rules enforced by a sovereign, and that it has no necessary connection with morality. See: S. Ratnapala, \textit{Jurisprudence: An Introduction}, Cambridge University Press, Cambridge, 2009, p. 8.
  \item [7] Cardozo was particularly interested in the role of language in legal judgments, and the way that it could be used to “serve the ends of [an] argument or parable.” He observed: “The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration
\end{itemize}
propose that our experience of the law “begins in and unfolds through rhetoric”, and similarly, that the law is a linguistic entity – “it has no basis outside of language.”

In his writing, White encouraged his students (his text was effectively a handbook) to reflect on the way that lawyers use words – in the form of metaphor, irony and allegory – as tools of persuasion, and additionally, to consider the significance of “what the law leaves out” in its texts of judgment – that is, its ambiguities and evasions.

Peter Goodrich has expanded upon White’s foundational work by observing that:

Law is a literature which denies its literary qualities. It is a play of words which asserts an absolute seriousness; it is a genre of rhetoric which represses its moments of invention or of fiction; it is a language which hides its indeterminacy in the justificatory discourse of judgment; it is a procedure based upon analogy, metaphor and repetition and yet it lays claim to being a cold or disembodied prose… it is a narrative which assumes the epic proportions of truth.

In this excerpt, Goodrich references the gaps, silences and evasions of the law, and suggests that ‘law and literature’ studies seek to unmask these in order to promote the possibility of expanded meaning in law. ‘Law and literature’ provides, therefore, not only practical and political insights, but also

and antithesis, or the terseness and tang of the proverb and the maxim. Neglect the help of these allies and it may never win its way.” See: B. Cardozo, ‘Law and Literature’ in Law and Literature and Other Essays and Addresses, Harcourt, Brace and Co., New York, 1931, p. 9.


a vocabulary and theory “for allowing us to enter [into] and keep open the conversation about what it means to interpret the laws” that both provide us with, and restrict, our freedoms.\textsuperscript{11}

In the more than forty years since \textit{The Legal Imagination} was first published, the focus of ‘law and literature’ studies has expanded as a result of its intersections with critical race and feminist theories. The movement is now especially interested in the way that the stories of raced, gendered and sexual ‘others’ have the potential to shape cultural attitudes and the law more broadly.\textsuperscript{12} The historically variable nature of its study (advocates have used ‘law and literature’ theory to read, for example, Victorian legal texts and narratives, as well as contemporary American case law and criminal trials) provides a model for this thesis’ application of the movement’s insights in an Australian context, and specifically in relation to the experience of Indigenous Australians. In this light, my project intends to build on existing scholarship (where Indigenous legal concerns have typically been viewed as separate from narrative and literary studies) by exploring the nature of the relationship between law and story in the context of post-\textit{Mabo} Australia. Before expanding on \textit{Mabo} in further detail, I will first reflect briefly on the nature of the intellectual division within ‘law and literature’, and make some general remarks about the way that this distinction functions in the context of this project.

\textbf{Law in Literature, Law as Literature:}

The ‘law and literature’ movement is divided broadly into two descriptive categories: ‘law in literature’ and ‘law as literature’.\textsuperscript{13} According to Robin


\textsuperscript{13} There is considerable debate about the nature of this division. Most scholars accept the ‘law in literature’ and ‘law as literature’ bifurcation, while others point to a tripartite division (Robin West identifies literary, jurisprudential and hermeneutic approaches to ‘law and literature’ studies).
West, ‘law in literature’ is the “most commonsensical” of the two broad approaches to ‘law and literature’ because of the way that it “attends to the depictions of law found in imaginative literature.” In essence, West argues that ‘law in literature’ tells us something (through narrative) about the law that the law itself cannot – particularly in relation to the experiences of those who have been subjugated or marginalised. For Richard Weisberg, who adopts an expanded vision of the movement, ‘law in literature’ is an approach that offers a “potential gold mine of knowledge about the law”, being capable, he suggests, of filling an ethical void and of changing the way that lawyers think.

Weisberg’s vision of the humanist potentials of ‘law in literature’ is highly contested. Julie Stone Peters, for example, describes as “brazen” the claim of proponents that literature restores humanity to the law. Similarly, Robert Ferguson asserts that “the novel is no panacea for legal reform” and that, “the bold assertion that reading literature makes the absorber of it a more empathetic observer of life is... false.” By contrast, Peter Brooks takes a more measured approach, arguing compellingly: “It’s not that I think ‘the humanities’ necessarily teach people to behave humanely... but [that] the


16 R. Weisberg, Poetics, 1992, pp. 3-5.
19 While Ferguson acknowledges that “the closed nature of legal thought needs to be pried open when it refuses to face uncertainty or oversimplifies matters to reach a decision”, he advocates a multidisciplinary approach beyond ‘law and literature’ (‘law and the humanities’), R. Ferguson, Practice Extended: Beyond Law and Literature, Columbia University Press, New York, 2016.
humanities can perhaps teach people to *read* with a fine and necessary suspicion."\(^{20}\)

The second branch of the ‘law and literature’ movement focuses on the study of law as literature. In simple terms, it refers to the use of the methods of literary criticism and interpretation in the analysis of legal texts. According to Judith Resnik and Carolyn Heilbrun, ‘law as literature’ provides “a playing field for arguments about intentionality, objectivity and meaning.”\(^{21}\) This is largely because of the way that it involves reading legal texts in terms of their aesthetics and relationships of power. More than this, however, a ‘law as literature’ approach also attempts to make sense of the way that the “signs, symbols and figures of which the [legal] text is composed can be read as indicators of semantic choice.”\(^{22}\) For these reasons, ‘law as literature’ (and the ‘law and literature’ movement more broadly) has been conceived of as exercising a destabilising influence — primarily because of the way that it challenges traditional assumptions about the autonomy and/or scientificity of the law.\(^{23}\)

In an expanded sense, ‘law as literature’ also involves the examination of the stories told (or suppressed) in court cases — such as those by victims of racial discrimination or gendered violence. It is, as a result, attuned to questions of race and gender, and the ways that these are negotiated within the law. Through its engagement with the “oppositional”\(^{24}\) voices of women and people of colour, I suggest that ‘law as literature’ can be understood within a framework of narrative jurisprudence, which is an associated mode of legal critique that involves the analysis of stories previously unheard at


\(^{23}\) Peter Brooks has argued compellingly that law resists literature because, “much of its efficacy and power derives from its self-enclosure, its capacity to impose an exclusionary rule on attempts to open up its hermeticism.” See: P. Brooks, ‘Law, Literature, Memory’ in M. Leskiewiez (ed), *Law, Memory & Literature* (ALPSA 2004 Annual Publication), UQ Vanguard, St Lucia, 2004, p. 11.

law.\textsuperscript{25} I will expand on what is meant by narrative jurisprudence at a later stage in this introductory chapter.

The prominence and influence of the two categories – ‘law in literature’ and ‘law as literature’ – has been shaped and complicated by developments in literary and legal theory. In her article, ‘Law, Literature and the Vanishing Real: On the Future of an Interdisciplinary Illusion’, Julie Stone Peters traces the way that ‘law and literature’ has moved beyond its humanist origins (the idea that literature could return a human ethic to the law) to incorporate hermeneutic and narrative approaches (the kind typified by ‘law as literature’). These shifts occurred, she contends, because by the late 1970s, legal humanism was “out of step with [the] theoretical debates” surrounding post-structuralism, a philosophical movement which had taken primacy in the 1970s.\textsuperscript{26} Post-structuralists emphasized the indeterminacy of meaning in texts and questioned “whether the ground of legal interpretation was as stable as [it was] traditionally claimed to be.”\textsuperscript{27} This development encouraged sweeping critical reflection and suggested that legal texts and doctrine were capable of being deconstructed by literary studies scholars who sought to “make their interpretive techniques work on something closer to ‘reality.’”\textsuperscript{28}

The field of ‘law and literature’ studies was complicated further by developments in legal theory; most notably by the intervention of critical legal studies, with its feminist and critical race approaches. Critical legal studies scholars challenge the idea that the law is both neutral and value free. They argue instead that the law – in both its formulation and implementation – frequently reproduces inequality and injustice, even though it is supposed to redress both.\textsuperscript{29} As a result, feminist and critical race scholars emphasise the importance of voice and storytelling in law as a way to confront and address

\textsuperscript{25}K. Dolin, \textit{A Critical Introduction to Law and Literature}, 2007, p. 31.
\textsuperscript{27}P. Brooks, ‘Literature as Law’s Other’, 2013, p. 350.
the law’s structural inequalities. According to Judith Resnik and Carolyn Heilbrun, “both law and literature share the activity of generating narratives that illuminate, create and reflect normative worlds, that bring experiences that might otherwise be invisible and silent into public view.”

Rather than necessarily attempting a total transformation of legal thought, I suggest that ‘law in literature’ has the potential to challenge the way that lawyers and other legal agents think about (and act within) the law. It also, moreover, has the potential to inspire modest shifts in understanding through the analysis of stories that provide new knowledge and propose new questions. In an Australian context, Birri Gubba author and lawyer Nicole Watson has argued that literature about the law can provide instructive insights, and that it can also “spur [legal] scholars to build meaningful vehicles for change; vehicles that are rooted not in what lawyers think Indigenous people need, but what Indigenous peoples believe they need.”

This thesis engages with both branches of the ‘law and literature’ movement. It does this by first reading two quasi-judicial texts (the Human Rights Commission’s Bringing Them Home Report and the Report of the Hindmarsh Island Bridge Royal Commission) through the prism of ‘law as literature’, and second, by analysing four fictional narratives by Aboriginal writers, each of which is read with regard to the way that it articulates an Indigenous perspective and experience of the law, and, importantly, how it introduces an Indigenous jurisprudence based in an Indigenous cosmological worldview.

Before expanding on the thesis’ other theoretical approaches (such as narrative jurisprudence and critical race theory), it is necessary at this point

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to introduce the project’s key contextual markers: these include the doctrine of *terra nullius*, the historic *Mabo* judgment, and the politics of codifying native title in Australian law.

**Part Two: Foregrounding Colonisation and Native Title**

When the colony of New South Wales was proclaimed in 1770, its land was imagined by the British as *terra nullius* – belonging to no one. The effect of this designation was to cast the new colony’s original inhabitants as trespassers in a land that they had occupied for thousands of generations. It also set up a non-recognition of rights to land which would last late into the twentieth century. The judicial narrative that grew in support of this designation relied on an understanding of the settler colonial experience as one of “fatal impact”, whereby “Indigenous law systems gave way immediately upon the colonial invasion and occupation.”

Gerry Simpson describes the durability and resistance of this discourse as “at once impressive and surreal” – it reflects a position, which, according to Henry Reynolds, required an extraordinary intellectual and moral gymnastics to sustain. This legacy – of the story of *terra nullius* – is carried by all Australians, and now “sticks to our shoes with the dirt as we walk over Indigenous sovereignties everyday.”

This section begins by situating the doctrine of *terra nullius* within its broader historical and legal contexts, and in relation to the responses of a number of Indigenous scholars. Its focus then shifts to a discussion of native title in relation to the landmark *Mabo* case, which is frequently understood as representing an *overturning* of the legal fiction of *terra nullius* in Australia. While I do not intend to analyse the text of the *Mabo* judgment or native title law in explicit detail, this commentary is important because it foregrounds

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many of the concerns raised by the texts studied in this thesis, including questions about the disjunctive relationship between native title (a non-Indigenous legal framework established to give recognition to the proprietary nature of Indigenous relationships with land prior to colonisation) and Indigenous conceptions of sovereignty, which are “grounded within complex relations derived from the inter-substantiation of ancestral beings, humans and land.”

An “Invisible and Inescapable Cargo of English Law”:

The arrival of the First Fleet in Sydney Cove on the 26th of January 1788 is frequently misunderstood as Australia’s ‘foundation moment’ – that is, as the point at which Australia was ‘discovered’ by the British. This misunderstanding obscures a long history of European navigation in the southern oceans, where naval vessels had searched for a fabled land since at least the fifteenth century. The British had been active participants in this exploration, and in 1768, King George III issued Captain James Cook with ‘Secret Instructions’ to take possession of “a continent or land of great extent” thought to exist in the southern latitudes (terra australis incognita).

The ‘Secret Instructions’ are worth quoting here at length because they provide evidence of the precise conditions in which the colonisation of Australia took place:

You are also, with the consent of the natives, to take possession in the name of the King of Great Britain, of convenient situations in such countries as you may discover, that have not already been discovered or visited by any other European power; and to distribute among the inhabitants such things as will remain as

37 Dutch explorer Dirk Hartog reached the coast of Western Australia in 1616 after sailing off-course on voyage to the Dutch East Indies. In the following years, a number Dutch and British explorers (including Willem de Vlamingh and William Dampier) tracked sections of the Western Australian coast without laying claim to land ‘found’.
traces and testimonies of your having been there; but if you find the countries so discovered are uninhabited, you are to take possession of them for his Majesty, by setting up proper marks and inscriptions, as first discoverers and possessors.\(^{39}\)

In other words, King George III provided explicit instruction to take land where it was uninhabited, and where this wasn't the case, with the "consent of the natives", which implied negotiation or treaty. Having engaged in neither of these, Cook arrived at Possession Island "just before sunset on Wednesday 22 August 1770" (after having sailed along the eastern coast of the continent from southern New South Wales to Botany Bay and north to the Torres Strait) and declared the 'new found' land a British territory. The arrival of the First Fleet eighteen years later marked the official and actual taking of the land into British possession. It is also said to represent the point at which the "invisible and inescapable cargo of English law fell from the shoulders [of the earliest settlers] and attached itself to the soil on which they stood",\(^{40}\) and thus, the point at which Indigenous sovereignties and systems of law were displaced.

**Explaining *Terra Nullius* and its Legacy:**

I was surprised to learn, in the course of study for this thesis, that the concept of *terra nullius* is in fact "a contemporary term used to describe an old reality."\(^{41}\) It did not belong to the vocabularies of James Cook, Arthur Phillip and their contemporaries when they arrived on Australian shores in the 1770s. Instead, the term gained currency in Australia much later than this, in the context of the land rights movement of the 1960s. It was taken up, according to historian Henry Reynolds, because of its ‘convenience’; it could adequately and effectively describe the experience of Australia’s colonisation.


where no other word existed,\textsuperscript{42} while also providing an “approximation of the use of the law of the first taker in natural law to justify dispossession.”\textsuperscript{43} It reflects, in other words, “anachronistic history.”\textsuperscript{44}

The legal relevance of the doctrine of \textit{terra nullius} to the dispossession of the Indigenous peoples of Australia has been a source of significant debate for historians. Some criticise what they perceive as Reynolds’ activism; he is accused of \textit{creating} a tangible \textit{doctrine} for the Australian judiciary to demolish “in order to correct itself or reverse its position.”\textsuperscript{45} David Ritter argues, for instance, that \textit{terra nullius} was in fact doctrinally \textit{irrelevant} to the question of whether native title existed in Australia and that it became, instead, a “convenient scapegoat” to explain why Aboriginal rights to land had never been recognised under Australian common law.\textsuperscript{46}

Nevertheless, \textit{terra nullius} is taken to mean, therefore, land or territory belonging to no one.\textsuperscript{47} An expanded definition of the term has been used to describe situations (such as in Australia) where occupied land was taken to be vacant because the coloniser could not – or would not – recognise local markers of proprietorship. These assessments were always informed by a reading of the native inhabitants as primitive, and the concomitant assumption that they were either incapable of owning land in a meaningful way, or of having a sophisticated system of laws for its management.\textsuperscript{48} As a result, \textit{terra nullius} finds its common law counterpart in the doctrine of ‘desert

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\textsuperscript{42} H. Reynolds, ‘A New Historical Landscape?’, 2006, online.
\textsuperscript{47} For an explanation of the genealogy of \textit{terra nullius} (and associated concepts) see: A. Fitzmaurice, ‘The Genealogy of \textit{Terra Nullius}’, 2007, pp. 4, 13.
\textsuperscript{48} Alan Frost has argued that British understandings of effective land use were influenced at this time by philosophy and religion. In particular, he notes the role of the Book of Genesis, which suggested that “man moved about in an absolute state of nature in which his only inherent property was the labour of his body.” When this labour was mixed with “the spontaneous produce of the earth”, the produce became the man’s own. See: A. Frost, ‘New South Wales as Terra Nullius: the British denial of Aboriginal Land Rights’, \textit{Historical Studies}, Vol. 19, No. 77, 1981, p. 515.
\end{small}
\end{flushright}
and uncultivated’, which was formalised in the 1760s by the jurist William Blackstone, who described the legal concept in the following terms:

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties… And both these rights are founded upon the law of nature, or at least that of nations… for it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.50

Indigenous responses to Terra Nullius:

For Indigenous Australians, terra nullius has functioned as a narrative of erasure, promoting a view of Indigenous peoples and cultures as being on “an unstoppable path to extinction.” According to Christine Black, it:

Endorsed the ‘law of theft’ and allowed the subsequent invaders to call themselves settlers and colonists, moving to the rhythms of the northern hemisphere, rather than accepting the reality of being in the southern hemisphere, the existence of the Aboriginal people

49 Ulla Secher has provided a detailed outline of the legal background to this foundational doctrine, and has considered its invocation in the Mabo case. See: U. Secher, ‘The High Court and Recognition of Native Title: Distinguishing between the Doctrines of Terra Nullius and “Desert and Uncultivated”, University of New South Wales Law Review, Vol. 11, No. 1, 2007, online.
51 The idea of terra nullius as a proxy for annihilation has been explored by Nicholas Blomley, who emphasises that territory shares etymological roots with both terra (meaning land) and terror (terrere). Blomley suggests that settlement (and settler violence) is predicated on a zero-sum logic of territorial and spatial annihilation. This translates in a colonial setting to a logic of severability, which entails “not only individual acts of expulsion, but also sustained and continuing acts of forgetting.” These themes are explored in greater detail throughout the thesis, and specifically in Chapter Six. See: N. Blomley, ‘Cuts, Flows, and the Geographies of Property’, Law, Culture and the Humanities, Vol. 7, No. 2, 2010, pp. 212, 213.
and their legal systems, and most importantly, the reality that the land was their responsibility rather than their right.\textsuperscript{52} 

For Irene Watson, terra nullius is central to what she describes as the “schizophrenia” of the law; it creates a false sense of reality (that is, the idea of a land “empty of sovereign peoples awaiting European occupation”) while also retaining “a life still today.”\textsuperscript{53} This argument is echoed by Ambelin Kwaymullina, who proposes that terra nullius continues its “fictioning” in Australia because, “it is a tale with only one ending. It must always dispossess, for it has no other resolution and no other purpose.”\textsuperscript{54} Her insistence that the “story” of terra nullius be “challenged wherever and whenever it is told”\textsuperscript{55} resonates clearly in the texts studied in this thesis – each of which engages in a discussion about its cultural and legal pervasiveness.

\textbf{“An Important and Unsuspected Fact” – an Historical Background to the Recognition of Native Title:}

In order to trace the development of native title – that is, how it came to be recognised by the High Court in 1992 – it is important to reference the contribution of Henry Reynolds, whose revisioning of Australia’s legal and political history in The Law of the Land effectively laid the foundations for legal change in Australia.\textsuperscript{56} Through his research, Reynolds pointed to inconsistencies in the application of colonial law, highlighted instances of historical recognition of Indigenous ownership (from as early as the 1830s), and looked to the more “helpful”\textsuperscript{57} jurisprudence of the United States in order

\textsuperscript{56} The extent of the influence of Reynolds’ research is evident in the Mabo judgment itself, where the Justices of the High Court refer to The Law of the Land on four occasions.
to argue for the survival of an Indigenous proprietary interest in the land. His arguments were developed, Bain Attwood has emphasised, within the confines of the law itself; he “accepted its authority and treated it as a solution rather than the problem.”

A key contention of *The Law of the Land* is that eighteenth and nineteenth-century British common law was flexible on the question of the type of land tenure required to guarantee its exclusive use and possession. In particular, it argues that the stripping of Indigenous proprietary rights was always problematic in law because it had never been a requirement in Britain to enclose land for farming, nor to live permanently in one place in order to prove possession. In Australia, however, it was suggested that Aboriginal populations ‘ranged’ over their lands and that, as a result, they could not claim to own them.

Reynolds also provides examples in *The Law of the Land* of recognition by British officials of the proprietary nature of the relationship between Aboriginal peoples and their land. He draws particular attention to a statement of James Stephen, Permanent Head of the Colonial Office, who in 1840 penned “one of the most important sentences ever written in the history of Aboriginal-white relations” when he communicated to the imperial centre in London that:

> It is an important and unsuspected fact that these Tribes had Proprietary in the Soil – that is, in particular sections of it which were clearly defined and well understood before the occupation of their country.”

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60 Reynolds references the large tracts of land held in a “natural state” in England for the purposes of hunting, fowling and fishing. He observes that, “English gentlemen may not have had much interest in foraging for food but they would have been amazed that they were not actually in possession of their hunting grounds and trout streams because they weren’t using them properly.” See: H. Reynolds, *The Law of the Land*, 1987, p. 20.

61 Colonial Office Records, Australian Joint Copying Project, File No. 13/16, Folio 57.
Reynolds uses this statement to argue that, from at least the 1840s, the idea of *terra nullius* was “an embarrassment to many colonists.” It was also an embarrassment, he suggests, in the context of twentieth-century land rights movements, where “there [was] the added difficulty that the basic principles of native title were so clearly understood and so forcefully stated one hundred and fifty years ago.” The principles to which Reynolds refers had been set out in the domestic law of the United States between 1810 and 1835, and included the understanding that native title was “a legal right based on the fundamental principle of prior possession.” In Reynolds’ view, then, “[a] way out of” the non-recognition of Indigenous rights to land “had always been available to Australian jurists.”

It is important to note that Reynolds’ approach – his searching for inconsistencies in the application of the common law – contrasts with the arguments developed by other historians. Andrew Fitzmaurice, for example, traces the genealogy of *terra nullius* (it is a derivative of *res nullius*, which itself is drawn from the Roman law of first takers) in natural law, which he suggests has provided a framework for philosophical debate about the justness of colonisation since the sixteenth century. Whereas Reynolds effectively contributed to a juridical narrative which linked the concept of *terra nullius* to the denial of Indigenous rights and the dispossession of land, Fitzmaurice argues that the contemporary use of the idea of *terra nullius* is, in fact, consistent with a tradition in which natural law was used to oppose colonisation. While he does acknowledge that *terra nullius* “was sometimes used positively [in natural law] to argue that land could be appropriated”, Fitzmaurice’s commanding argument is that the idea of *res nullius* was used to defend the rights of Indigenous populations – in other words, to assert that

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64 In the US, the recognition of native title was not dependent upon any particular land-use or settlement, nor did it exist in opposition to the ‘complete, ultimate’ title of the United States, which retained the right of extinguishment. See: H. Reynolds, *The Law of the Land*, 1987, pp. 45-47.
66 A. Fitzmaurice, ‘The Genealogy of Terra Nullius’, 2007, p. 4
67 Fitzmaurice cites the theologians of the Salamanca School who “used ferae bestiae to argue that the Spanish conquests were unjust because the land and property of the vanquished American civilisations clearly had not been in a state where they could be appropriated by the first taker.” See: A. Fitzmaurice, ‘The Genealogy of Terra Nullius’, 2007, pp. 6-7.
they could not be arbitrarily dispossessed of their lands and goods. Importantly, he also suggests that Reynolds’ argument is consistent with this tradition.

**Mabo and Native Title:**

The proprietary interest “in the soil” that had been observed by James Stephen of the Colonial Office in 1840 was eventually recognised as native title in 1992 in the *Mabo* case, which had been brought to the High Court by Eddie Mabo, a Meriam man of the Torres Strait. With others, Mabo lodged a statement of claim against the State of Queensland, arguing that the group was entitled (by virtue of their birth and status as original custodians) to certain native title rights over the Murray Islands. In 1992, after a decade of protracted legal debate, the High Court handed down its judgment; it found that native title had survived in Australia, but that its survival was contingent upon a number of conditions. These included that it could only be recognised on Crown land (it was found to have been ‘extinguished’ in areas covered by freehold title), and only in circumstances where the claimants could prove a continuing connection to land and culture that was consistent with pre-

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69 This defense was not necessarily based in humanitarian generosity, but rather, in concern for the universal applicability of the principles of property and the rule of law. See: A. Fitzmaurice, ‘The Genealogy of Terra Nullius’, 2007, pp. 12-14.

70 The plaintiffs’ original claim was set aside for a period from 1985 in order to respond to the Queensland Coast Islands Declaratory Act 1985, which was enacted by the Queensland Government as a preemptive attack on Indigenous land claims (it sought the retrospective abolition of Meriam native title). The plaintiffs argued that the Queensland Act was in breach of the Racial Discrimination Act of 1975 (specifically section 10, which provides for equality before the law) and claimed that commonwealth law should override state law in instances of judicial inconsistency. See: *Mabo v Queensland* [1988]; HCA 69; 166; CLR 186 (8 December 1988). For further explanation, see: D. Speagle, *Mabo v Queensland Case Note*, Melbourne University Law Review, Vol. 17, No. 1, 1989-1990, pp. 168-173.


72 The instrument of extinguishment, which acts as an effective veto over claims in cases where the land claimed is held in freehold title, or in cases where a court cannot be satisfied by a claimants’ continuity of connection to country, has come to be a major source of criticism within the native title regime. According to Irene Watson it is “alien to Indigenous people’s knowledge frameworks” because it “claims the power to erase First Nations Peoples’ connections to the land.” See: I. Watson, *Aboriginal Peoples, Colonialism and International Law*, Taylor and Francis, Hoboken, 2015, pp. 40, 42.
settlement cultural and social practice. Alexander Reilly provides a succinct account of the terms of the judgment in the following excerpt:

In *Mabo*, the High Court declared that upon the assertion and the introduction of the common law into Australia, the Crown did not become the absolute beneficial owner of all the land of the new colony. Instead, the Crown held a radical title to the land, which was burdened by the proprietary rights of the Indigenous peoples that derived from their continuing occupation… These rights were not extinguished through the introduction of the common law into the new colony as had been originally believed, but were extinguished by subsequent acts of the new sovereign. Extinguishment took place ‘parcel by parcel to make way for expanding colonial settlement.’

In other words, the Justices of the High Court found that native title had survived the Crown’s acquisition of sovereignty, and additionally, that the “rights and privileges” conferred by native title had also survived the acquisition of radical title (which was a concept invented in the *Mabo* ruling and described as “a postulate of the doctrine of tenure and a concomitant of sovereignty” ). Despite this, however, they ruled ultimately that the acquisition of sovereignty had “exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.” This meant, in effect, that the “rights and privileges” conferred by native title were diminished with each successive grant of land by the Crown. Justice Brennan emphasised this point when he ruled that: “Once traditional native title expires, the Crown’s radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.”

73 *Mabo v Queensland (No 2) [1992]* Brennan at 61, 64 and 66.
75 *Mabo v Queensland (No 2) [1992]* Brennan at 50.
76 *Mabo v Queensland (No 2) [1992]* Brennan at 83.3.
77 *Mabo v Queensland (No 2) [1992]* Brennan at 66.
The *Mabo* judgment also raised important questions about the nature of the relationship between the common law and native title. For Penelope Pether, it exposed a significant power differential in which native title existed as a “creature” of the common law, and always subject to its authority. I would argue, moreover, that native title is in fact a captive of the common law, relying on it for practical effect, despite being born neither of it nor of Indigenous law. As a result of this genealogical ambivalence, native title is often described as a “curious legal hybrid” and as the “recognition space” between two systems of law. It is also, in effect, underwritten by a power imbalance which privileges non-Indigenous epistemologies and systems of proof (scientific knowledge, rules of evidence) over Indigenous knowledge systems. These fundamental differences are thrown into stark relief by Noni Sharp in her analysis of the *Mabo* litigation, where she outlines that “the Meriam witnesses were not asked about their ownership of stars or winds; their claims extended to foreshore, lagoons and fish traps, and reef areas, but not to stars.” In other words, Sharp argues that native title fails to take the full complexity of Indigenous relationships with land into account. This has the effect of disadvantaging Indigenous litigants, whose traditional cultural knowledge is story-based and non-literate. The end result of this is, according to Ben Golder, the eliding of Indigenous voices, the erasure of subjectivities and the constitution of Indigenous Australia as an object of Anglo-Australian knowledge.

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82 This conflict is highlighted in Chapter Two of the thesis, which is a textual study of the *Report of the Hindmarsh Island Bridge Royal Commission*.

The Native Title Act:

In 1993, native title was written into statutory law through the Native Title Act, which was responsible for codifying the *Mabo* judgment (it sought the “recognition and protection of native title”) and for providing the legislative framework through which the National Native Title Tribunal, an adjudicatory body, derived its authority. According to Garth Nettheim, the Keating government moved with urgency to legislate native title primarily for reasons relating to process and politics; it “was deemed essential” to be able to provide certainty to, and neutralise attacks from, the mining sector, which had joined with conservative political forces in opposing the recognition of native title. In this context, Nettheim suggests that native title was viewed either as a question of real estate, or as a question of human rights, and that, as a result, Indigenous peoples had “much to lose” from the “prospect” of legislation. He cites the judge Hal Wootten, who has reflected on this debate by arguing that:

Either they [Indigenous peoples] had native title or they did not, and if they had it under the High Court decision they did not need legislation to give it to them. Indeed legislation was likely to take away some of what they had... To a considerable extent Aboriginals were fighting a rearguard action; they were seeking to hold on to as much as possible of what the *Mabo* decision had given them.

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84 Section 4 of the *National Native Title Act* 1993.
85 The Act has been subject to numerous amendments, most notably in 1998 following a change of government and in response to the High Court’s *Wik* ruling, which found that, in some circumstances, native title could co-exist alongside pastoral leases. See: *Wik Peoples v Queensland* [1996]; HCA 40; 187 CLR 1 (23 December 1996); *Native Title Act 1993* (Cth); *Native Title Amendment Act 1998* (Cth).
In these circumstances, the Aboriginal and Torres Strait Islander Commission (also known as ATSIC, and now defunct) was invited to take a central role in the drafting of the legislation. Its chairwoman at the time, Lowitja O’Donoghue, gave an insight into the nature of these negotiations when she referenced the “compromises” that were made by Aboriginal and Torres Strait Islander peoples in order to achieve both the passage of the legislation and what she described as a “truly national settlement.” In conceding that Aboriginal people would not get “everything [they] sought” from the native title recognition process, O’Donoghue remained optimistic and chose to frame the legislation in terms of its potential for “genuine reconciliation.” She is quoted as saying:

It is an historic decision. The decision is historic not because we have gained from the Prime Minister agreement to everything we sought. We have been willing to compromise in the interests of a truly national settlement… A new political voice has emerged in this country that will have to be listened to… Indigenous affairs will never be the same in our nation.

*Mabo: a Signifier of Justice?*

In this light, the *Mabo* judgment has been construed, Ali Gumillya Baker and Gus Worby report, as a “signifier of justice”, standing for the resurrection of Aboriginal rights and representing equally “the possibility of a new beginning”, a “vehicle of epiphany” and “the epilogue to a supposedly receding colonial past.” Broadly speaking, the judgment was welcomed – though with qualifications and exceptions – by many within the Indigenous

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90 Lowitja O’Donoghue cited in ‘A Step Towards Reconciliation’, *The Australian*, 20 October 1993, p. 2. These included, for example, the involvement of state governments in decision making processes.
93 B. Silverstein, ‘Submerged Sovereignty: Native Title within a history of Incorporation’, 2013, p. 60.
94 D. Ritter, *Contesting Native Title: From Controversy to Consensus in the Struggle over Indigenous Land Rights*, Allen & Unwin, Crows Nest, 2009, p. 131. Ritter ties native title to the birth of the politics of reconciliation and suggests that this process was imagined as a channel for resolution.
community. For example, the legal scholar and author Larissa Behrendt has described feeling a sense of “elation… on the day the Mabo decision came down.” This response signals to the anticipation which had grown around the case – there was a clear sense that it represented a rewriting of Australia’s legal history. Although Behrendt remains a vocal critic of native title processes (and instead advocates for treaty and the recognition of sovereignty), she has suggested that the Mabo case remains “a solid reminder” that historical wrongs “can be righted, that courts can remedy legal fictions and [that] those historically excluded can be brought back in to the recognition and protection of the legal system.”

Mabo was also, on the other hand, criticised from within the Indigenous community for representing an *illusion of change*. According to Irene Watson, it “opened a door that slammed in our face.” She prefaces this argument by suggesting that the Mabo judgment was a pragmatic one, in the sense that it “retained all things as they were before. Only the image of the state was revamped and made good again.” Watson refers specifically to the fact that the High Court held that the legitimacy of the sovereignty of the Australian state could not be challenged (it “was not justiciable”), and thereby foreclosed the possibility of the recognition of Indigenous sovereignties. At the same time, it also confirmed the capacity of municipal courts to make determinations on the consequences of the acquisition of sovereignty. This meant, in effect, that the High Court sought to preclude challenges to the lawfulness of the legal system that was making determinations on the survival (or otherwise) of an alternative system of proprietorship based in an alternative tradition of law.

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101 *Mabo v Queensland (No 2) [1992]* Brennan at 32.

102 *Mabo v Queensland (No 2) [1992]* Brennan at 32.
The texts considered in this thesis complicate the picture of Mabo as a “signifier of justice” by engaging with terra nullius and native title – both major legal ‘events’ in the life of the Australian nation – from the perspective of Indigenous experiences of law. I use the expression ‘post-Mabo’ in the thesis both as a chronological signpost (to indicate a time after the Mabo judgment of 1992) and also in a more expansive sense, as a way of signalling the social and cultural implications of the judgment (which extended beyond the legal sphere). In this broad sense I refer to “post-Mabo Australia” and ‘post-Mabo narratives” – both of which imply (and grapple with) revised understandings about Australia’s foundation narrative. Not only do they imply concepts such as land rights, sovereignty and native title, but they also deal with questions relating to belonging and identity (for both Indigenous and non-Indigenous Australians).

Part Three: Cultural Responses to Mabo

This thesis represents the first substantive engagement from a ‘law and literature’ perspective with what might be called ‘native title narratives’ – that is, the fictional texts produced by Indigenous writers in the aftermath of the Mabo judgment, and which engage in debate about questions of process and the justness of the native title regime. By introducing particularised knowledge, the narratives provide a means through which minority voices can both critique the law, and “assert control over the parameters of important public debates.” This is especially important in the context of what Nicole Watson has said about native title, which is that it resembles the colonisation – rather than accommodation – of platforms for self-determination. Through narrative, Indigenous storytellers are able to resist this disempowerment by articulating aspirations for legal change, and by

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setting out new terms of engagement with legal systems. They are also able to explicate alternative epistemologies and ontologies.

I begin this preliminary discussion of cultural responses to Mabo by first setting out the intrinsic link between cosmology and story in Indigenous jurisprudential cultures. This discussion provides a foundation for the thesis’ engagement with the disjunctive relationship between Indigenous and non-Indigenous legal cultures, and also references the epistemological incommensurability that is a recurring theme in the texts studied in the thesis – most notably in the Report of the Hindmarsh Island Bridge Royal Commission. The focus then turns to a consideration of what is implied by the idea of a ‘post-Mabo narrative’, and how these texts might confront the “normalised habits of convenient… amnesia” which have been pervasive in Australian law and culture.

**Narrative, Cosmology and Incommensurability:**

Many of the narratives produced in the context of (what has been described as) the “huge output of creative energy” catalysed by the Mabo ruling engage, in a number of ways, with the cosmological nature of the relationship between Indigenous peoples and their laws and lands. Palyku author and legal scholar Ambelin Kwaymullina traces this relationship – between law and story – to a time before Mabo; she argues that, “in this land, stories have power. We are surrounded by tales that shaped and shape, this country.” Kwaymullina’s assertion is supported and expanded by Larissa Behrendt, who contends that, “in our culture… we tell stories as a way to keep our law.” This characterisation is confirmed, in turn, by Christine Black, who

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105 A. Baker & G. Worby, 'Aboriginality since Mabo', 2007, p. 36.
106 S. Flood, 'The Spirit of Mabo: The land needs the laughter of children – Native Title and the Achievements of Aboriginal People', online.
108 L. Behrendt, 'Home: The Importance of Place to the Dispossessed', 2008, p. 73. Although it is not the focus of this thesis, it is worth acknowledging that story is also used by claimants in native title cases in order to demonstrate legal, social and spiritual connections to land. Scott Cane’s book, *Pila Nguru: The Spinifex People*, outlines the way that “native title paintings” were offered as evidence by the Spinifex Peoples during the negotiation of their native title settlement. See: S. Cane, *Pila Nguru: The Spinifex People*, Fremantle Arts Centre Press, Fremantle, 2002.
has remarked that, “the narrative has always been the home of jurisprudence.” Although this thesis is not a study of Indigenous cosmology itself, it is interested in the ways that post-
Mabo narratives have been used to articulate Indigenous epistemologies, and to engage in debate about the politics of native title and belonging. Prior to advancing this discussion further, I will first highlight the way that the thesis engages with two disjunctive jurisprudential systems, and then signpost the way that their incommensurability impacts on this project’s intellectual processes.

In the context of this thesis, then, jurisprudence refers both to the common law system introduced to Australia at the time of its colonisation, and also to the systems of Aboriginal law which are derived “from a time the old ones [ancestors] called… the Dreaming.” Where the common law relies on prescribed rules, doctrine and empirical observation, Indigenous jurisprudence, by contrast, is established around the idea that the law is the land: “it is not made up of doctrinal texts or historical precedent, but rather is actualised from the land itself.” Marcia Langton expands on this foundational premise by suggesting that Indigenous legal systems provide “a religious, philosophic, poetic and normative explanation of how the natural, human and supernatural domains work”, and that they also “tie” individuals to ‘country’ and to Dreamings. This account of Indigenous law as being comprised of a series of mutually sustaining relationships is supported by Ambelin and Blaze Kwaymullina, who argue that:

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110 Irene Watson has explained that, in Aboriginal societies, the Dreaming refers to “a time before, a time now, a time yet coming.” It is also the source of creation stories, which provide, according to Christine Black, “a particular group’s theory of how things came to be, and more specifically, how to live in a certain place.” See: I. Watson, ‘Aboriginal Laws and the Sovereignty of Terra Nullius’, 2002, online; C. Black, A Dialogical Encounter with an Indigenous Jurisprudence, 2007, p. 6.
Aboriginal law is thus formed by relationships – in the sense that legal systems consist of the web of relationships that is country – and informed by relationships, in that the fundamental role of the law is to sustain, maintain and renew the connections between all life.\textsuperscript{113}

It is possible to argue, then, that this difference in the nature of the origin of the common law and of Aboriginal legal systems represents a significant source of disjuncture; while Indigenous legal systems are rooted in country and Dreamings, the common law, on the other hand, is an alien species of jurisprudence which has established jurisprudential primacy in Australia. This primacy was confirmed in the \textit{Mabo} case, and has been reconfirmed in subsequent native title cases, such as \textit{Yorta Yorta},\textsuperscript{114} where Justices Gleeson, Gummow and Hayne recognised the “intersection of two normative systems”\textsuperscript{115} (doctrinal law and the “traditional laws and customs of the Indigenous peoples of this country”\textsuperscript{116}) but ultimately upheld the dominance of the former over the latter:

The assertion of sovereignty by the British Crown necessarily entails that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible.\textsuperscript{117}

Despite the non-recognition of Indigenous sovereignties, Indigenous law remains an “inalienable”\textsuperscript{118} component of the lives of Indigenous peoples: it is, according to Aileen Moreton-Robinson (who is of the Quandamooka

\textsuperscript{113} The authors emphasise that each legal system is country-specific, and that each ‘country’ is “the source of its own truth.” See: A. Kwaymullina & B. Kwaymullina, ‘Learning to Read the Signs: Law in an Indigenous Reality’, \textit{Journal of Australian Studies}, Vol. 34, No. 2, 2010, p. 203.
\textsuperscript{114} In 2002, an appeal to the High Court by the Yorta Yorta people (of the south-east of Australia) for native title over their lands was dismissed. See: \textit{Members of the Yorta Yorta Aboriginal Community v Victoria} [2002] HCA 58; 214 CLR 422 (12 December 2002).
\textsuperscript{115} \textit{Yorta Yorta v Victoria} [2002] at 39.
\textsuperscript{116} \textit{Yorta Yorta v Victoria} [2002] at 40.
\textsuperscript{117} \textit{Yorta Yorta v Victoria} [2002] at 44.
nation), “constitutive of us.” This relationship is also, I suggest, the source of an ontological and epistemological disjunct between Indigenous and non-Indigenous Australians that cannot be bridged. Moreton-Robinson highlights this when she argues that the bond between Indigenous peoples and the land (which is also, as I have suggested, the source of law) “cannot be shared with the post-colonial subject, whose sense of belonging in this place is tied to migrancy.” In other words, she argues that, because non-Indigenous Australians do not ‘belong’ to the land, they cannot claim to understand it or read it in the same way that Indigenous Australians can and do. A similar assertion is made by Baker and Worby, who argue that Indigenous “knowledge systems and practices... sometimes exceed the limitations of Western discourse.” This position is echoed by the non-Indigenous critic Alison Ravenscroft, who argues in her analysis of Alexis Wright’s *Carpentaria* that “Indigenous law cannot be ‘seen’ from a Waanyi point of view if one is not Waanyi... the law falls out of the scene of white Western imagining [and of what] we can see or know.” Ravenscroft’s point here is that there is a limit to the knowledge white readers can expect to take from a text (this itself poses a challenge to the white-subject position’s assumed access to all knowledge), and that it is problematic to presume that Indigenous law, for example, can be understood in all of its complexity in any case. This argument influences the intellectual assumptions of this thesis; in other words, it is shaped by a recognition of the limitations of the non-Indigenous reading lens.

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To speak of post-*Mabo* writing, and of a post-*Mabo* Australia, suggests that there was once a pre-*Mabo* literature whose narratives explored different questions, and a pre-*Mabo* Australia, which was, perhaps, a different place. In this thesis, I suggest that *Mabo* stands as a significant *moment* in Australia’s legal and cultural history, and that it is also, therefore, an important chronological signpost, marking (what was promoted as) the beginning of a new judicial reality. Much has been said about this, and in particular, the claim that the judgment forced a significant shift in national self-understanding through its revisioning of Australia’s ‘foundation narrative’.

Some of this critical reflection was inspired, at least in part, by the words of Justices Deane and Gaudron, who remarked in the *Mabo* case that, “the acts and events by which [the] dispossession in legal theory was carried into practical effect constitute the darkest aspects of the history of this nation.”

This reckoning demanded, in many ways, that white Australians reconcile the legitimacy of their presence in a stolen land.

For Ken Gelder and Jane Jacobs, *Mabo* turned Australia into an ‘uncanny’ space: it became, almost overnight, unsettling and unhomely. Russell West-Pavlov has argued similarly that the effect of *Mabo* was to make white...

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124 *Mabo* joined with a number of other important socio-legal events in catalysing this critical reflection. They included Australia’s bicentenary (1988), the Royal Commission into Aboriginal Deaths in Custody (1987-91), Prime Minister Paul Keating’s ‘Redfern Speech’ (1992), and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997).

125 *Mabo v Queensland (No 2) [1992]* Deane and Gaudron at 56.

126 For an analysis of the way that non-Indigenous novelists (such as Andrew McGahan, Kate Grenville and Gail Jones) have engaged with this idea – and with *Mabo* and the ‘sorry debates’ more broadly – see: L. Zavaglia, *White Apology and Apologia: Australian Novels of Reconciliation*, Cambria Press, New York, 2016.

127 Gelder and Jacobs argue that an ‘uncanny’ experience may occur when one’s home is rendered, somehow and in some sense, unfamiliar, such that one has the experience, in other words, of being ‘in place’ and ‘out of place’ simultaneously. See: K. Gelder & J. Jacobs, *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation*, Melbourne University Press, Carlton South, 1998, pp. 138, 23.
Australia irreversibly different to itself – it revealed that the white template of the nation was underpinned by a black one, which had its own corresponding relationships of land curatorship.128 Nicole Watson, the Indigenous author and lawyer, takes a different view, which is that the *Mabo* story is no longer considered “unsettling” for white Australians (perhaps in the way described by Gelder and Jacobs) because it now “accords” with a “stock story”, which is that, while Aboriginal people suffered in the past, their circumstances are now improving.129 This is a compelling argument, and Watson traces its emergence to the absence of outsider-storytelling in the context of native title; there is, she suggests, a poor understanding of the “lack [of] humanity”130 in its processes.

In a post-*Mabo* context, then, Penelope Pether has argued influentially that literature plays an important role in imagining the nation and national identity, and that it might also, moreover, “help in the work of restoring justice to the law.”131 This expression of optimism is echoed by Baker and Worby who contend that:

> In times where there is a constriction of political dialogue around issues of belonging, lawful sovereignty and justice for Indigenous peoples, artistic practice... has a role to play in transgressing or exposing ideological borders, and [in] clearing a space for dialogue, interaction and transformation.132

Baker and Worby develop this argument by suggesting that Aboriginal writers and storytellers have responded to the political convulsions of *Mabo* by seeking transformation through the “affirmation and restoration of their

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131 These reflections are made in the context of her search for a “comparative constitutional epic”, which is to say, for a legal fictional narrative that might “make coherent narratives out of the messy contingency of evidence.” Pether suggests that the Australian film, *The Castle*, may be the “cinematic double” of the *Mabo* decision, and that “literature’s feminine supplement might help in the work of restoring justice to law.” See: P. Pether, ‘The Prose and the Passion’, 2007, Vol. 66, No. 3, 2007, pp. 44, 47.
knowledges”, as well as through “shifts in consciousness, critiques of discourses and [by articulating] resistance to normalised habits of convenient… amnesia.”¹³³ This summary of what might be called the ‘social work’ of post-\textit{Mabo} Aboriginal writing links with the narrative texts studied in this thesis – each of which participates in debates about \textit{Mabo} and native title, while also emphasising the embeddedness in place of Australia’s Indigenous peoples. Prior to introducing the texts studied in the thesis (and offering an outline of the politics of Indigenous literacy), I will first reflect briefly on narrative jurisprudence and critical race theory and foreshadow the ways in which the texts studied in this thesis use story and/or narrative to “assert control over the parameters of important public debates.”¹³⁴

\textbf{Part Four: Narrative, Law and Race – Narrative Jurisprudence and Critical Race Theory}

In its simplest sense, jurisprudence refers to the theory or philosophy of law, being derived from the Latin words \textit{jus}, meaning law or rule, and \textit{prudentia}, meaning knowledge. Suri Ratnapala expands on this definition by suggesting that jurisprudence is, in fact, an “imprecise term”, referring both to the substantive rules of the law and to its interpretation.¹³⁵ Specifically, he identifies two broad approaches – ‘analytical’ and ‘normative’ – and uses these to shape a discussion of the development and contemporary applications of the term. In Ratnapala’s understanding, ‘analytical’ jurisprudence is co-extensive with legal theory and associated with the positivist tradition, while ‘normative’ jurisprudence refers to the moral dimensions of the law, and so can be linked to natural law.¹³⁶

‘Law and literature’ scholar Peter Goodrich also traces the development of jurisprudence, and argues that contemporary law has been “displaced” from its origins in morality (where it was understood as “the knowledge of things divine and human and the science of what is just or unjust”\(^\text{137}\)) such that it now resembles a “modernist science subject to distinct and autonomous rules of legal method.”\(^\text{138}\) In particular, he proposes that legal positivism has contributed to a view of the law as “the brute fact of a system of norms... predicated on closure” and resistant to the possibility of indeterminacy.\(^\text{139}\) For Goodrich, this means that jurisprudence has now turned from the divine to the human, from art to science and from justice to law.\(^\text{140}\) In voicing this concern, he articulates a key contention of advocates of narrative jurisprudence, which is that modern (doctrinal) law is characterised by an absence of justice. This concern is echoed and expanded by critical race theorists, who suggest that the law systematically discriminates against people of colour, and that legal storytelling provides the tools to address and correct this absence.\(^\text{141}\)

Narrative jurisprudence was “inaugurated... as a mode of legal critique”\(^\text{142}\) in Robert Cover’s 1983 essay, ‘Nomos and Narrative’, which highlighted the “inseparability” and interdependence of law, narrative and meaning.\(^\text{143}\) In general terms, narrative jurisprudence refers to the intervention of story in contemporary legal situations, and works under the assumption that the inclusivity of the law can be enhanced by drawing attention to the


\(^{139}\) P. Goodrich, Law in the Courts of Love, 1996, pp. 162, 161, 162.

\(^{140}\) P. Goodrich, Law in the Courts of Love, 1996, p. 10.

\(^{141}\) Richard Delgado suggests that “voice” scholarship (which is to say, legal storytelling or outsider-storytelling) has the potential to bring to light “the petty and major tyrannies that minority communities suffer... [and to] enable us to see and correct systemic injustices that might otherwise remain invisible.” See: R. Delgado, ‘When a Story is Just a Story: Does Voice Really Matter?’, Virginia Law Review, Vol. 76, No. 1, 1990, p. 109.


\(^{143}\) Cover argued that “no set of legal institutions exists apart from the narratives that locate it and give it meaning” and that, “once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.” See: R. Cover, ‘Nomos and Narrative’ in M. Minow, M. Ryan & A. Sarat (eds), Narrative, Violence and the Law: The Essays of Robert Cover, The University of Michigan Press, Ann Arbor, 1993, p. 96.
experiences of those who have been marginalised or subjugated by it. It does this by analysing the stories told at law, by detecting suppressed voices and by telling new stories, previously unheard at law. According to Ian Ward, it “advances the idea that justice is something more than law – something that needs a literary supplement.” In this sense, narrative jurisprudence interfaces with ‘law and literature’ – indeed, Richard Weisberg suggests that it “conflates” the ‘law ‘as' and ‘in’ literature’ division – because of the way that it seeks to expose the limitations of traditional doctrinal analysis (it responds to the positivism and scientism of legal culture) and by providing a means through which to understand the “dynamic... jurisprudence of our era.” Stories offer, according to Richard Weisberg (who has been one of the strongest advocates of the study of the role of narrative in law), a means to “trace and grasp” injustice, as well as the tools to interrogate power relations and to challenge the universalizing and abstract assumptions of the law.

On this point, Peter Brooks articulates that:

“Narrative has a unique ability to embody the concrete experience of individuals and communities, to make other voices heard, to contest the very assumptions of legal judgment. Narrative is thus a form of countermajoritarian argument, a genre for oppositionists intent on showing up the

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144 This approach has not been without criticism. For instance, Guyora Binder and Robert Weisberg argue that, “the hope that narrative will work some utopian transformation of law and legal culture is quixotic [and rests on] sentimental oppositions between reason and passion, objectivity and subjectivity, society and individual.” See: G. Binder & R. Weisberg, Literary Criticisms of Law, Princeton University Press, New Jersey, 2000, p. 208.
147 Weisberg argues that, “narrative jurisprudence conflates these subdivisions [law in literature, law as literature]...because the law in literature already involves the central hermeneutic challenges artificially labeled the law as literature and at the same time emphasises style – an awareness that style and substance are linked. See: R. Weisberg, ‘What Remains Real About the Law and Literature Movement?: A Global Appraisal’, Journal of Legal Education, Vol. 66, No. 1, 2016, p. 39.
150 R. Weisberg, ‘What Remains Real About the Law and Literature Movement?’, 2016, p. 43.
exclusions that occur in legal business-as-usual – a way of saying, you cannot understand until you have listened to our story.”\textsuperscript{151}

While recognising the benefits and potentials of analysing the stories told at law, Brooks also observes that narrative is a “moral chameleon”, capable of promoting “the worse as well as the better cause every bit as much as legal sophistry.”\textsuperscript{152} It is, he suggests, therefore incapable of making a “superior ethical claim” over traditional legal doctrine – principally because “storytelling… is never innocent.”\textsuperscript{153} Guyora Binder and Robert Weisberg make similar observations; they warn against the “sentimentality of categorical claims that narrative subverts or redeems law by opposing cold rationality with authentic human feeling”,\textsuperscript{154} and reject what they perceive as “extravagant” claims about the potential for narrative to transform the law and legal culture (John Braithwaite, for example, argues that storytelling in the law represents a path to “liberation”\textsuperscript{155}). For Binder and Weisberg, this is a “utopian” and “quixotic” hope.\textsuperscript{156} To be clear, it is not that these scholars necessarily dispute the intersections between law and narrative (Brooks describes this as a “productive” field of enquiry and advances a “legal narratology”\textsuperscript{157}), but rather that they caution against the idea that storytelling alone can change legal culture.

Julie Stone Peters echoes the concerns raised by Brooks, Binder and Weisberg when she observes that narrative jurisprudence represents a mid-1980s “revival” of the humanism associated with the ‘law and literature’ movement of the 1970s. According to Stone Peters, narrative jurisprudence

\textsuperscript{153} P. Brooks, ‘The Law as Narrative and Rhetoric’, 1988, p. 16. Brooks’ claim is based on the suggestion that narrative always seeks to impart and induce a point of view.
\textsuperscript{157} Brooks suggests that a legal narratology would be interested in decoding “stories in the situation of their telling and listening, asking not only how these stories are constructed and told, but also how they are listened to, received, reacted to, how they ask to be acted upon and how they in fact become operative.” See: P. Brooks, ‘Narrative Transactions – Does the Law Need a Narratology?’, \textit{Yale Journal of Law and the Humanities}, Vol. 18, No. 1, 2006, p. 25.
“clothe[s] its truth claims in a revived humanist rhetoric rendered palatable through a transfer to the sphere of oppositional politics and the psychology of oppression.”

Notwithstanding these theoretical critiques, minority and subordinated groups have made effective use of narrative in furthering their claims for justice and recognition. Stone Peters gestures to this, and to the emergence of critical race theory, in the above excerpt.

Critical Race Theory and Legal Storytelling:

Critical race theory, which emerged as an area of academic focus at the intersection of race, law and power at around the same time as narrative jurisprudence, responds to the law’s claims to procedural and substantive equality by arguing compellingly that, “neutrality and objectivity are not just unattainable ideals... they are harmful fictions that obscure the normative supremacy of whiteness.” In order to address this inequality, and the narratives that make white dominance seem “fair and natural”, exponents of the movement promote the role of narrative in “giving voice to the voiceless” and in transforming legal culture through the creation of a counter-discourse, “which [would] document and disseminate the knowledge and experience of the oppressed and silenced.” At a practical level, then, critical race theory promotes outsider-storytelling (or counter-storytelling) as a means to challenge or displace the “pernicious narratives and beliefs held by dominant groups that marginalise outsiders and determine their social and

161 R. Wharton & D. Miller, ‘New Directions in Law and Narrative’, Law, Culture and the Humanities, July 2016, p. 3.
legal outcomes.” For this reason, outsider-storytelling is linked with narrative jurisprudence (Gary Minda describes it as a genre of narrative jurisprudence because of the way that both are invested in highlighting suppressed stories and transforming legal cultures.

In an Australian context, Nicole Watson has used critical race theory to reflect on native title, and to illuminate the link between outsider-storytelling and the politics of self-determination. Specifically, she has characterised the Aboriginal Tent Embassy (which was established in Canberra in 1972 and has remained a highly visible symbol of Indigenous claims to sovereignty) as an “exemplar” of outsider-storytelling, and has argued that its “privileging of Aboriginal experiences of invasion and occupation” was instrumental to “removing the mental shackles that had convinced many of our people that they were the authors of all of their ills.” Crucially, Watson contends that the Tent Embassy was successful at drawing public attention to questions of sovereignty primarily because of the way that its outsider-stories penetrated the consciousness of the nation’s parliaments and living rooms. In this light, she suggests that the Tent Embassy provides instructive insights in relation to native title, and moreover, that outsider-stories have the potential to expose its limitations and “shortcomings.”

Like narrative jurisprudence, critical race theory has also, however, been opposed as a method and movement at a number of levels, including by those who reject the suggestion that people of colour speak with different voices, and by those who contend that its impact on legal discourse has

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163 In their writing, Delgado and Stefancic argue that, if racism is constructed, then it is capable of being deconstructed – and that this can be done through counter-storytelling. See: R. Delgado & J. Stefancic, Critical Race Theory: An Introduction, 2012, pp. 49, 7-8.
been negligible. Kimberlé Crenshaw summarises this critique by observing: “We’re told… our work is beyond all reason, we offer no analysis, we just tell stories – bad ones, at that – and we don’t do law.” Despite this resistance, Nancy Levit argues that “the idea that stories are a useful method [for] provoking thinking about law has sifted into the legal academy.” This is so, she suggests, because stories “illuminate diverse perspectives; evoke empathetic understandings; and their vivid details engage people in ways that sterile legal arguments do not.”

Central to the development of this relationship has been the emergence of a discourse of human rights, which understands intensely that story is intrinsic to the way that experiences of trauma are articulated. In this context, the role of testimony (which has been framed by Homi Bhabha as “the voice of justice in first-person”) is elevated in recognition of the way that it provides a means for those who have been wronged – that is, those whose human rights have been violated – to frame their own stories in their own terms. It represents, according to Joseph Slaughter, an important source of individual and community empowerment. Although the presentation of testimony (and of counter-stories) has taken a number of forms in recent years, in Australia it has carried particular salience in life-writing and through the quasi-judicial genre of the human rights report.

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It is important to note at this point, however, that there are fundamental differences between storytelling in a legal context and storytelling in a literary sense. This thesis considers both kinds – first through its analysis of two quasi-judicial texts (where testimony is “repackaged and circulated far beyond the control of the individual narrators”\(^{176}\)), and then through its consideration of four fictional narratives. These differences relate primarily to questions of genre and convention: where the novel is understood as a work of imagination, storytelling in law makes significant claims on truth.

In his writing on ‘law and literature, Robert Ferguson reminds us that, “the novel – or any well-told story – creates its own world.”\(^{177}\) It is not controlled by “principles and systems” in the same way that testimony presented for adjudication is. Ferguson extends this argument further by contending that, “fiction defines behaviour in any manner it wants to as long as it convinces its readership… We learn what each character believes and does through the set world created by the novelist. All of the evidence is gathered on the page.”\(^{178}\) Storytelling in law, by contrast, does not have this freedom – it is “severely” constrained by norms of legal practice developed over centuries.\(^{179}\) According to Peter Brooks, this is because the law recognises the power of storytelling (the way that it compels) and so has sought to “formalise the conditions of telling, in order to ensure that narratives reach those charged with judging them in certain rule-governed forms.”\(^{180}\) As a result, testimony is heavily mediated in a court or quasi-legal setting: witnesses are bound by an oath of truth and their testimony is (typically) subject to cross-examination.

\(^{176}\) H. Goodall, ‘Challenging Voices: Tracing the Problematic Role of Testimony in Political Change’, \textit{Australian Literary Studies}, Vol. 22, No. 4, 2006, p. 514. In Chapters One and Two I will describe the ways in which testimony was mediated in each of the quasi-judicial enquiries.


\(^{179}\) R. Kennedy, ‘Subversive Witnessing: Mediating Indigenous Testimony in Australian Cultural and Legal Institutions’, \textit{Women’s Studies Quarterly}, Vol. 36, No. 1-2, 2008, p. 71. This is despite their similarities in form; testimony has a number of literary aspects, including tone, style, structure and affect.

Despite these differences in convention, I argue in this thesis that there are strong links between the legal storytelling conveyed in *Bringing Them Home* and the storytelling that occurs in the four novels subject to analysis. Both forms engage in counter-storytelling by giving voice to the voiceless (victims of dispossession and forcible removal) and by “disseminat[ing] the knowledge and experience of the oppressed and silenced.”

**Part Five: Literacy, Culture and Aboriginal Literature**

It should go without saying that post-*Mabo* narratives are tied intimately to the social, political and legal events out of which they unfold. This point is made by Adam Shoemaker, who contends that “black creative writing cannot be studied in isolation.” Baker and Worby expand on this point by arguing that, “*Mabo* and Aboriginality are part of larger and changing narratives of cultural interaction and confrontation… that allow stories to bring writers and readers, tellers and listeners together.” In the following section I will introduce the complex nature of the relationship between Indigenous culture and literacy, reflect on the politics of the production of Aboriginal writing, catalogue important scholarship in the field of Indigenous literary criticism and make some general remarks about the style and impact of Aboriginal writing in Australia. This discussion is important because it signals the way that literature facilitates the telling of stories in a print culture context, and moreover, the way that literature can be used to advance claims of injustice.

*Writing Never Arrives Naked* – the Politics of Language and Literature:

According to Michele Grossman, the colonisation of Australia should be recognised as a disruptive moment, not least because of the “event of literacy” and the introduction of new ways of organising meaning and

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knowledge – such as through an alphabetic script and the written word.\(^\text{184}\) She cites Gayatri Spivak to argue that the introduction of writing to Australia represents an act of “epistemic violence” which involves the institution of an invasive order of knowledge and systems of classification that attempt to transform “Aboriginal consciousness... and marginalise its previously analphabete systems of meaning by reshaping the ways Aboriginal peoples come to know and relate to themselves.”\(^\text{185}\) According to Grossman, this results in the displacement and disenfranchisement of Aboriginal ways of viewing and being in the world. While it is true that the arrival of the English language in Australia can be regarded as an occasion of violence (Aboriginal literacy is deeply implicated with oppression\(^\text{186}\)), it is also a relationship marked by dynamism and transformation.

In her insightful text, *Writing Never Arrives Naked: Early Aboriginal Cultures of Writing in Australia*, Penny van Toorn reflects on the complexities of the relationship between Indigenous Australians and the paper culture introduced by the British in 1788. She emphasises that the theoretical view of oral and literate cultures as fundamentally opposed is misguided,\(^\text{187}\) and suggests instead that it was not reading and writing *per se* that eroded traditional Indigenous cultures, but rather, “the particular circumstances under which Indigenous peoples acquired literacy and engaged with the material artefacts of literate Western culture.”\(^\text{188}\) Van Toorn argues that the ideological, material, linguistic, semantic, socio-political and institutional

\(^{184}\) M. Grossman, ‘When they Write what we Read’, 2006, online.


\(^{186}\) Penny van Toorn explains that, “writing was carried into [the worlds of Aboriginal people] by individuals whose skin colour was the same as that of the people who shot them, sexually abused them, poisoned their water, ruined their hunting grounds, took away their children, and dispossessed them from their lands.” See: P. van Toorn, *Writing Never Arrives Naked: Early Aboriginal Cultures of Writing in Australia*, Aboriginal Studies Press, Canberra, 2006, p. 14.

\(^{187}\) According to van Toorn, the “authority of science and the imaginative force of the arts have combined to create a perception that Aboriginal cultures are essentially oral, while literacy is the province of the settler society.” Throughout the colonial period it was assumed that oral and literate cultures were “successive, mutually exclusive stages in a single, unavoidable path of cultural evolution towards modernity.” This was a view influenced by the philosophy of the Enlightenment which assumed that, “humankind is characterised by a ‘will to writing’, that writing is a universal cultural goal, and that all cultures are somewhere along the road to writing.” van Toorn expands on this point by arguing that “to deem Aboriginal cultures ‘oral’ is to reinforce a narrow Eurocentric definition of ‘writing’, a definition that excludes or demands non-alphabetic graphic systems. See: P. van Toorn, *Writing Never Arrives Naked*, 2006, pp. 2, 12, 9, 18, 19-20.

dimensions of literacy must be considered in any reading of the relationship between Indigenous peoples with reading and writing, and that, historically, the extent of Indigenous engagement and interplay with literacy has been understated. Accordingly, she argues that this cross-cultural “entanglement” continues to shape Indigenous reading and writing practices today.

For these reasons, and because of this “entanglement”, it is clear that Indigenous Australian writing has been both constituted by, and resistant to, literacy-based formations of knowledge and representation. In other words, it responds to the politics of its cultural context and is innovative as a result of the adaptation of, and interplay between, diverse modes of expression. For Noongar author Kim Scott, writing is both a “by-product” of colonisation and a part of the “continuation and regeneration of a prior Indigenous culture.” Wiradjuri scholar Anita Heiss argues similarly that writing is integral to reviving and maintaining Indigenous history and culture, and moreover, that it is also “a logical and necessary move in the development of Indigenous expression." These assertions are supported by Ken Gelder and Paul Salzman, who imagine Aboriginal literacy as negotiating “a pathway between the fact of dispossession and the need to articulate a sense of belonging.” They argue, in other words, that writing is central to the politics of self-identification and, more broadly, to the process of interrogating the historical representation of Aboriginality. Anne Brewster expands on these possibilities by suggesting that Aboriginal authors act as “interlocutors”, engaged in “reshaping the knowledge and sensibilities of

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189 For instance, van Toorn claims that alphabetic characters were assimilated into Indigenous understandings of the universe (particularly when they were encountered without white guidance) and so perceived in relation to traditional frames of reference. See: P. van Toorn, Writing Never Arrives Naked, 2006, pp. 13-14.
190 M. Grossman, ‘When they Write what we Read’, 2006, online.
191 Indigenous writing demonstrates, for example, great inventiveness in its incorporation of Dreaming stories and Aboriginal languages (within English-language texts) across a diverse range of genres, including science fiction, young-adult fiction, gothic fiction and historical fiction. Nicholas Jose emphasises this point when he argues that Aboriginal literature “has its own traditions, modes and rhetoric” and that it “asks us to think again about what is literature at its furthest limits and horizon.” See: N. Jose, ‘Foreword’ in B. Wheeler (ed), A Companion to Australian Aboriginal Literature, Camden House, New York, 2013, p. ix.
whiteness and non-Indigenous audiences and publics”, while also “reconfiguring cross-cultural relationships.”\textsuperscript{195}

Tracing the Politics of the Production of Indigenous Literacy:

In the introduction to their anthology of Indigenous literature, Anita Heiss and Peter Minter argue convincingly that, “the use of English by Indigenous people became a necessity in order to survive colonisation.”\textsuperscript{196} Specifically, they contend that, in the context of social and legal oppression, writing became a tool for negotiation through which Aboriginal voices could be heard in a form recognisable to British authority. It is not surprising, then, that the first Aboriginal writing can be traced to the genres of political activism – that is, to the “letters by individuals to local authorities and newspapers, petitions by communities in fear of further forms of dispossession or incarceration, and the chronicles of the dispossessed.”\textsuperscript{197} Out of these beginnings, Aboriginal writing established itself as a protest writing. It also, however, evolved in the second half of the twentieth-century to span all genres and forms of contemporary textuality, including scholarly research and criticism, journalism, poetry, film and radio scriptwriting, novels, histories and biographies. Much of this was shaped, according to Heiss and Minter, by the activism of the 1960s, which laid the foundations for the “aesthetic questions and possibilities”\textsuperscript{198} that Aboriginal authors engage with today.

The dynamism and inventiveness of this writing continues to be compromised, however, by the “prevailing conditions of production,

\textsuperscript{195} Brewster also emphasises, however, that it is important not to “reify” the category of Indigenous literature “as self-evident or unified”, and to instead be conscious of the way that Aboriginal writers are heterogeneous and diverse.” See: A. Brewster, \textit{Giving This Country a Memory: Contemporary Aboriginal Voices of Australia}, Cambria University Press, New York, 2015, pp. xvii-xviii, xiv.


\textsuperscript{198} Heiss and Minter suggest that, from the 1960s, “Aboriginal writers began publishing volumes of poetry and fiction with both mainstream and grassroots presses, works for the theatre were successfully produced, published and widely read, and around the country Aboriginal journalists were contributing to the pamphlets, newsletters, newspapers and magazines from which an independent Aboriginal print media has since grown and flourished.” See: A. Heiss & P. Minter, ‘Introduction’, 2008, p. 5.
consumption and interpretation.” According to Heiss, this interference has the effect of frustrating the autonomy and expression of Indigenous writers. Despite these interventions and complications, it is also the case that Australian publishers have played a significant role in the proliferation of writing by Indigenous authors, and in its distribution to local and global markets. Mainstream presses, such as Picador, Allen & Unwin and Penguin Books, have taken an active role in this process (particularly by publishing the work of established Aboriginal writers), as have university-affiliated presses and smaller, independent publishers, such as Giramondo Publishing, Spinifex Press, Fremantle Press and Federation Press. Significantly, each of Australia’s three Aboriginal presses – IAD Press, Aboriginal Studies Press and Magabala Books – have all, also, been instrumental to the circulation of Aboriginal writing.

Part Six: Structure of the Thesis

Chapters One and Two of this thesis examine post-‘Mabo’ texts of an ‘official’ (or quasi-judicial) kind: the Human Rights Commission’s Bringing Them Home report and the Report of the Hindmarsh Island Bridge Royal Commission. This approach enables a narrative jurisprudence analysis of significant encounters between Indigenous and non-Indigenous Australians, and specifically, of the inquiries that have been established to scrutinise

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200 Gubba is a Koori word meaning ‘white person’. Heiss refers to the application of ‘white’ reading and writing practices (in the publishing process) to Indigenous literature. See: A. Heiss, Dhuuluu-Yala – To Talk Straight, 2003, chapters 4 and 5.
202 The University of Queensland Press (UQP), in particular, has shown support for Indigenous literature through the ‘Black Australian Writers Series’, its sponsorship of the David Unaipon Award and the appointment of Indigenous academic Sandra Phillips as an editor within the organisation. Heiss also suggests that UWA Publishing is “committed to understanding the cultural differences affecting Aboriginal writing production or publishing.” See: A. Heiss, Dhuuluu-Yala – To Talk Straight, 2003, p. 63.
204 It is also important to note, however, what Heiss has described as the “disproportionate influence” of white (in-house) editors, managers and publishers within Australia’s Aboriginal publishing houses. See: A. Heiss, Dhuuluu-Yala – To Talk Straight, 2003, pp. 51-57.
aspects of this relationship. By centering its analysis in these chapters on official, quasi-judicial texts, the thesis is able to reflect upon contrasting approaches to the intervention of narrative in the law. It shows that, where Bringing Them Home identified a role for story in the ‘healing’ of the nation, the Hindmarsh Island Bridge Royal Commission, by contrast, resisted this possibility and instead framed its investigation in adversarial and positivist terms.

In this context, a ‘quasi-judicial’ inquiry refers to a semi-legal body with powers resembling those of a court or judge, and which is established to investigate matters of public or political importance. Human rights inquiries, such as Bringing Them Home, are generally understood to elevate the status of voice and story in official discourse by legitimizing their claims to truth, and by imbuing them with an affective power. This privileging of voice reflects a challenge to the traditionally monologic language of legal analysis, and so provides a way for the law to “tell history in a radically new way.” The Royal Commission is a similarly adhoc and adaptable mode of inquiry that has been used by governments to intervene in, and bring a resolution to, politically ‘difficult’ situations. While both models call witnesses and hear evidence, neither has the authority to initiate prosecutions or to deliver legally or legislatively binding judgments. Instead, quasi-judicial inquiries make determinations – or a series of recommendations – in the reports that are presented to government; these are based on an analysis of the evidence received during the hearing process, and respond to the terms of reference set out by the inquiry’s governing authority.

Chapter One:

Chapter One of the thesis engages with the Human Rights and Equal Opportunity Commission’s Bringing Them Home report, which is a comprehensive presentation of the findings of an inquiry that was initiated in Australia in the mid-1990s to trace the “past laws, practices and policies”

\(^{205}\) T. Phelps, ‘Reading as if for Life: Law and Literature is More Important than Ever’, 2008, p. 145.
leading to the forced removal of Aboriginal and Torres Strait Islander children from their families. By approaching the report through the framework of ‘law and literature’, the chapter seeks to contribute new knowledge to the study of a legal text which was described, upon its release, as “the saddest of all stories.” As a consequence of its instruction to “consult widely”, Bringing Them Home incorporates (and gives primacy to) the voices of victims of the ‘stolen generations.’ In doing so, it demonstrates the way that the ‘hidden’ nature of Aboriginal experience (of injustice) can be brought to the surface – and to the centre of national political debate – through legal processes. The chapter engages in these debates by drawing from narrative jurisprudence and critical race theory (as methods of legal critique) in order to frame the text’s stories as counter-stories. It also reflects more broadly on the way that the report itself functions (through its rhetorical strategies) in the mode of advocacy – it calls for acknowledgement, apology and redress. Finally, my analysis considers the report’s dialogism (it is influenced by Mikhail Bakhtin’s claim that all texts are in a constant negotiation with other texts, and that this informs their “socio-ideological consciousness” and suggests that, through the relationship that it sets out between speaker, reader and nation, Bringing Them Home attempts to navigate a path to reconciliation.

Chapter Two:

The focus of Chapter Two of the thesis is an analysis of the Report of the Hindmarsh Island Bridge Royal Commission. When it was announced in 1995 – just three years after the Mabo ruling – the Royal Commission was tasked with investigating whether claims about the existence of secret ‘women’s business’ had been fabricated in order to prevent the construction of a bridge on the traditional lands of the Ngarrindjeri people. In the chapter, I suggest that the report’s processes and finding (which was that the ‘women’s business’ had been fabricated) were marked by a particular presumptuousness – where it was assumed that Indigenous epistemologies

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could be scrutinised, known and adjudicated by an alternative and incommensurate (Western) legal system. By approaching the report through the theoretical prism of ‘law as literature’, the chapter seeks to engage with the law’s consistent privileging of literate modes of communication, and to point to the way that this creates gaps in our official understanding of other, alternative ways of knowing. These arguments are developed through a deconstructive reading practice, which is employed in order to reflect on the role of legal language in the report (the way that it is used to create ideas of ‘good’ and ‘bad’, true and false, ‘authentic’ and ‘fabricated’) but also to engage with the concept of ‘fabrication’ as a metaphor for the report’s constructedness.

Although Bringing Them Home and the Hindmarsh Island Affair do not deal explicitly with the issues raised by the Mabo judgment, they do engage broadly with the concept of ‘home’, which, it can be argued, was a central concern of the Mabo litigation. In Mabo, Chief Justice Brennan asserted:

> The common law itself took from Indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live.208

Both quasi-judicial inquiries engage with the themes and ideas raised by Brennan in his judgment; Bringing Them Home traces the stories of children who were removed from their families and their homes, while the Hindmarsh Island Bridge Royal Commission seeks to investigate and verify claims about the desecration of the Ngarrindjeri peoples’ spiritual and ancestral homelands. As such, both inquiries can be understood as cultural responses

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208 Mabo v Queensland (No 2) [1992] Brennan at 28.
to *Mabo* because of the way that they deal with questions relating to dispossession and belonging.

The second half of the thesis examines the way that four Indigenous novelists – Larissa Behrendt, Terri Janke, Nicole Watson and Melissa Lucashenko – have used literature to participate in important political debates, and to advance their own stories and narrative jurisprudence. Their writing occurs in the context of what has been described by Wiradjuri scholar and writer Jeanine Leane as a “blossoming”\(^{209}\) of Indigenous literature since *Mabo*. This characterisation (of the state of Indigenous literature) suggests that the recognition of native title provided a fertile ground for the development of an Aboriginal literary canon, which Leane describes as having, “a different sound and voice than the Anglo-Australian canon that has dominated the Australian literary landscape.”\(^{210}\) Like Leane, Belinda Wheeler also argues that Indigenous literature has now become a “recognised canon in its own right.”\(^{211}\) The collection of essays in her edited volume, *A Companion to Australian Aboriginal Literature*, provide a comprehensive overview of some of the key themes in this writing, as well as a summary of the ways in which Indigenous writers are engaging with – and adapting – a range of literary genres.

In the section below, I present summaries of the narrative texts studied in the thesis, and foreshadow the ways that they engage with and critique Australian history and law, and more specifically, the native title regime. Importantly, I do this by linking each of the texts to a genre or literary mode in order to highlight the depth of style and form within the Aboriginal literary canon.


\(^{210}\) Leane suggests that many of the texts in the emerging canon “serve as a counter-discourse to the colonial positioning of Aboriginals as primitive, exotic, lazy, simple and isolated.” See: J. Leane, ‘Rites/Rights/Writes of Passage’, 2013, pp. 121, 122.

Chapter Three:

A “blossoming” of Aboriginal literature also occurred in the context of the release of the *Bringing Them Home* report, which chronicled the stories (in the mode of the quasi-judicial report) of Aboriginal people whose lives had been devastated by policies relating to the forcible removal of children from their families. Inspired by this storytelling, Indigenous writers turned increasingly to the life-writing genre in order to articulate experiences of trauma, and as a way to counter-narrativise the dominant narratives of Australia’s history. In *Home* (2004), Larissa Behrendt participates in this revisioning by telling the story of the ‘homecoming’ of Candice Brecht, whose family was dispossessed of their ancestral lands in the nineteenth-century, and whose grandmother was ‘stolen’ from her community (when she was a child) in 1918. Through discontinuities in time and place, Behrendt frames this story of dispossession in relation to the *Mabo* judgment, and in doing so, facilitates a critical engagement in the text with the politics of native title and questions of social justice. My analysis of the novel focuses in particular on its didactism, and the way that Behrendt seeks to establish an aesthetic distance between the text and the reader in order to encourage critical reflection on matters of political and legal significance.

Chapter Four:

Aboriginal writers have also engaged with, and adapted, the *Bildungsroman* as a mode of literary expression. In her critical writings, Jeanine Leane identifies the *Aboriginal Bildungsroman* as being distinct from the traditional *Bildungsroman* because of its focus on the restoration of community identifications, and because of its interest in developing an individual’s sense of belonging in relation to their wider community (they are often stories of reunion and re-integration). In this thesis, I suggest that Terri Janke’s novel, *Butterfly Song* (2005), takes the form of the *Aboriginal Bildungsroman* because of the way that it traces the ‘coming into being’ of its protagonist in relation to the Torres Strait Islander community, and, importantly, the legal profession. Specifically, I argue that the novel uses the story of the
misappropriation of a pearl brooch as a metaphor for the dispossession of Indigenous lands in Australia, and that the story of its return (Tarena Shaw represents her family in their legal action) is mimetic of the famous *Mabo* case. By narrativising the processes of the reclamation of the brooch, Janke’s novel engages in a critique of the legal system (Tarena is in her final year of study when the High Court overturns the doctrine of *terra nullius*), and proposes possibilities for reshaping the law and legal culture.

*Chapter Five:*

Also joining the *Bildungsroman* and life-writing genres within the expanding canon of Aboriginal literature is Aboriginal gothic writing, which has been engaged, according to Katrin Althans, in subversive and transgressive ways by Indigenous authors in order “to negotiate issues of... cultural strength and identity”212 According to Althans, Indigenous writers use the gothic mode to remind their white readers that circumstances of terror and horror “are not removed from reality, but [are instead] being repeated every day.”213 This description speaks to the way that Nicole Watson engages the gothic tradition in her novel, *The Boundary* (2011), to plot a sequence of judicial murders which are carried out in the aftermath of a failed native title claim. Through her narrative – which is at once an example of crime fiction, legal drama, postcolonial detective fiction and magical realism – Watson provides a potent critique of the native title regime, and also advocates for alternative legal approaches to Indigenous self-determination, such as treaty and sovereignty.

*Chapter Six:*

Magical realism, which is a literary mode that straddles the real and the fantastic, has also been engaged by Indigenous authors as a way to reflect on the multiiciplity of belief systems in colonised societies. Generally

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understood as a mode of subversion, I suggest that magic realism provides scope for novelists in an Australian context to integrate Indigenous spiritual beliefs within contemporary political and legal debates. This integration is evident in Melissa Lucashenko’s novel, *Mullumbimby* (2013), as Jo Breen makes her ‘homecoming’ to Bundjalung country and is welcomed by the sound of singing hills. In a subsequent (and similarly surreal) episode, she learns that the lines on the palms of her daughter’s hands carry the topographical markings of her ancestral country – it is a literal expression of her embeddedness in place. The chapter argues, therefore, that magical realist elements combine in *Mullumbimby* to contribute depth to the reader’s understanding of the Bundjalung peoples’ connection with country, and importantly, to raise questions about the adequacy of introduced systems of proprietorship (privately held land, native title) for protecting and sustaining these relationships.
A Narrative of Trauma: Reading Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families

In the early 1990s the ‘stolen generations’ narrative “unequivocally” entered Australia’s national consciousness and penetrated its political and legal domains.\(^{214}\) It followed on from *Mabo* and became both a significant cultural event and an intervention in national storytelling. Central to the ‘stolen generations’ narrative was the *Bringing Them Home* report, which provided a platform for the voices of the ‘stolen generations’ to be heard by the nation for the first time.\(^{215}\) When it was tabled in May 1997, the report – which had been commissioned by the Commonwealth Government and produced by the Human Rights and Equal Opportunity Commission – stood as “one of the most shocking and painful Australia had ever seen.”\(^{216}\) The public response was also unprecedented – the original print run of 2000 sold out within days and a second release of 4000 copies went to press at the same time as 40,000 community guides were distributed.\(^{217}\)

Almost overnight, *Bringing Them Home* became a site for the contestation of historical truths; it provided a “collective framework of perception and a

vocabulary of collective memory” out of which private events could be worked through and brought into the public sphere, where they took on a national and international significance. In other words, *Bringing Them Home* became a major event in the moral life of the Australian nation and positioned Australians as a witnessing public. More than attempting to represent how legislation was translated into the lived experience of Indigenous people, the report used ‘story’ as its organising trope in order to highlight that the harms of forcible removal were not just “inflicted on statistically identified groups or populations, but on individual people, with names… with voices, and with distinctive experiences.”

This chapter draws on the methodologies of ‘law and literature’ studies to access *Bringing Them Home* – which is ostensibly a quasi-judicial text – as a narrative text. Specifically, it adopts a deconstructive approach in order to focus on questions of form and style (the interaction of discourse and framing, the interplay of voices), as well as the “citational” and “collaging” strategies employed in the report in the process of weaving together witness statements. By situating *Bringing Them Home* within the human rights report genre (which has established its own rules of style and presentation over the past three decades), the chapter is able to reflect on the text’s affective dimensions while also opening up a discussion on the complexity of the dialogue between testifier (speaker), witness (reader) and nation. Significantly, by engaging with the methodologies of critical race theory, I will suggest that the report (and its stories) can be read as a powerful example of the potentials of counter-storytelling. After first setting out the key concepts and concerns, the chapter will move to a discussion of the processes and politics of the National Inquiry, before turning to a survey of existing scholarship in the field.

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Bringing Them Home – a Quasi-Judicial Narrative:

In this thesis, I argue that Bringing Them Home is a quasi-judicial text, and that it shares resemblances with the reports of truth and reconciliation commissions and human rights inquiries, both of which are broadly defined as the products of quasi-judicial investigations. According to Paul Gready, these institutions are marked by a number of core characteristics, including: a focus on the past; an investigation of patterns of abuse and specific violations (often of human rights) committed over a period of time; a short-term life span culminating in the production of a report with recommendations; a victim-centred approach and official status.

The term quasi-judicial is well established in law, and describes an administrative body with powers derived from executive authority and resembling those of a court (quasi means ‘as if’ in Latin). Its primary function is to hold hearings in order to investigate and arbitrate alleged infractions against individuals or communities by governments and other institutions. In this sense, quasi-judicial bodies are analogous to the traditional court system insofar as they call witnesses (without the power to compel), hear evidence and make recommendations. They are not, however, bound by the same rules as a court, and so do not necessarily follow strict rules of evidence and procedure.

In Australia, the High Court has referred to the quasi-judicial body as having as its overriding consideration “whether there will emerge from its proceedings a determination of truth and justice [that is] a matter of public concern.” The connection that the High Court draws between justice and

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222 To a lesser extent, the National Inquiry also shares resonances with the Royal Commission genre, insofar as both resemble a court. It is interesting to note that Rosanne Kennedy describes Bringing Them Home as being neither a truth commission nor legal trial, but instead a “trauma trial”, which is, she suggests, a mode for transforming private memory into a national, collective story. See: R. Kennedy, ‘Australian Trials of Trauma’, 2011, pp. 336-337.


224 In terms of the relationship between “public concern” and Bringing Them Home, Kelly Butler has argued that, “no other event in Australia’s socio-political life has necessitated such a profound reorientation of national life.” See: K. Butler, Witnessing Australian Stories: History, Testimony and Memory in Contemporary Culture, Transaction Publishers, New Jersey, 2013, p. 43; Mann v O’Neill [1997]; HCA 28 (31 July 1997).
“public concern” in this instance is critical to this thesis’ reading of Bringing Them Home; I argue that the quasi-judicial inquiry functions to carry narrative claims of social injustice, and that it does this specifically through its use of personal testimony and story.

Quasi-judicial texts are officially sanctioned and produced in response to quasi-legal inquiries that investigate “crises that the law itself is unequal to addressing.” According to Penelope Pether, they exercise a particularly destabilising influence upon power because they challenge the claims of the texts of state power (such as statutory and common law) to speak “the whole truth”, while also rewriting legal discourse “so that it is capable of doing justice to alternative jurisprudences [by] compelling an audience for the voiceless.” Pether argues further that quasi-judicial reports (which are often the products of inquiries forced on the state as a result of its own inaction, or by a populace who “does not believe the authorised truth the state has told them”) testify to the “inadequacy of the present language of law to doing justice, and bespeak the ability of a differently constituted legal language to make it possible.”

National Inquiries and Truth Commissions in the Context of Human Rights:

In his writing, Homi Bhabha has argued influentially that the right to narrate (and to be heard, recognised and represented) is itself a human right, and that this is not “merely” a legal or procedural matter, but also an aesthetic

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226 In the context of the ‘stolen generations’, see for example Cubillo v Commonwealth, in which the Federal Court dismissed the claims of Lorna Cubillo and Peter Gunner, who had been removed from their families in the Northern Territory under the Aboriginals Ordinance (Act) 1918 in 1947 and 1956 respectively. See: Cubillo v Commonwealth [2000]; FCA 1084 (11 August 2000).
and ethical concern.\textsuperscript{229} Bhabha suggests that, “the right to narrate... is an
enunciative right – the dialogic right to address and be addressed, to signify
and be interpreted, to speak and be heard, to make a sign and know that it
will receive respectful attention.\textsuperscript{230} In the context of \textit{Bringing Them Home},
Rosanne Kennedy has argued similarly (by invoking the work of Shoshana
Felman and Dori Laub) that, “to testify is to address another, to impress upon
a listener, to appeal to a community.”\textsuperscript{231} In this light, it is clear that the act of
listening, and of acknowledging, is central to testimonial exchange, and that
this is especially apparent in the context of human rights dialogues.
According to Julie Stone Peters:

\begin{quote}
In the past few decades we have seen the rise of a new
phenomenon – quasi-judicial... in nature: the truth commission
and other national and international arenas in which victims may
bear witness to what they have suffered, and in which the
narrative of atrocity may serve at once as testimony, redress and
public catharsis.\textsuperscript{232}
\end{quote}

Peters argues that two factors in particular have contributed to this
development – both the institutionalisation of human rights discourse and the
convergence of literary studies of witness testimony with legal storytelling.\textsuperscript{233}
With reference to the quasi-judicial, she contends that there is a desire for a
form of authenticity represented through the human voice, which, it is
claimed, “offers a kind of truth that documentary evidence, reports [and] legal
determinations cannot provide.”\textsuperscript{234} In other words, truth commissions and

also locates the motif of the speaking person within ethical and legal discourse. See: M. Bakhtin,
\textsuperscript{230} H. Bhabha, ‘The Right to Narrate’, 2014, online.
\textsuperscript{231} R. Kennedy, ‘Subversive Witnessing: Mediating Indigenous Testimony in Australian Cultural and
\textsuperscript{232} J.S. Peters, ‘“Literature,” the “Rights of Man” and Narratives of Atrocity: Historical Backgrounds to
\textsuperscript{233} Peters holds a number of reservations about the healing potential of quasi-judicial bodies, and the
faith that is often placed in them by literary and legal scholars. She suggests that, for literary theorists,
there is an idealisation of the storytellers’ victimhood, while for human rights theorists there is an
idealisation of narrative or story. This has provided the conditions for, she suggests, “an epidemic of
278, 283.
human rights bodies are said to elevate the status of voice and story by both legitimating their claims to truth, and by imbuing them with an affective power. Peters cites Andre du Toit in order to expand on this point:

> What is at stake when victims are enabled to ‘tell their own stories’ is, “not just the specific factual statements, but the right of framing them from their own perspectives and being recognised as legitimate sources of truth with claims to rights and justice.”

By forging a link between narrative and (human) rights, it is possible to reflect on the role of the quasi-judicial body as a site for speaking and listening, and in particular, as a forum where “formerly unauthorised narrators are allowed to speak with authority.” For Joseph Slaughter, who understands international human rights law as “a commitment to narratability,” this is significant because it suggests that human rights discourse provides both the right to tell one’s own story and the right to control representation. This reflects an unsettling of established dynamics of power, as well as a challenge to the traditionally monologic language of the law. It means, in other words, that the voices of those who have been subjugated are elevated: they assume a powerful salience, being able to “tell history in a radically new way.”

According to Claire Moon, they do this through the human rights report, which has established itself as a literary genre in recent years “with its own rules of style and presentation.” I will expand on some of these ‘rules’ in subsequent analysis.

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237 Slaughter proposes that, “If human rights abuses exist on a continuum of narratability, with oppressive voicelessness on one end and bellicose vociferousness on the other, human rights instruments and norms can be evaluated and promoted for their effectiveness in addressing that continuum and providing a public, international space that empowers all human beings to speak.” See: J. Slaughter, ‘A Question of Narration’, 1997, p. 413.


An “Untold Story” and a National Inquiry:

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was commissioned by Attorney-General Michael Lavarch on the 2nd of August 1995 in response to increasing pressure on the Australian Government to tell the “untold story” of the ‘stolen generations.’ Lavarch issued instructions to the Human Rights and Equal Opportunity Commission – a statutory body with quasi-judicial status – to “consult widely”, and to “trace [the] past laws, practices and policies which resulted in the separation of children from their families by compulsion, duress or undue influence.” Ronald Wilson, a former High Court Justice and President of the HREOC, was appointed Commissioner and Yawuru barrister Mick Dodson was (belatedly) named co-chair in response to concerns about the need for an Indigenous person to take a leadership role within the Inquiry. The Commission was allocated $1.3 million and 18 months to conduct its inquiries and to report back to the Federal Government. According to Antonio Buti, this was “demonstrably insufficient to run the inquiry properly”, and so the Commission responded by making the hearing process non-adversarial. This arrangement suited the purposes of the Inquiry, which was designed to hear the voices of those who had been affected by forcible removal without interference or qualification. By its end, the inquiry had heard from 535 individual Indigenous witnesses, and in total from 770 people and organisations. It received over 1000 submissions in a variety of forms, including poetry, prose and song.

240 R. Vijeyarasa, ‘Facing Australia’s History: Truth and Reconciliation for the Stolen Generations’, International Journal on Human Rights, Vol. 7, No. 1, 2007, p. 129. The ‘Going Home’ Conference, which was held in Darwin in October 1994, brought together 600 Aboriginal people who had been removed from their families as children. Participants at the conference passed a resolution to make governments accountable for actions of the past.

241 The Human Rights and Equal Opportunity Commission (HREOC) is given statutory authority by the Human Rights and Equal Opportunity Commission Act 1986, which is empowered to make inquiries (through Section 11) into any act or practice inconsistent with or contrary to human rights.

242 Bringing Them Home, 1997, p. xi. In calling on the inquiry to ‘consult widely’, there is an explicit demand for the report to convey what it has ‘heard’.

243 See: A. Buti, A Matter of Conscience: Sir Ronald Wilson, UWA Publishing, Crawley, 2007, p. 310. The Commission also appointed a number of Indigenous female co-chairs so that it could receive evidence from women who may have been prevented from giving evidence to a man for cultural reasons. The Inquiry also took advice from an Indigenous Advisory Council.

244 A. Buti, A Matter of Conscience: Sir Ronald Wilson, 2007, p. 306. According to Buti, the under-resourcing meant that the Commission could not afford to employ a full-time counsel assisting.
Much has been made of the non-adversarial style of the Commission’s hearings, which have been both praised for their emphasis on respectful listening (a divergence from the hostile questioning typical of courts) and simultaneously condemned for their failure to cross-examine. Anna Haebich, who worked as a consultant to the Inquiry, has described the hearings as providing a “safe haven” for a respectful dialogical process, while Penny van Toorn has argued that the Commission demonstrated great “cultural and emotional sensitivity” by conducting the Inquiry in a non-adversarial way. According to Rosanne Kennedy, this is because Commissioner Wilson conceived of the inquiry in “therapeutic terms”, believing that it would participate in a “healing” of the nation. In relation to its functionality, Bain Attwood has suggested that the hearings resembled the “couch and confessional”, where the Commissioners were said to have listened “with open hearts and open minds” by suspending rules of evidence (processes of proof, the corroboration of documentary evidence) in favour of receiving testimony with the rawness with which it was delivered. Buti also provides an insight into the operation of the Commission by reflecting on the spatial and emotional dynamics of the hearings:

Seated behind a school table or desk, [the Commissioner] only listened. The storyteller sat in front or to the side of the individual commissioner… or the commissioners… The tape recorder was on, but sometimes nothing came from the storyteller. Occasionally it took thirty seconds, a minute, two minutes or

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248 Attwood suggests (unfairly and cynically) that the Inquiry actually encouraged “testimony affected by trauma” and that, as a consequence, the form and content of the stories presented by witnesses were shaped by what they presumed their audiences expected to hear. In this way, Attwood contends that the narrative “became mutually validating and self-confirming.” See: B. Attwood, ‘Learning about the Truth: the Stolen Generations Narrative’, 2001, p. 203; B. Attwood, ‘In the Age of Testimony’, 2007, p. 83.
even more before the storyteller spoke. Her or his facial muscles twitched and tears rolled down the cheeks.\textsuperscript{249}

Jim Brooks, who was Secretary of the National Inquiry, recollects the way that:

\begin{quote}
Stories of grief, loss, sexual abuse and emotional and psychological damage were poured out to a tired Commissioner or staff member doing their best in a cramped meeting room or a staffer’s motel room.\textsuperscript{250}
\end{quote}

These descriptions of the informality of the hearings reflect the adaptability of the quasi-judicial mode, and also point to the way that the National Inquiry afforded speakers significant latitude (more than would have been allowed in a court\textsuperscript{251}) by listening with compassion and respect. This is highlighted by Commissioner Wilson, who has implied that the emotional \textit{truth} of testimonies validated the Commission’s non-adversarial style: “How could you doubt the authenticity of a story when tears are running down the faces of the storytellers?”\textsuperscript{252}

More could be said about the procedural and practical characteristics of the Inquiry – and the way that these deviate from the traditional court system – however this is not the primary focus of the chapter.

\textsuperscript{250} J. Brooks, ‘This story’s right, this story’s true’ in \textit{Remember Me: Commemorating the Tenth Anniversary of the Bringing Them Home Report}, Secretariat of National Aboriginal and Islander Childcare Inc., Fitzroy, 2007, p. 33.
Responses to *Bringing Them Home* and the National Inquiry – a Critical Survey:

*Bringing Them Home* has been characterised by scholars in numerous and compelling ways, with most commentary reflecting primarily on the report’s affectivity and its cross-genre constitution. It has been described, for example, as a 700-page anthology; a “bureaucratic document”; a “national archive of Indigenous feelings”; “a living, breathing petition”; and as a “potent document with well-told stories.” This chapter identifies three broad analytical approaches to the report and to the National Inquiry: the first refers to historians who read *Bringing Them Home* against the ‘historical record’; the second identifies scholars who focus on the politics of speech and witnessing in the context of the Inquiry; and the final group includes the cultural studies critics who have engaged with the report at a textual level. In the following section I provide a summary of this material.

The greatest backlash to *Bringing Them Home* came from conservative historians, who objected to the non-adversarial style of the Inquiry (how could the truth of testimony be believed if it had not been cross-examined?) and its claim that the forcible removal of Aboriginal and Torres Strait Islander children constituted genocide. In response, they argued that, where children were removed from their families, it was as a result of neglect, and not of any genocidal intent. The report was also criticised for its inclusion of untested testimonies, which was said to contribute to a supplanting of historical interpretation with emotional interpretation. According to Bain Attwood, this

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253 Human rights specialist Meredith Wilkie was given the task of constructing the report, which involved pulling together research and data in response to the Inquiry’s terms of reference, and combining this with the individual stories and submissions received through the hearing process. See: A. Buti, *A Matter of Conscience: Sir Ronald Wilson*, 2007, p. 318.


meant that ‘objective’ histories were dismissed in favour of ‘subjective’ stories, and that the legitimacy of the report itself (and its claim to represent historical truth) could be cast into doubt. In a powerful rebuttal to Attwood’s argument, Rosanne Kennedy suggests (by invoking the discourse of human rights) that this democratisation of history reflects a climate in which:

Witnesses are [now] no longer offering their testimony as evidence to be interpreted by the historical expert. Rather, they are themselves active producers of historical meaning, which Attwood apparently finds unsettling.257

The second scholarly grouping includes those whose work has engaged with Bringing Them Home in terms of the politics of speaking and listening, and in relation to trauma studies.258 Kay Schaffer and Sidonie Smith have been central to these discussions; they have argued that the National Inquiry opened up a new discursive space for witnesses to articulate their experiences of pain and trauma from the past to a listening public.259 Gillian Whitlock has expanded on this point by reflecting on the speaking/listening relationship that characterises both the National Inquiry and Bringing Them Home. She argues that, in both texts, the ‘first person’ and ‘second person’ (who is also the Australian nation) are engaged in a “narrative transaction”260 whereby the listener (or ‘second person’) is positioned as a witness to the speaker. This means, in other words, that the ‘second person’ is called on to confirm the experience of the ‘first person’, and to acknowledge their own complicity in this history of trauma and dispossession. Whitlock calls this

recognition an “ethical responsiveness”, and suggests that it is influenced by the politics of reconciliation.\textsuperscript{261}

Others have reflected more critically on the outcomes of the speaking/listening relationship demonstrated by the National Inquiry. Indigenous scholar Tony Birch claims, for instance, that \textit{Bringing Them Home} served the function of “allowing colonial listeners confronted with a narrative of their own violence… to simultaneously absorb and purge themselves of trauma.”\textsuperscript{262} This suggests that, rather than facilitating reconciliation (which would have required introspection and contrition, as well as a recognition of guilt and complicity), the Inquiry and the report instead enabled the listener to move forward and to leave the trauma of dispossession and forcible removal in the past – to be dealt with by Indigenous Australians. Birch argues that, having provided for the healing of the coloniser through the National Inquiry, “Indigenous communities… now carry the burden of being left to live within a state of injustice.”\textsuperscript{263} This position is supported by Sarah Ahmed, who suggests that, even though its testimonies “demanded national shame”, \textit{Bringing Them Home} “allowed” white readers to “disappear from [their] history, having no part in what was done.”\textsuperscript{264}

Bain Attwood makes a similar argument, and reflects rather cynically on the centrality of the ideal of reconciliation to the National Inquiry. He claims that, as a result of “narrative accrual” at this time, the testimony that was received and relayed through \textit{Bringing Them Home} coalesced into a monolithic story which “sidelined or omitted anything that did not fit with the image of unhappy victims who had always identified as Aboriginal.”\textsuperscript{265} He is suspicious,

\begin{itemize}
\item \textsuperscript{262} T. Birch, “‘The First White Man Born’”, 2004, p. 140. Birch cites the philosopher Slavoj Zizek in order to argue that, “this outcome lacks the ethic of responsibility… [and that] in order to forget an event, we must first summon up the strength to remember it properly.”
\item \textsuperscript{263} T. Birch, “‘The First White Man Born’”, 2004, p. 140.
\item \textsuperscript{264} S. Ahmed, \textit{The Cultural Politics of Emotion}, Routledge, New York, 2004, p. 34.
\end{itemize}
therefore, of the “storytelling and listening” which characterised the Inquiry, and argues that it presumed a “talking cure” whereby:

The repressed Aboriginal past is released from the national unconscious, its truths uttered, the pain of the dispossessed Aborigines acknowledged, the sins of the non-Aboriginal Australians or their forebears confessed, and forgiveness sought.266

While it is true that, by framing the report as being “directed to healing and reconciliation for the benefit of all Australians”,267 the National Inquiry imagined itself as being central to a transformative shift in the nation’s self-understanding, it is also the case that the report represents (and indeed, recognises itself as representing268) only one stage in a continuing process of healing. Attwood’s criticism, therefore, is unnecessarily cynical; it devalues the role and legitimacy of personal testimony.

The third and final grouping includes the cultural studies scholars who have engaged critically with the text of the report, while also situating it within a wider body of ‘stolen generations’ narratives. Each of the scholars recognises the role of *Bringing Them Home* – and in particular the culture of testimony that it developed – in contributing to a “proliferation” of ‘stolen generations’ stories.269 Bain Attwood suggests that this was due in large part to the report’s “affective presentation”, which prompted Aboriginal people to produce more testimony in the form of life-writing, historical fiction, and visual art, for example. Penny van Toorn points instead to the cultural texts preceding *Bringing Them Home* as priming the Australian public (and commercial markets) for the report’s release.270 Kay Schaffer, meanwhile,

268 Through its recommendations the Inquiry sets out the ways in which governments should proceed in terms of recognition, reparations and learning from past practices. Importantly, the inquiry’s first recommendation is the provision of funding to allow the recording and preservation of the testimonies of Indigenous victims of forcible removal. See: *Bringing Them Home*, 1997, p. 651.
270 van Toorn cites Sally Morgan’s *My Place* (1987) and Rita and Jackie Huggins’ *Auntie Rita* (1994) as examples. Specifically, she argues that the commodification and distribution of ‘stolen generations narratives’ could “go a long way to breaking down racist attitudes.” See: P. van Toorn, “Tactical History
has reflected on the way that the report precipitated a growth in Indigenous life-writing. She argues compellingly that post-*Bringing Them Home* narratives “exhibit a sureness of voice partially enabled by the knowledge gleaned from historical records, new revisionist histories and the human rights framing of the HREOC Inquiry.”²⁷¹ Schaffer also argues, with respect to the report, that it represents “not one story but a multitude of stories; not an individuated, polished text... but an official, public government document punctuated with first-person accounts of trauma.”²⁷² Like Schaffer, John Frow engages critically with the text of *Bringing Them Home* and argues convincingly that the report is characterised by a “collaging strategy”, whereby third-person reporting and analysis is punctuated episodically with fragments of story. This is, he suggests, “designed to allow these voices to have a space of effectivity, of answerability.”²⁷³ Frow invokes Bakhtin here through his use of the term ‘answerability’ (which refers to the anticipation of a response in an utterance or dialogue) and so can be said to reflect on *Bringing Them Home* as a dialogical text, where personal stories intersect with a narrative of reportage.

*Bringing Them Home* – a Dialogue of Trauma:

“The story in my hand is the saddest of all stories. It is the story of children taken from their mothers and fathers and families.”²⁷⁴

When he spoke to launch *Bringing Them Home* in May 1997, Mick Dodson framed the National Inquiry in the terms of narrative. His decision to present

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²⁷¹ Schaffer makes a number of observations about the characteristics of post-*Bringing Them Home* narratives. She suggests, for instance, that they produce confident narrators “telling truth to power”; utilise a language of human rights; adopt a position of subjectivity rather than objectivity; and that the narrators shift from recounting individual experiences to understanding themselves as collective subjects, connected to other Indigenous communities in Australia and to victims of human rights abuses from around the world. See: K. Schaffer, ‘Dorothy Green Memorial Lecture – Narrative Lives and Human Rights: Stolen Generations Narratives and the Ethics of Recognition’, JASAL, Vol. 3, No. 1, 2004, pp. 15, 13.


the report as a “story” – and not as an outwardly legal or bureaucratic document – situates the text within the field of narrative and invites literary analysis. Before advancing this discussion further, I will first signpost the key arguments to be pursued in the remainder of this chapter. They include the introduction of Bakhtin’s idea of ‘dialogism’ as a way for thinking about Bringing Them Home as a ‘dialogic’ text; a consideration of the way that the report’s ‘narrative of enquiry’ and ‘discourse of personal experience’ are engaged in a constant negotiation with the language of law; a discussion of the report’s “citational” and “collaging” strategies and the way that these facilitate a reading of Bringing Them Home as an affective counter-story.

As has been indicated, this chapter engages with Mikhail Bakhtin’s theorisation of texts as ‘dialogical’ in order to reflect on the constructedness of Bringing Them Home. At the centre of Bakhtin’s argument is the claim that words in texts are relational, and that, through these relationships, meaning is exchanged. In his own words, Bakhtin explains (by invoking a metaphor of fabrication) that, through language, “utterances cannot fail to brush up against thousands of living, dialogical threads.” In essence, he argues that dialogical works are in a constant negotiation with other texts (and voices), and that these inform its “socio-ideological consciousness.” All of this means, in other words, that there is a constant conditioning of meaning in a dialogical exchange, and that this comes about as a result of the interactions between texts, speakers and listeners. This claim is supported by the narratologist Ian Reid, who similarly proposes that, “when a text is made to

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275 By describing itself as “no ordinary report”, Bringing Them Home emphasises the place of “intimate” and “personal” experience in its constitution and simultaneously distances itself from standardised (quasi) legal documents. See: Bringing Them Home, 1997, p. 3.

276 According to Paul Cobley, dialogue is the defining feature of the ‘signs’ passed between humans. Michael Holquist argues similarly that the exchange of meaning is “at the heart of” any dialogue. See: P. Cobley, Narrative: the New Critical Idiom, Routledge, London, 2001, p. 230; M. Holquist, Dialogism: Bakhtin and His World (Second Edition), Routledge, London, 2002, p. 37. This marks a significant departure from structuralist thinking, which views meaning as internal to language. Although Bakhtin is not generally recognised as a poststructuralist, it has been argued that, through his “relentless contextualisation” of language, his theories contribute to the “popular deconstruction” of official discourses and ideologies. See: P. Barta (et al.), ‘Introduction – Beginning the Dialogue: Bakhtin and Others’ in P. Barta et al., Carnivalizing Difference: Bakhtin and the Other’, Taylor & Francis, Florence, 2013, p. 5.

277 This will be explored in the next chapter’s consideration of the ‘fabricatedness’ of the Report of the Hindmarsh Island Bridge Royal Commission.


mean something, it is always by being both separated from and joined with a variety of references.”

Dialogism can be read, therefore, as the opposite of monologism – or monologic language – because of the way that it implies multiplicity of voice and experience. Indeed, for Bakhtin, it is the case that the “dialogical imperative” of language “ensures that there can be no actual monologue” and that, where it is presumed to exist – such as in the authoritative language of law – it is always “overpowered by the force of heteroglossia and thus dialogism.”

These arguments can be expanded further in relation to *Bringing Them Home* by engaging with the criticisms of John Frow, who has characterised the report (in what is effectively another way for thinking about its dialogism) as being made up of “collaging” and “citational” practices. Frow recognises *Bringing Them Home* as a “collage” because of the way that it “episodically punctuates” third-person analysis with first-person story. He proposes that it does this through a “performance of discursive mixing”, whereby knowledge grounded in “citational” reference (what could be understood as the report’s ‘official’ discourse) is “split” from the plural and disseminated languages of witness testimony. The effect of this collaging, then, is both the fragmentation of discourse – where the monologic rhetoric of the law is destabilised – as well as the creation of a space of affectivity for Indigenous voices.

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281 Peter Goodrich refers, for example, to the way that “the language of the legal decision strives for the appearance of objectivity and the exclusion of dialogue in favour of monologue [which is aimed at] achieving an image of incontestable authority and of correct legal meanings.” See: P. Goodrich, *Reading the Law: A Critical Introduction*, 1986, p. 188.
284 To cite is to reference a source (or sources) for the purpose of substantiation. Frow argues that *Bringing Them Home* “deploys” a citational practice similar to that of the bureaucratic or historiographic document, and importantly, that it seeks to turn these formal similarities to “different ends”. See: J. Frow, *A Politics of Stolen Time*, 1998, p. 356.
It is helpful at this point to re-engage with Bringing Them Home in terms of the human rights report, which is a genre that has established its own rules of form and style in the last three decades. Ron Dudai, for example, describes the report genre as being made up of two parts – ‘fact-finding’, which is the documentation of rights abuses, and ‘legal analysis’, where the producers of the report attempt to show that the documented rights abuses violate international legal norms. This chapter also conceives of Bringing Them Home as being made up of two parts, however I have termed these the ‘narrative of enquiry’ and the ‘discourse of personal experience’. In view of Dudai’s commentary, it can be argued that the ‘narrative of enquiry’ is roughly analogous with the ‘legal analysis’ frame of the human rights report (its focus is broader, however, and reflects an engagement with ‘legal’ as well as ‘official’ and ‘academic’ discourses), and that the ‘discourse of personal experience’ shares resonances with the ‘fact-finding’ element of the report genre. Both of these frames are engaged in a constant dialogical exchange, whereby the particularised stories of witnesses are embedded within the report’s ‘narrative of enquiry’, which is led, effectively, by Commissioners Wilson and Dodson, who act as advocates and marshal evidence in a methodical and comprehensive way. The result of the ‘embedding’ of witness statements within the ‘narrative of enquiry’ is to contribute emotional depth to the report; the stories create stark pictures (which have been described by Carmel Bird as “arresting little sentences that will chill you to the bone”) and establish a national narrative of dispossession.

According to Dudai, the “meticulous” use of footnotes is an additional characteristic of the human right report genre, which is designed to show that its fact-finding is sourced and not born out of moral condemnation. It is, in other words, intended to give the impression of a quasi-scientific document. This is problematic, however, in the context of a report genre which relies on an “emotional call” to mobilise public support. In order to address this tension, the report introduces first person, unedited testimonies which “provide the reader with the emotional, non-legal language that the authors feel compelled not to insert themselves.” See: R. Dudai, ‘Advocacy with Footnotes: The Human Rights Report as a Literary Genre’, Human Rights Quarterly, Vol. 28, No. 3, 2006, pp. 784, 789, 790.

Moon also argues about the human rights report that it works as an advocacy tool, having both ‘documentary’ and ‘interventionist’ duties. Frow makes a similar claim by reading the word ‘report’ as a verb – it means to carry a story from one place to another. See: C. Moon, ‘What One Sees and How One Files Seeing’, 2012, p. 879; J. Frow, ‘Discursive Justice’, 2001, p. 334.

In this light, *Bringing Them Home* begins by first outlining the scope of the National Inquiry’s investigations, and by giving an account of its methodologies – particularly in relation to the inquiry’s Terms of Reference. In Part Two, subtitled ‘Tracing the History’, the report communicates the histories of colonisation in each of Australia’s states and territories, as well as the policies (and policy frameworks) that facilitated the removal of Indigenous children from their families. It continues in Part Three by outlining the ‘Consequences of Removal’ in terms of the experiences of the children removed (in childhood and as adults), the impacts on their families and the complicatedness of family reunion. Part Four lays out a claim for reparations, and makes suggestions for how this can be achieved, while Part Five discusses the response of governments and their agencies in terms of the provision of (or lack of) resources for family reunion and the restitution of lands, for example. Finally, the report considers some of the causes of contemporary separations – particularly in the context of juvenile justice and family law – before making 54 recommendations on matters of practical and symbolic significance. Evidently, there is not scope within this chapter to provide an analysis of every aspect of the report. Instead, I will highlight key passages in order to illustrate how *Bringing Them Home* functions as both a dialogical narrative and a counter-story.

**“No Ordinary Report” – Advocacy and Methodology in *Bringing Them Home***:

*Bringing Them Home* begins by introducing the evidence of a person removed from their parents’ care in Tasmania in the 1960s:

> So the next thing I remember was that they took us from there and we went to the hospital... I was all upset and I didn’t know what to do and I didn’t know where we were going. I just thought: well, they’re police, they must know what they’re doing... they’re taking me to see Mum. You know this is what I honestly thought... But then we turned
left to go to the airport and I got a bit panicky about where we were going… [but] they still told us were going to see Mum. ²⁸⁹

This story of anguish sets the tone of the report and provides a context for its opening statement that: “Grief and loss are the predominant themes of this report. It is no ordinary report. Much of its subject matter is so personal and intimate that ordinarily it would not be discussed.” ²⁹⁰ Implicit in the witness’ story are questions about the role of the state in the care of children; these echo around the report and are addressed by the Human Rights and Equal Opportunity Commission through its demand for acknowledgement, apology and reparations. The report also describes the “permanent scarring” of “later generations”, and attributes this “to the laws, policies and practices” which “resonate in the present and will continue to do so in the future.” ²⁹¹ This language is passionate and partisan and can be understood in terms of the advocacy role of the human rights report. It can also be read as a departure from legal orthodoxy, and from what Pierre Bourdieu has described as “juridical rhetoric”, which refers to the impersonal and neutral language of the law. ²⁹² Essentially, Bringing Them Home encourages its readers to think and to feel. It does this by suggesting, for instance, that:

The suffering and the courage of those who have told their stories inspires sensitivity and respect... The devastation [of forcible removal] cannot be addressed unless the whole community listens with an open heart and mind.” ²⁹³

²⁸⁹ Witness statements to the inquiry (which are distributed throughout and characterised by first-person narrative voice) are presented in bold print, and so are distinguished from the body text of the report. See: Bringing Them Home, 1997, p. 2.
²⁹⁰ Bringing Them Home, 1997, p. 3.
²⁹¹ Bringing Them Home, 1997, p. 3.
²⁹³ In what can be understood as something of a defensive gesture, the report insists that it is, “in no sense... ‘raking over the past’ for its own sake.” It goes on to cite the former Attorney-General of Australia, William Deane, who argued in 1996 that, “it should... be apparent to all well-meaning people that true reconciliation between the Australian nation and its Indigenous peoples is not achievable in the absence of acknowledgement by the nation of the wrongfulness of the past...” See: Bringing Them Home, 1997, p. 3.
This approach – the creation of space within the official ‘narrative of enquiry’ for voices of personal experience – contrasts sharply, for example, with the *Report of the Hindmarsh Island Bridge Royal Commission*, which sought to emphasise its objectivity and scientifcicity through adversarialism, and by monopolising legal debate.

The report continues in its introductory chapter by addressing methodological concerns, and specifically, by defining key concepts within the inquiry’s Terms of Reference. It does this by first citing from a legal handbook (in order to furnish the report with technical detail), and then by referencing the particularised stories of victims, which essentially complement and humanise the otherwise abstract language of law. The term, *compulsion*, for instance, is described as referring to the legal or illegal exercise of force or coercion, while *duress* is defined as differing from ‘compulsion’ insofar as it can be achieved without the application of force – it is often understood as involving threats of violence and/or moral pressure. Many of the accounts of forcible removal submitted to the inquiry combine both compulsion and duress, and through its incorporation of story, *Bringing Them Home* is able to testify to the practical effects of these terms. In introducing one such story, the report notes:

The following story seems to fit the definition of duress, with elements of compulsion.

I can recall when I was young how my mother went through custody battles for my sister and I to keep us… The Sullivan family told people my mother was crazy and the court gave us to the Sullivan family. My mother was not crazy she was only nineteen. She was the right one and shouldn’t have killed herself but she

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knew no better as there was no one to help her keep her children... The day she died we died.295

By observing that this story “seems” to combine elements of compulsion and duress, the report effectively engages in a process of deliberation; it makes a determination about the nature of the evidence and, importantly, how it can be situated within the report to illustrate a particular argument. This methodology reflects, in other words, the validation of narrative as a source of truth within the quasi-legal genre.

The “Destiny of the Natives” – a National Overview:

Part Two of Bringing Them Home provides a comprehensive overview of the early history of colonisation in each of Australia’s states and territories. It does this in order to contextualise the development of the policies and practices that enabled the removal of Aboriginal children from their communities. Of particular note is the report’s claim that, “since the very first days of the European occupation of Australia... Indigenous children have been forcibly separated from their families.”296 This suggests that, even before colonial governments had turned their attention to what became known as “the half-caste problem”,297 Indigenous children were being taken from the care of their families – often as a source of labour at the frontier, but also so that they could be employed in the service of colonial settlers. At this point, and as part of its “citational strategy”, the report references Henry Reynolds, whose research suggests that, “any European on or near the frontier, quite regardless of their own circumstances, could acquire and maintain a personal servant.”298 This citation works in a functional sense to

296 Bringing Them Home, 1997, p. 27.
both authorise and endorse the narrative that the report presents. According to John Frow, the “citational strategy” also institutes a “reality” in the report, whereby a division between past and present “is made intelligible by this relation.” In other words, the citation can be understood as providing a context for the report’s claims because, without it, they are abstract and detached from historical reality. This practice is repeated throughout the report, and can be read as evidence of the text’s dialogism.

The report continues by tracing shifts in relation to the management of Indigenous affairs. It highlights, for instance, the way that policies of protection (which involved setting aside land for missions) were replaced by those directed at the absorption of Indigenous peoples (specifically those of mixed descent) within the fledging Australian nation. Despite it being the overwhelming view of policy-makers that ‘absorption’ could be achieved most efficiently through the separation of mixed-descent children from their families, there was some conjecture about how it should and could be done. The report cites a South Australian Royal Commission (which was conducted between 1913 and 1916) and describes the way that it investigated the “optimum age for forced removal”, and “whether children should be removed at birth or [at] about two years old.” By presenting this evidence, Bringing Them Home seeks to situate its claims within the historical record (it is a “citational strategy”), and to draw attention to the way that policy and practices of this nature were refined.

The report continues in its engagement with the historical record by contrasting contemporaneous views on the practice of forcible removal. It cites, for example, the 1937 resolution of the Commonwealth-State Native Welfare Conference, which determined that:

300 ‘Protectionist’ policies were effectively abandoned as colonial governments became overwhelmed by the social problems associated with impoverished Indigenous populations languishing on the outskirts of towns, and the increasing numbers of mixed-raced children. This period coincided with the emergence of the eugenics movement in the late 19th century.
This conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.\textsuperscript{302}

This statement of policy direction is set against the 1938 manifesto of Aboriginal activists William Ferguson and John Patten, who, the Commissioners suggest, “forcefully den[ied] the myth of white benevolence” by insisting that:

You have almost exterminated our people, but there are enough of us remaining to expose the humbug of your claim, as white Australians, to be a civilised, kindly and humane nation… You hypocritically claim that you are trying to ‘protect’ us… But you dare not admit openly that what you hope and wish is for our death!\textsuperscript{303}

Through the juxtaposition of these (and other) citations, Bringing Them Home presents a compelling reading of the nation’s historical record. In this example, the first citation is intended to reflect clear evidence of a racially discriminatory programme of biological absorption, while the second stands in defiance of this and as a powerful statement of Indigenous resistance. The juxtaposition of the two statements also facilitates a re-reading of the first, so that its vague allusion to the “destiny of the natives” is recast (with reference to Ferguson and Patten’s manifesto) in a new and sinister light.

\textsuperscript{302} Bringing Them Home, 1997, p. 32.
Central to *Bringing Them Home*’s “citational strategy”, according to John Frow, is the way that it produces a “laminated text of historiography.”³⁰⁴ This means, in other words, that the report is built up by layers of citations, and that out of these layers, voices and narratives of the past intersect with stories told in the present (it has a “collaging” effect) which testify to the way that historical traumas continue to resonate in the lives of the victims of forcible removal.³⁰⁵ We see this process at work in the report, for instance, where the words of a Protector of Aborigines, James Isdell, are quoted in the context of a discussion about the operation of the mission system in the northwest of Western Australia in the first decade of the twentieth century.³⁰⁶ Isdell, who served as Protector of Aborigines in the north of the state between 1906 and 1915, is quoted as stating:

> The half-caste is intellectually above the aborigine, and it is the duty of the State that they be given a chance to lead a better life than their mothers. I would not hesitate for one moment to separate any half-caste from its aboriginal mother, no matter how frantic her momentary grief. They soon forget their offspring.³⁰⁷

These words, and other similar sentiments (which reflect an especially cold and callous ideology) echo across the report and are ‘engaged’ with by witnesses to the inquiry whose testimonies detail – often in confronting ways – how their lives have been devastated by the translation of these ideas into

³⁰⁶ Much has (rightly) been made of the role of the so-called ‘Protector’ in the history of the administration of forcible removals in Australia. From the early twentieth century, each state had its own Chief Protector who became the legal guardian of all Aboriginal children under the age of 16. In Western Australia, and through the *Aborigines Act of 1905* (WA), the Chief Protector was given discretionary power to (among other things) remove Aboriginal children from their families. Of all of the Chief Protectors, A.O. Neville, who served in the role in Western Australia between 1915 and 1940, has achieved the greatest notoriety – particularly as a result of his advocacy for policies directed at biological absorption.
³⁰⁷ The report attributes this quotation to Submission 385, which was made by historian Christine Choo. See: *Bringing Them Home*, 1997, p. 104.
practice. One witness – identified as giving Confidential Evidence 139 –
demands in her testimony that:

The government has to explain why it happened? What
was the intention? I have to know why I was given the life I
was given and why I’m scarred today? Why was my mum
meant to suffer? Why was I made to suffer with no
Aboriginality and no identity, no culture? Why did they
think that the life they gave me was better than the one my
mum would give me?  

Though they do not appear on the same page (or even in the same chapter)
of the report, it is my argument that the extracts above should be understood
as being engaged in an intense dialogue, or, in Bakhtin’s words, as providing
evidence of an utterance “brushing up against thousands of living, dialogical
threads.” In this example, Isdell’s statement goes some way to answering
the questions that the witness asks (her removal as a child was inspired by
an officially sanctioned belief in the racial inferiority of Indigenous peoples),
and at the same time, the witness’ statement can be read as a response to
the (false) assertions of the Protector. His insistence that the separation of
Aboriginal children from their families would give them “the chance to lead a
better life” is challenged by the witness, who describes her own experience
of “suffering” as well as that of her mother, whose trauma endures despite
the Protector’s claim that “aboriginal mothers... soon forget their offspring.”
Also implicit in the witness’ statement is a demand for acknowledgement and
apology (“the government has to explain why it happened”), which the report
responds to by making a series of recommendations, including that
“reparation be made in recognition of the history of gross violations of human
rights” and that all Australian parliaments offer official apologies and
acknowledgements of wrongdoing.  

310 The National Inquiry identifies five components of reparations, which include: acknowledgement
and apology; guarantees against repetition; measures of restitution; measures of rehabilitation; and
“Homes Are Sought For These Children” – ‘Collaging’ in Bringing Them Home:

In his analysis of Bringing Them Home, Frow is concerned principally with the “politics of writing” as it relates to the text’s “citational” and “collaging” strategies.311 He does not consider, as a result, the way that the report embraces other modes (such as poetry, photography, newspaper reporting) in order to add depth and complexity to the story that it tells. The inclusion of a newspaper article in Part Two of the report, headlined ‘Homes Are Sought For These Children’, provides a particularly illuminating example of how this “collaging” works.312 The article, which was first published circa 1932, is accompanied by a photograph of six sad-looking Aboriginal children (described in the language of the time as “half-caste” and “quadroon”) who are identified as residents of the “Darwin half-caste home.” Its caption reads:

The Minister for the Interior (Mr Perkins) recently appealed to charitable organisations in Melbourne and Sydney to find homes for the children and rescue them from becoming outcasts.

The Minister’s “appeal” – which was made in the context of a push by government to integrate mixed-descent children within white society313 – is effectively answered by a person whose scrawled handwriting appears directly beneath the article’s caption.314 In this sense, there is a dialogue between the article itself and the respondent, who observes: “I like the little girl in centre of group, but if taken by anyone else, any of the others will do, so long as they are strong.” Based on this response, it is evident that the article should be understood as an advertisement, rather than as a benevolent call for “charity” (which is how it was originally framed). The

313 John Perkins was the Minister for the Interior between 1932 and 1934, prior to self-government in the Northern Territory.
314 The image is reproduced in the report courtesy of the ‘Between Two Worlds’ exhibition (supported by the National Archives of Australia), which toured Australia between 1993 and 1999, and again between 2000 and 2001.
respondent’s desire for a “strong” child, for example, suggests that he or she will be used as a source of labour, and the scrawling of an ‘X’ over one of the children implies a literal claim of ownership. This dialogue between the article and the respondent is then, in turn, engaged in an additional dialogue with testimonies that confirm a reading of the article as an advertisement:

We was bought like a market. We was all lined up in white dresses, and they’d come round and pick you out like you was for sale. Confidential submission 695, New South Wales: woman fostered at 10 years in the 1970s; one of a family of 13 siblings all removed; raped by foster father and forced to have an abortion.

I clearly remember being put in line-ups every fortnight, where prospective foster parents would view all the children. I wasn’t quite the child they were looking for. Confidential evidence 133, Victoria: man removed at 6 months in the 1960s; institutionalised for 3 years before being fostered by a succession of white families.315

Through the vividness of their statements, the witnesses create a compelling picture of despair. Its affect is magnified through the use of bold font, which serves to render a stark visual counterpoint to the ‘narrative of enquiry’, and also represents an additional aspect of the text’s “collaging” strategy.316 By testifying to the dehumanisation inherent in the process of being “market[ed]” for “sale”, the victims respond not only to the newspaper article, but also to its respondent, who becomes a participant in this exploitation. In this light, it can be argued that the juxtaposition of the two sources is intended to confront claims about the morality of “rescuing” mixed-descent children from “becoming outcasts.”

316 According to Claire Moon, the use of bold and italicised font is a recurring motif in the typography of the human rights report. It is designed, she suggests, to establish a formal relationship between aesthetics and action. See: C. Moon, ‘What One Sees and How One Files Seeing’, 2012, pp. 882-883.
Critical Race Theory and Counter-Storytelling:

Parts Three and Four of *Bringing Them Home* trace the intergenerational effects of forced separations, while also reflecting on the complicatedness of the experience of returning ‘home’. By calling on the voices of victims, the report narrativises a national story – that of the ‘stolen generations’ – and simultaneously opens a window to their suffering. For some, like Penny van Toorn, this exposure is troubling because it positions the reader as “voyeur” to “scenes of cruelty, terror and sexual depravity.”\(^{317}\) It is also the case, however, that ‘voice’ is central to the way that human rights abuses are articulated, and to the way that human rights inquiries communicate injustice and make claims for reparations. For Julie Stone Peters, ‘voice’ is intended to stand as “a kind of truth that documentary evidence, reports [and] legal determinations cannot provide.”\(^{318}\) Understood in this way, legal storytelling has the potential to “awaken the sympathetic moral sense of the broader public”\(^{319}\) and to “break [the] silence” of the past.\(^ {320}\) Implicit in *Bringing Them Home*, therefore, is a conscious recognition of the power of story to convey the complexities of lived experience. This is coupled with an acknowledgement of the limitations of the report’s ‘narrative of enquiry’ – and the law generally – to communicate a particularised knowledge of this kind. The report frames this ‘concession’ in the following way:

It is difficult to capture the complexity of the effects for each individual. Each individual will react differently, even to similar traumas. For the majority of witnesses to the Inquiry, the effects have been multiple and profoundly disabling.\(^ {321}\)

\(^{317}\) P. van Toorn, ‘Tactical History Business’, 1999, pp. 259. van Toorn is concerned with how this narrativisation plays into a broader commodification of Aboriginal history and trauma – out of which white Australians are the biggest beneficiaries.

\(^{318}\) J.S. Peters, “‘Literature,’ the “Rights of Man” and Narratives of Atrocity”, 2005, p. 276.

\(^{319}\) J.S. Peters, “‘Literature,’ the “Rights of Man” and Narratives of Atrocity”, 2005, p. 253. As I have indicated, *Bringing Them Home* mobilised public sympathies in an unprecedented way. In May 2000, during the ‘People’s Walk for Reconciliation’, more than 250,000 Australians marched in solidarity over the Sydney Harbour Bridge. This remains Australia’s largest-ever political protest.

\(^{320}\) T.G. Phelps, ‘Reading as if for Life: Law and Literature is more important than ever’, 2008, p. 147.

\(^{321}\) *Bringing Them Home*, 1997, p. 178. The report also acknowledges that, despite relying on statistical surveys to furnish its findings, these are similarly unable “to capture the experiences of those people whose Aboriginality is unknown even to themselves.” See: *Bringing Them Home*, 1997, p. 32.
This is an important qualification because it foregrounds the way that the report turns to story (or, what I have called ‘the discourse of personal experience’) in order to articulate the individual traumas that traditional legal language – because of its monologism – is unable to convey. In this sense, Bringing Them Home is unusual as a legal text because of its multivocality; it allows victims to tell their own stories and frames these in a considered and sympathetic way. Rather than being heavily mediated, the stories speak for themselves and in a “tragic chorus.”

In this light, it is possible to engage with Bringing Them Home in conjunction with critical race theory, which is the framework developed by scholars of colour for the purpose of deconstructing the relationship between race, law and power. Specifically, critical race theorists advocate counter-storytelling as a way to draw attention to substantive and procedural breaches of equality in the law; they argue that story can “sharpen our concern, enrich our experience… and stir our imaginations.” Central to this claim is the suggestion that, by listening to the voices of those whose stories have been suppressed (by virtue of their race, but also as a result of their gender and/or sexuality), the law and its institutions can be reshaped so that it is responsive to a multiplicity of experience. In practice, this would mean that lawyers and law-makers – who are now able to see through “the eyes of the outsider” – adapt their lawyering and law-making in order to acknowledge the lived experience that lies beyond their own “received wisdoms and shared understandings.”

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323 Critical race theory challenges “traditional legal orthodoxy and contends that the neutral, a-contextual approach taken in legal scholarship is seriously flawed.” It also, according to Culp, Harris & Valdes, rejects three entrenched beliefs about racial injustice: 1) that blindness will eliminate racism; 2) that racism is a matter of individuals and not systems; and 3) that racism can be fought without paying attention to sexism, homophobia, economic exploitation and other forms of oppression. See: A. Johnson, ‘Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship’, Iowa Law Review, Vol. 79, No. 1, 1993-94, pp. 803; J. Culp, A. Harris & F. Valdes, ‘Introduction: Battles Waged, Won and Lost’, 2002, p. 2.
325 Philip Meyer points to this disjunct when he observes that “our communities are multivocal [and yet] the law speaks… univocally and systematically excludes the voices and stories of those who ought to be included in the community of authoritative speech.” See: P. Meyer, ‘Will You Please Be Quiet Please? Lawyers Listening to the Call of Stories’, Vermont Law Review, Vol. 18, No. 1, 1993-1994, pp. 570-571.
of counter-storytelling is self-evident: she argues that, “there is no more powerful way to lead a change of hearts and minds than to show the human side of... law and politics.”

By relaying narratives of lived experience, *Bringing Them Home* divorces itself from the monologic language of law and commits itself to exposing the “truth” of the past. At the centre of its advocacy are the more than a dozen eponymously-named ‘condensed life-stories’ (each between two and four pages in length), which are dispersed throughout the report and allow victims to narrate *in their own words* stories of trauma. Characterised by a retrospective outlook and first-person voice, the stories resemble (aesthetically speaking) Indigenous life-writing, which was an emergent genre at the time and is characterised by black voices speaking truth to power. Some of the stories are strident in their criticisms, while others – like ‘Fiona’s’ – are subtle and reflective. ‘Fiona’ was removed from the Ernabella mission in 1936 at the age of 5. With her sisters, she was taken to Oodnadatta, a remote South Australian mission hundreds of kilometers away, from where she was eventually apprenticed as a domestic servant. ‘Fiona’ recounts the story of her removal in the following way:

> We had been playing all together, just a happy community and the air was filled with screams because the police came and mothers tried to hide their children and black their children’s faces and tried to hide them in caves.

This sentence is interesting syntactically because of the way that it merges the idea of a “happy community” with the idea of an “air... filled with

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329 I use the term ‘truth’ in the sense that it is used by Julie Stone-Peters to refer to the way that ‘voice’ provides “a kind of truth that documentary evidence, reports [and] legal determinations cannot provide.”

330 Even though the names used in the stories (‘Greg’, ‘Jennifer’, ‘John’, etc.) are pseudonyms, it remains the case that this naming strategy draws the reader into a close proximity with the speaker. Unlike the hundreds of witness statements that are effectively embedded within the report’s ‘narrative of enquiry’, the ‘life-stories’ are, in a stylistic sense, separate from the body text of the report. They appear, for example, at intervals between chapters and have pages marked by border art.


screams”. The shift in the tone of the storytelling conveys the suddenness of the arrival of the police and the fear and anxiety of mothers who sought desperately to protect their children. Elsewhere, the narrative creates stark, visually compelling pictures. ‘Fiona’ describes, for instance, the feeling of losing her culture and family as like being “stabbed... with a knife.” She also outlines in a particularly affective way the processes of her community’s grief: “Every morning as the sun came up the whole family would wail. They did that for 32 years until they saw me again.” In the rest of her story, ‘Fiona’s’ focus shifts to introspection as she thinks deeply about the way that the trauma of losing a child would remain with a parent:

Who can understand that, the trauma of knowing that you’re going to lose all your children? We talk about it from the point of view of our trauma but – our mother – to understand what she went through. I don’t think anyone can really understand that.

These questions also resonate with the reader, who must grapple with the emotional weight of this history.

“A hole in your heart that can never heal” – the Politics of ‘Returning Home’:

Many of the stories in Bringing Them Home reflect on the inter-generational effects of forcible removal. The report contextualises their inclusion within its narrative by noting that the “overwhelming evidence” of victims to the inquiry was that, “the impact does not stop with the children removed. It is inherited by their own children in complex and sometimes heightened ways.” This observation is then, in turn, validated by witnesses who testify to the enduring (and heightened) effects of their suffering:

It never goes away. Just ‘cause we’re not walking around on crutches or with bandages or plasters on our legs and arms, doesn’t mean we’re not hurting. Just ‘cause you can’t see it doesn’t mean… I suspect I’ll carry these sorts of wounds ‘til the day I die. I’d just like it to be not quite as intense, that’s all.”

“There’s things in my life that I haven’t dealt with and I’ve passed them on to my children… I look at my son today who had to be taken away because he was going to commit suicide because he can’t handle it… I have passed that on to my kids because I haven’t dealt with it... How do you deal with it? How do you sit down and go through all those years of abuse?”

In the first statement, the witness describes what is essentially an internalised and invisible struggle, and calls (by drawing an analogy with physical scarring) for greater recognition and acknowledgement of the complexities of the legacies of this kind of trauma. In the second statement, the witness describes a debilitating feeling of shame – “I have passed that on to my kids” – and sheds light on the way that the burden of carrying “years of abuse” (without having the means to “deal with it”) has materialised in a number of damaging ways. These feelings are echoed by a third witness, who testifies to the way that their father’s trauma has haunted their own life: “I’ve come to realise that because of Dad being taken away, grief and all that’s been carried down to us... We don’t know where we’re heading.”

Each of the statements reflects a great sense of despondence and despair, and captures the way that unresolved traumas reverberate across generations.

In its discussion of the politics of returning ‘home’, *Bringing Them Home* frames reunion as “the beginning of the unravelling of the damage done to Indigenous families and communities by the forcible removal policies.”

Central to this process (of returning ‘home’) is the matter of victims being able to reconcile with their Aboriginality, which was, in the report’s words, intended to be, “stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance of them.”

The Commissioners ground their discussion of family reunion (and separation) in academic arguments about what is necessary for the development of a person’s “psycho-historical identity.” They observe, for example, that the psychological development of an adopted person (or analogously, of a forcibly removed person) is handicapped by the absence of a sense of genealogical history. In this context, they advocate for the “need” for reunion and the “need” for support for agencies who facilitate them.

One such agency is NSW LinkUp, whose submission provides a particularly compelling picture of the many complexities of ‘returning home’:

Going home is fundamental to healing the effects of separation. Going home means finding out who you are as an Aboriginal: where you come from, who your people are, where your belonging place is, what your identity is…. The journey home is mostly ongoing and in some ways never completed.

This statement is important within the wider context of the report because it endorses the Commissioners’ arguments about the link between reunion and psychological development (thereby forming part of the report’s citational strategy), but also because of the way that it dialogues with individual testimonies. Its recognition that the “journey home” is “ongoing” and “in some ways never complete” resonates intensely with the stories of victims, and particularly with those who describe “a strong sense of not belonging either in

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343 The report cites a submission from the Victorian Adoption Legislation Review Committee, which was published in 1983.
344 A number of the report’s final recommendations relate to the provision of resources to assist in the reunion process. See recommendations: 11, 13, 21, 22a, 22b, 23, 27, 30a, 30b and 31.
the Indigenous community or the non-Indigenous community."\textsuperscript{346} This feeling is articulated particularly clearly by one witness – identified as giving Confidential Evidence 210 – who offers a sober analysis of their lived experience: "You spend your whole life wondering where you fit. You’re not white enough to be white and your skin isn’t black enough to be black either, and it really does come down to that."\textsuperscript{347} Other witnesses describe a persistent feeling of disconnection and isolation – even after “journeying home”:

“I can’t even talk to them... That’s their home, that’s their country, they can’t imagine ever living anywhere else and yet now when I go back I feel so isolated from it and I really would like to be part of that community and to work with them.”\textsuperscript{348}

“I had to re-learn lots of things... It was like having to re-do me, I suppose. The thing that people were denied in being removed from family was that they were denied being read as Aboriginal, they were denied being educated in an Aboriginal way.”\textsuperscript{349}

It is interesting, then, that by acknowledging the devastating consequences of being stripped of language and of culture, the witnesses to the inquiry effectively invoke a discourse of human rights, where voice is framed as an emblem of subjectivity and where human rights abuses can be understood as representing any infringement on a person’s ability to narrate their story.\textsuperscript{350} This infringement is explicated clearly in the first statement (but also in dozens of others throughout the report) where the witness describes the “isolating” effects of the suppression of language and voice, as well as the trauma of being prevented from communicating with the family that they have

now been reunited with. This devastation is corroborated by the second witness, who testifies to an erasure of Aboriginal subjectivity – “they were denied being read as Aboriginal.”

The Language of Law in *Bringing Them Home*:

In establishing a case for reparations, *Bringing Them Home* invokes colonial legal standards and international human rights law in order to argue that the practice of removing Indigenous children from their families was, “contrary to [the] accepted legal principle imported into Australia as British common law and, from 1946, constituted a crime against humanity.” It reaches this conclusion by first viewing forced separations in “light of the legal values prevailing at the time those actions were taken”, and subsequently, with reference to international human rights law which, after 1946, had passed binding resolutions relating to racial discrimination and genocide. With reference to the common law, the Commissioners suggest that, “there was a significant divergence between the imported notions of fairness and liberty and the treatment of Indigenous peoples in Australia.” They build on this discussion by tracing (in a detailed and comprehensive way) the development of legal “safeguards” – such as judicial scrutiny in cases of deprivation of liberty and deprivation of parental rights – and then present instances of where these ‘safeguards’ were “cast aside when it came to Indigenous families and children in Australia.”

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351 The Inquiry’s Terms of Reference called for an examination of “the principles relevant to determining the justification for compensation for persons or communities affected by such separations.” See: *Bringing Them Home*, 1997, p. 275.
353 The report notes that: “within a few years of the end of the Second World War, Australia, together with many other nations, had pledged itself to standards of conduct which required all governments to discontinue immediately a key element of the assimilation policy, namely the wholesale removal of Indigenous children from Indigenous care and their transfer to non-Indigenous institutions and families.” It also argues that the policy of forcibly removing Indigenous children “for the purpose of raising them separately from and ignorant of their culture and people” could “properly be labeled ‘genocidal.’” See: *Bringing Them Home*, 1997, pp. 266, 275.
355 *Bringing Them Home*, 1997, p. 252. Emphasis added. The report cites the common law case of *Re Agar-Elis* 1878, which confirmed that the law has the right to “interfere” with the exercise of a parental right, “but it must be for some sufficient cause known to the law.”
At the centre of the report’s argument is a focus on the nature of the relationship between child and state in the context of the existence of the Chief Protector and Protection Boards. Specifically, it is argued that this relationship was of a fiduciary nature because of the statutory obligations enshrined in the legislation which created the position(s) of Chief Protector and which designated that person as the legal guardian of all Aboriginal children in a state or territory. By citing nineteenth-century case law, the report sets out the legal basis for its claim that the Protector and other officials were “obliged” by the laws of the day to:

- Refrain from causing physical harm to forcibly removed children, to protect the children from any such harm, to provide individually and in each child’s best interests for their custody and maintenance, and to provide for education.

It is clear that, by invoking contemporaneous case law, the report seeks to establish an idea of what legal principles ought to have been applied in the nineteenth and twentieth centuries. In doing so, it (implicitly) counters anachronistic arguments about what could or should have been done differently “with the wisdom of hindsight.” Perhaps predictably, these were the terms in which the submission of the Commonwealth Government to the Inquiry was framed:

The Government takes the view that… it is appropriate to have regard to the standards and values prevailing at the time of their enactment and implementation, rather than to the standards and values prevailing today.

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356 *Bringing Them Home*, 1997, p. 260. For example, the Aborigines Act of 1905 (WA) in Western Australia.

357 See: *Reynolds v The Lady Tenham* [1723]; *Mathew v Brise* [1851]; *Plowright v Lambert* [1885]. *Bringing Them Home* argues that “agents [and] delegates of the State… failed in their guardianship duties” by failing to provide standards of care consistent with the care provided to non-Indigenous children in similar circumstances; failing to protect children from harm; and failing to involve Indigenous parents in decision-making about their children. See: *Bringing Them Home*, 1997, p. 260.

358 The Darwin Diocese of the Catholic Church was particularly remorseful in its submission to the Inquiry: “With the wisdom of hindsight we can only wonder how as a nation, and as a Church, we failed to see the violence of what we were doing.” See: *Bringing Them Home*, 1997, p. 405.

This is a “view” that is rejected by the Commissioners, who restate their opinion that the legislative and administrative actions of past governments should be understood in the light of the legal values prevailing at the time of those actions. In other words, the report seeks to undermine the credibility of arguments which justify past behaviours according to what are claimed to have been the “prevailing standards and values” of the time, and to make governments of “today” accountable for the actions of yesterday.

Conclusion:

By tracing the legacies of the past, Bringing Them Home aims to map a path to reconciliation for Indigenous and non-Indigenous Australians. It does this by listening to the voices and stories of the Aboriginal and Torres Strait Islanders who have been harmed by the policies of forcible removal, and by making recommendations for official acknowledgement, apology and redress. In this chapter, I have reflected on Bringing Them Home through the prisms of ‘law and literature’, human rights and critical race theory in order to deconstruct its text and to draw attention to the dialogical nature of the relationship between law and narrative. Despite the unprecedented public response to its stories, governments have been reluctant to implement in full – or even in part – the recommendations that were made in Bringing Them Home. Indeed, the immediate response of the Commonwealth Government was to deny the report’s findings (specifically that of genocide), to dismiss the possibility of financial reparations, and to characterise the experience of the ‘stolen generations’ as a mere “blemish” in the history of the nation.360 Nearly two decades since its release, and nine years since Prime Minister Rudd’s National Apology,361 Bringing Them Home’s commitment to “healing and

360 When the Bringing Them Home report was tabled in parliament, Prime Minister John Howard responded by stating: “I [do] not believe that current generations of Australians [should] be held accountable or regarded as guilty for the acts of earlier generations over which they had no control.” See: J. Howard, ‘Aboriginal Reconciliation’, Hansard, 27 May 1997, online.

361 Kevin Rudd delivered the National Apology, his government’s first order of business in the new parliament, on 13 February 2008. In his speech, Rudd referenced the Bringing Them Home report, and the way that its “searing… firsthand accounts… scream[ed] from the pages.” More recently, in February 2017, he has warned about (the possibility of) the creation of a “second stolen generation” as a result of the alarming growth in the number of Indigenous children being removed from their families and communities – often without consultation with Indigenous organisations. See: K. Rudd, ‘Apology to
reconciliation for the benefit of all Australians” remains, in a number of ways, incomplete.
Reading a Royal Commission: Deconstructing the Hindmarsh Island Bridge Royal Commission

The commitment of Australian courts and legislatures to the spirit of reconciliation engendered by *Mabo* was tested in the mid-1990s by the highly divisive Hindmarsh Island Bridge Affair, which had at its centre a Royal Commission to investigate whether claims about the existence of secret ‘women’s business’ had been “fabricated” in order to prevent the construction of a bridge on the traditional lands of the Ngarrindjeri people. The inquiry’s finding – that “the whole claim of the ‘women’s business’ from its inception was a fabrication” – marked a low point for a nation that had, by virtue of its High Court’s recent rejection of the ‘fiction’ of *terra nullius*, committed itself to a new tradition of cross-cultural understanding. In this chapter I will draw attention to the way that the saga raised questions about the law’s consistent privileging of literate modes of communication and knowledge transmission, while also reflecting on the ethics and politics of what has been described as the “intrusion of the state” into the realms of culture and spirituality.

By reading the report of the Commission – a quasi-judicial text – through the lens of ‘law and literature’ studies, and in particular, with regard to discourse theory, the chapter will open up a discussion about the implications of the purposeful silence of the Ngarrindjeri ‘proponent’ women, and consider what this says about the operation of narrative in law. The chapter will begin with an overview of the events and critical commentary surrounding the case, before proceeding to an analysis of the “fabric” of the text of the report.


364 This view of text as analogous to fabric is influenced by Stephen Muecke, who employs the term to describe the way that texts are made up of differences, quotations, citations, things lost, things absent, things presented again, misrepresented and misquoted. Fiona Probyn adopts this analogy in relation to the question of truth in the context of the Hindmarsh Island dispute. See: K. Benterrak, S. Muecke & P. Roe (eds), *Reading the Country: An Introduction to Nomadology*, 1984, p. 21; F. Probyn, ‘A Poetics of Failure is No Bad Thing: Stephen Muecke and Margaret Somerville’s White Writing’, *Journal of Australian Studies*, Vol. 26, No. 75, 2002, pp. 18-19.
The Hindmarsh Island Affair – an Explainer:

Hindmarsh Island is one of a number of islands at the mouth of the Murray River in South Australia, located within the traditional lands of the Ngarrindjeri people, who are among the most closely scrutinised of any Indigenous group in Australia. In 1990, the South Australian Government approved plans for the construction of a bridge to connect Hindmarsh Island to the historic mainland town of Goolwa. The bridge was part of a wider plan to develop the island and its surrounding areas as a tourist precinct, and had been the subject of community debate since the mid-1980s. As part of the approval process, consultant anthropologist Dr. Rod Lucas was appointed to survey the site and to make observations about its significance in relation to Aboriginal heritage. His conclusion that there were no recorded “mythological sites specific to Hindmarsh Island” and that, if such sites had ever existed, they “were probably lost to us now”, paved the way for the government’s green lighting of the project. The terms of Lucas’ conclusion – that any site of significance is “lost to us now” – echo the idea of the extinguishment of native title, and were made in the context of a muted Aboriginal resistance to the construction of the bridge, which can be explained in part by the dispersal of Ngarrindjeri people throughout South Australia as a result of the dispossession of lands. Despite maintaining a strong presence at Raukkan, which is approximately 30km from Goolwa (and the site of the former Point McLeay mission), very few Ngarrindjeri people now reside at either Goolwa or on Hindmarsh Island.

366 The bridge and marina project was an initiative of Binalong Pty Ltd., a company registered to wealthy Adelaide developers Tom and Wendy Chapman.
367 Lucas’ report identified burial grounds at Hindmarsh Island, as well as middens and other archaeological sites deemed to be of a low level of significance. See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 66.
368 The Report emphasises that the developers and consulting anthropologists and archaeologists went to great lengths to engage with members of Ngarrindjeri representative bodies, who were, incidentally, all men. Conservative anthropologist Geoffrey Partington provides a detailed account of the extent of engagement. See: G. Partington, ‘Hindmarsh Island and the Fabrication of Aboriginal Mythology’ in Proceedings of the 15th Conference of the Samuel Griffith Society, 2003, online. The Report also suggests that there has been only one Aboriginal resident in the area of Goolwa and Hindmarsh Island “in recent times.” See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 45.
Prior to the active involvement of Ngarrindjeri people in the organised resistance to the construction of the bridge, a grassroots activist movement (made up of locals and out-of-town environmentalists and unionists\(^{369}\)) was gaining momentum in the early 1990s. In late 1993, and following the election of a State Liberal Government, the Lower Murray Aboriginal Health Committee (LMAHC) sought advice from the Aboriginal Legal Rights Movement (ALRM) about steps that it could take to stop construction of the bridge.\(^{370}\) After receiving legal advice in relation to Aboriginal heritage law, the group contacted the Federal Minister for Aboriginal Affairs, Robert Tickner, to ask that Section 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* be invoked to guarantee a 30-day injunction over the site.\(^{371}\) In agreeing to invoke Section 9, the Minister commissioned an inquiry into the significance of the site, to be conducted by Professor Cheryl Saunders. The most compelling and controversial submission to Saunders’ inquiry, for which she received over 400 statements of evidence, was the written submission of anthropologist Dr. Deane Fergie, who had been appointed by the LMAHC to take the evidence of a group of Ngarrindjeri women who claimed that restricted women’s knowledge would be significantly compromised if the construction of the bridge continued. Given the sacred and secret nature of the evidence, the women’s transcribed testimonies were attached to Fergie’s anthropological report as annexed appendices (in sealed envelopes) and marked with the instruction, ‘Confidential: to be read by women only.’\(^{372}\)

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\(^{370}\) The Liberal Party was elected to government in December 1993 after more than a decade in opposition, where they had been opposed to the construction of the bridge. In government, however, they were contractually obliged to honour a contract entered into by the previous government.

\(^{371}\) Robert Tickner was a Minister in the Keating Government, which was regarded as progressive on issues relating to Indigenous affairs – in both policy and public discourse. Section 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) relates to an emergency declaration that can be issued by the relevant Minister when an oral or written submission is made by, or on behalf of, a group of Aboriginal people “seeking the preservation or protection of a specified area from injury or desecration.” In order to issue the emergency declaration, the Minister must be satisfied that the area is “a significant Aboriginal area” and that “it is under serious and immediate threat of injury or desecration.”

In July 1994, Tickner invoked Section 10 of the *Heritage Protection Act*, thereby prohibiting development at the site for a 25-year period. By this stage, details of a rift within the Ngarrindjeri community (between those who supported claims about the existence of restricted women’s knowledge and those who denied its existence) had entered the public domain and become a source of gossip, innuendo and deep fascination. This interest peaked in November 1994 when the Federal Member for Barker, Ian McLachlan, spoke in the Parliament and described the claims about ‘secret women’s business’ as a “fabrication.” This framing was significant because it shaped the way that the Affair was conceived in the public imagination – most notably by being adopted in the Royal Commission’s terms of reference. McLachlan’s claim appeared to be validated in the months after it was made (in what was essentially a vacuum of silence on account of the ‘proponent’ women’s refusal to speak publically on the matter) when Ngarrindjeri man Doug Milera and ‘dissident’ women Dorothy Wilson and Dulcie Wilson spoke to the media to allege that the claims had been “invented” in order to stop construction of the bridge.

McLachlan intervened in the Affair again in March 1995 by tabling the sealed envelopes of Saunders’ report (which had been sent to his office in error) in the Federal Parliament. This stunt was intended to highlight what he viewed as a flaw in the *Aboriginal and Torres Strait Islander Affairs Act*, whereby a legal and/or judicial decision could be made without a full disclosure of evidence. In the aftermath of this sensational episode (for which he was

373 Doreen Kartinyeri was the first woman to ‘publically’ claim (in the context of a closed meeting of Ngarrindjeri women) that she had specific knowledge of the ‘women’s business’. This had been passed to her, she claimed, by a deceased aunt. The ‘dissident’ women (a number of whom had originally supported Kartinyeri in her claims about ‘women’s business’) denied that this knowledge existed, and implied that the ‘proponent’ women had been manipulated by forces opposed to the bridge.

374 McLachlan’s electorate took in the area around the mouth of the Murray River. His claim was based on the evidence provided by Ngarrindjeri “informant” Allan Campbell, who recalled explaining to the Minister that, “in the opinion of Dorothy Wilson, the ‘women’s business’ was a load of rubbish.” See: *Report of the Hindmarsh Island Bridge Royal Commission*, 1995, p. 166; I. McLachlan, ‘Hindmarsh Island: Motion for Disallowance’, *Hansard*, 9 November 1994, online.

375 On 6 March 1995, McLachlan asked Tickner in Question Time: “Will you explain why you allowed these photocopies of those secret letters to be sent around Australia like flotsam in a wreck, in unregistered parcels, the copies of the letters in an unsealed envelopes, addressed to a white Australian male by the name of McLaughlin?” See: I. McLachlan, ‘Questions Without Notice: Hindmarsh Island Bridge’, *Hansard*, 6 March 1995, online. For a comprehensive summary of these events, see: M. Simons, *The Meeting of the Waters: The Hindmarsh Island Affair*, Hodder Headline, 2003.
widely condemned), McLachlan resigned from his role as Shadow Minister for Environment and Heritage.

In February 1995, Justice Maurice O’Loughlin of the Federal Court overturned Minister Tickner’s 25-year injunction on appeal. According to Robert van Krieken, the appeal was successful not because of a legal rejection of the claims of ‘women’s business’, but because of “errors of process in the Minister’s invocation of Section 10 of the Act.” By failing to consider all of the evidence (Tickner did not read the contents of the envelopes), the court ruled that the Minister had denied the developers natural justice, which is to say, procedural fairness.

Another consequence of Tickner’s decision was that it allowed a deep, public scepticism to grow around the ‘proponent’ women. Ken Gelder and Jane Jacobs engage with this, and the question of ‘secrecy’ in relation to Hindmarsh Island, by observing that protocols relating to the protection of secrets (particularly in relation to Aboriginal heritage) are the source of a “great paradox” because they are at once recognised and accommodated, while also being the subject of uncertainty and anxiety. They argue compellingly that secrecy is always complicated by its dialogical relationship with publicity (they share a “promiscuous entanglement”), and that, within this system of recognition there are pressures for secrets to be disclosed. I will expand on these ideas in the context of a discussion of the incommensurability of legal cultures.

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377 Procedural fairness implies the right to the full disclosure of information forming the basis of a decision-maker’s determination, and the right to a hearing enabling a response to that information. See: R. van Krieken, ‘Kumarangk (Hindmarsh Island) and the Politics of Natural Justice’, 2011, p. 138.
379 Gelder and Jacobs argue that “secrecy never meant silence – simply because details of the case were constantly flowing through a number of public domains.” See: K. Gelder & J. Jacobs, ‘Promiscuous Sacred Sites’, 1997, online.
In response to sustained opposition to the construction of the bridge, the South Australian government announced a Royal Commission in June 1995 to inquire into “whether the ‘women’s business’ or any aspect of the ‘women’s business’ was a fabrication and if so, (i) the circumstances, (ii) extent and (iii) purposes of such a fabrication.”

Like all other aspects of Australia’s legal infrastructure, the Royal Commission (as a mode of inquiry) was inherited from Britain and remains, according to George Gilligan, an “ad hoc, flexible, adaptive and adaptable model established by centralised authority to investigate nominated issues.” Prior to federation, each of Australia’s colonies made regular use of the Royal Commission as a mechanism for inquiring into matters of public or economic importance.

In the absence of a legislative framework, Commissions were given legal effect by letters patent issued by the monarch or a governing body. Following federation, and the assent of the Commonwealth’s Royal Commissions Act 1902, each of the six states introduced legislation to facilitate and manage the operation of Royal Commissions within their own jurisdictions.

Gilligan explains the “continuing popularity of Royal Commissions” by referencing what he describes as a tradition of state intervention in the creation and maintenance of core infrastructure. He argues that as a result of this history of interventionism, Royal Commissions are “politically attractive” because they deliver control to Ministers (over the appointment of Commissioners and the drafting of terms of reference) and can be used in the service of specific political agendas. Neil Andrews expands on this point by arguing that, because of its hybrid nature (it has both executive and

382 For example, see the Royal Commission on Real Property Law (South Australia, 1861) and the Royal Commission on Penal and Prison Discipline (Victoria, 1870).
383 See: Royal Commissions Act 1917 (SA); Royal Commissions Act 1923 (NSW).
384 Royal Commissions were traditionally directed to questions of economics (inquiries into industry, the role of tariffs, etc.), however recently their focus has shifted to inquiring into matters of social concern, such as in the Royal Commission into Aboriginal and Torres Strait Islander Deaths in Custody (1987) and the Royal Commission into Institutional Responses to Child Sexual Abuse (2013).
judicial powers), the Royal Commission complicates the Westminster model of the separation of powers – its support is often equivocal and partisan. The powers vested in a Royal Commission are broad and relate primarily to questions of compliance – that is, their ability to compel witnesses (both individuals and organisations) and to force the production of documents. They are also limited, however, insofar as they cannot initiate prosecutions, nor deliver legally or legislatively binding judgments. For these reasons, Mark Harris describes the Royal Commission as quasi-judicial – it has powers resembling those of a court. In the case of the Hindmarsh Island Bridge Royal Commission, Justice Iris Stevens, a former judge of the South Australian District Court, was appointed Commissioner by the Governor of South Australia and granted authority (via Section 10 of the Royal Commissions Act 1917) to issue subpoenas and enforce the compliance of individuals and government agencies. While the Commissioner chose not to use her powers of compliance to their full extent (recognising that this would likely have “embroiled the Commission in an unproductive and divisive disputation in which the real issues would have become lost to sight”), she did make use of what has been described as an adversarial style of cross-examination – even in the absence of the ‘proponent’ women whose claims regarding ‘women’s business’ were at the centre of the inquiry. Hearings were conducted “along the lines of a trial” (which contrasted with the Human Rights Commission’s Bringing Them Home inquiry) and ‘evidence’ was taken to mean the testimony given under oath in the witness box, in private

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387 Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 15. Section 10 of the Royal Commissions Act 1917 (SA) states that the Commissioner may “require by summons… the attendance of all such persons that they see fit to call before them.”


389 It is important to note that Commissioners are granted significant latitude in terms of the styling and setting of their inquiries, and that there were no procedural rules preventing a non-adversarial style in this instance.
hearings, or through the documents presented for scrutiny by the Commissioner.\textsuperscript{390}

It has been argued (by virtue of its adversarialism) that the Royal Commission demonstrated both a “counter-productive attitude” and a disappointing level of “inflexibility” in relation to its treatment of witness statements.\textsuperscript{391} This claim is compelling because it draws attention to the climate of hostility that surrounded the Commission,\textsuperscript{392} and also addresses the perception that the inquiry represented an attack on religious freedom.\textsuperscript{393}

It is noteworthy, then, that the Commissioner uses the first chapter of her report to outline, in what is effectively a performance of justification, the decisions that were made in relation to the use of coercion.

There were a number of considerations which dictated that the Commission should determine from the start the extent to which the use of its coercive powers was appropriate… Certainly the subject matter of the inquiry involved consideration of an issue of particular sensitivity. There were expressions of outrage by some sections of the community and claims that the Commission was an inquiry into traditional beliefs… Any threat of imprisonment of persons who were claiming that their refusal to cooperate with the Commission arose from religious, cultural or traditional beliefs contained a considerable propensity to worsen the deep divisions already existing.\textsuperscript{394}

\textsuperscript{390} The Commission also made special arrangements to hold private hearings when it was intimated by a witness that their evidence would involve confidential information. See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 5.

\textsuperscript{391} Neil Andrews describes the adversarial model as an inappropriate mode of inquiry because it encourages an “adversarial culture” and assumes the existence of an oppositional party, which was, in effect, absent (by virtue of the non-participation of the ‘proponent’ women). See: N. Andrews, ‘Dissenting in Paradise?’, 1998, p. 20.

\textsuperscript{392} Andrews explains that “the hearing was heavy with emotions, enormous tension, threats, intimidations and fear of religious retribution…” largely as a result of interjections from the public gallery. See: N. Andrews, ‘Dissenting in Paradise?’, 1998, p. 21.

\textsuperscript{393} Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson has addressed this point by arguing that, “faith cannot be proved in the dock of a courtroom… for those who have faith, no proof is required. For those who must doubt and destroy, no proof is sufficient.” Quoted in G. Mead, A Royal Omission, a Critical Summary of the Evidence given to the Hindmarsh Island Bridge Royal Commission with an Alternative Report, Greg Mead (self published), Adelaide, 1995, pp. vii-viii.

\textsuperscript{394} Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 15.
Despite its careful and thorough laying out of the issues of contention, as well its acceptance of the sensitivities associated with inquiring into (or ‘invading’) Indigenous religious tradition, the Commission is largely silent on the ethicality of its inquiry. It presents criticisms simplistically (“there were expressions of outrage by some sections of the community”) and offers no substantive engagement with the questions raised by those who resisted the inquiry. For these reasons, the processes and subject of the Royal Commission remain a source of significant controversy.

Fabrication – The Royal Commission Delivers its Findings:

In December 1995, the Royal Commission found that the “whole” of the ‘women’s business’ was a fabrication for the “purposes” of “obtaining a declaration from the Minister for Aboriginal and Torres Strait Islander Affairs… to prevent the construction of a bridge between Goolwa and Hindmarsh Island.”\(^{395}\) This was a controversial finding, particularly because it was seen to open a window to the judicial scrutiny of religious and/or cultural beliefs. Following the election of the Howard Government in 1996, the Federal Parliament passed the *Hindmarsh Island Bridge Act* in order to facilitate construction of the bridge. The *Act* was challenged in the High Court, however, in the case of *Kartinyeri v The Commonwealth*, where the applicant argued unsuccessfully that “the special bill constituted a racist refusal to accept the validity of the asserted beliefs of Aboriginal persons.”\(^{396}\)

In 2001, when construction of the bridge was complete, Binalong Holdings launched legal action in the Federal Court, seeking payment of damages from Minister Tickner, Professor Cheryl Saunders and Dr Deane Fergie for losses incurred as a result of the dispute, and for what it described as negligent reporting leading to financial loss.\(^{397}\) In his judgment, Justice John von Doussa ruled in favour of the respondents and against the Royal

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\(^{397}\) See: *Chapman v Luminis Pty Ltd (No 6)* [2002]; FCA 1100 (10 September 2002).
Commission’s “fabrication” finding. According to Robert van Krieken, Justice von Doussa “went through a forensic dismantling of the Royal Commission’s procedures and reasoning” to argue that there was a low probability that “the informants concocted the alleged tradition in a short space of time.”

Taking a broader view, von Doussa argued that, “non-Aboriginal people generally may have difficulty understanding many Aboriginal spiritual beliefs that are of profound importance... The asserted belief in this case is no different.”

Critical Survey of Literature:

A substantial body of criticism has developed around the Hindmarsh Island Bridge Affair. In the following section, I identify three broad disciplinary approaches taken to the study of the case. The first is concerned principally with the role of anthropology and ethnography, and centres on metacommentary by practitioners involved in the dispute. The second refers to analyses of gender and media representations of the ‘dissident’ and ‘proponent’ women. The third and final disciplinary approach is concerned broadly with legal and cultural studies analyses of the case. These criticisms coalesced in a special edition of the Journal of Australian Studies, which was published in 1996, but have also appeared as monographs and book chapters. Following the initial response, a second wave of academic interest coincided with the completion of the bridge in 2001 and the handing down of the Federal Court judgment in 2002. In 2011, Robert van Krieken reflected in a comprehensive way about the politics and processes of the Royal Commission and subsequent legal inquiries.

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398 R. van Krieken, ‘Kumarangk (Hindmarsh Island) and the Politics of Natural Justice’, 2011, p. 135.
399 See: Chapman v Luminis Pty Ltd (No 4) [2001]; 123 FCR 62 (21 August 2001) at 391.
402 R. van Krieken, ‘Kumarangk (Hindmarsh Island) and the Politics of Natural Justice’, 2011, pp. 125-149.
i) Anthropology:

It is unsurprising that debate by anthropologists has dominated critical commentary on the Hindmarsh Island Affair. In the context of the Royal Commission, anthropologists were employed as arbiters of truth, promoted as having the expertise to give credit to, or discredit, the claims of Ngarrindjeri women. In particular, the Commissioner relied on historical ethnographic studies of the Ngarrindjeri people, and an absence of records about ‘women’s business’, to make her finding. Criticisms by anthropologists relate chiefly to the politics and ethics of the Commission’s work, but also go to the question of the existence of ‘women’s business’. For purposes of brevity and relevance, I will refer only to a small sample of this work.

Between 1996 and 1997, South Australian Museum colleagues Philip Clarke and Steve Hemming engaged in a public debate in the pages of the Journal of Australian Studies over the veracity of the ‘proponent’ women’s claims. Philip Clarke argued that Hemming and others (including Deane Fergie) had “transplanted” the concept of ‘women’s business’ from Western Desert Aboriginal cultures and applied it in the Ngarrindjeri context. Hemming, who had worked closely with Doreen Kartinyeri at the South Australian Museum, replied (across a number of articles) by arguing that the “disparate group comprising pro-development forces, [including] academics, journalists, politicians and the Hindmarsh Island Bridge Royal Commission [itself], [had] worked to deny the historical evidence of gender based exclusivity of knowledge” and that this had contributed to an undermining of the position of Aboriginal people in Australian society more broadly. In her contribution to the debate, Deane Fergie (who was an active participant in the events)

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challenged the authority of the Royal Commission to rule on claims of Indigenous spirituality, and offered a number of criticisms of its operation. She suggested, for example, that without engaging with the contents of the envelopes, the findings of the Commission were “fatally flawed”, and that, moreover, the report was made up largely of inference. This is evident, Fergie argues, in what could be described as the Commission’s misunderstanding of what was meant by the term ‘women’s business’ (it refers, she specifies, to the specialised knowledge held by female midwives). Fergie argues that its propagation reflects an “erroneous” application of an assumption about a “simple gender exclusive division.”

**ii) Gender/Media Studies:**

In their analyses, gender and media studies scholars focus on representations of the ‘proponent’ and ‘dissident’ women in mainstream media, while also reflecting on the way that structural biases in the law disadvantage women litigants. Kathie Muir, for instance, has described news coverage of the Hindmarsh Island Affair as being characterised by a “sensationalist element” which fixated on the apparent split between the Ngarrindjeri women. Much of this commentary was hostile in tone, and reflected in headlines such as, “Lies, Lies, Lies” and “Island Secrets Damned as Lies.” In this light, both Marcia Langton and Mary-Ann Bin Sallik have described the ‘proponent’ women as being subjected to a “witch-hunt”, while Melissa Lucashenko has argued similarly that the Affair demonstrated “contempt for [the Ngarrindjeri women] both as blacks and as women.”

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406 Fergie objects fundamentally to the *Report’s* use of language, and particularly the expression ‘sacred secret women’s business’, which was used, she suggests, in an “unreflected upon manner.” See: D. Fergie, ‘Secret Envelopes and Inferential Tautologies’, *Journal of Australian Studies*, Vol. 20, No. 48, 1996, p. 18.
409 Muir concedes that there was a shift to a sympathetic portrayal of the women from some sections of the media after the public disclosure of the restricted knowledge. See: K. Muir, ‘Media Representations of Ngarrindjeri Women’, *Journal of Australian Studies*, Vol. 20, No. 48, 1996, p. 77.
rather radical approach to the case, Joanna Bourke has argued compellingly
that the defence of the ‘proponent’ women was limited by its “single-axis
thinking.” She means, in other words, that by focusing on the protections
offered through race discrimination legislation, the Aboriginal Legal Rights
Movement failed “to make use of the remedies available” through the Sex
Discrimination Act. Bourke argues more broadly that Indigenous women
carry “a legacy of cultural invisibility with respect to Australian law” (largely
because of ingrained and imperialist assumptions about the patriarchal
nature of Aboriginal societies) and that, the consequence of this is that
“Aboriginal women are at the bottom of the hierarchies of ‘credibility’ and
‘truth’ created through legal and political rhetoric.” Bourke cites Foucault’s
discussion of the hierarchy of knowledges (where Indigenous philosophy has
been subjugated historically because of its perceived lack of scientificity) in
order to explain that it was inconceivable to Australian law that there could be
“an unknowable” body of knowledge – unknowable even to
anthropologists. In this context, a picture of the ‘proponent’ women as
untrustworthy and deceptive took hold.

iii) Legal and Cultural Studies:

A third disciplinary grouping includes the socio-legal scholars who have
engaged with the narrative qualities and capacity of the Report of the
Hindmarsh Island Bridge Royal Commission. This group also reflects on
epistemological questions and considers the Commission’s treatment of
incommensurate knowledges.

In his article, ‘The Narrative of Law in the Hindmarsh Island Royal
Commission’, Mark Harris insists that the Hindmarsh Island case
demonstrated an “essential incompatibility of… two systems of law” –

413 J. Bourke, ‘Women’s Business: Sex, Secrets and the Hindmarsh Island Affair’, University of New
provisions within the Sex Discrimination Act could have been used, she is insistent that the advice of
the ALRM limited the legal choices available to the ‘proponent women’.


415 M. Foucault, ‘Two Lectures’ in C. Gordon (ed), Power/Knowledge: Selected Interviews and Other
between Ngarrindjeri laws and the legal framework introduced by the British. He attributes this “incompatibility” to the law’s “emphasis upon disclosure and [its] need to know against the essential secret sacred nature of some of the beliefs of Aboriginal peoples.”\textsuperscript{416} Christine Nicholls argues similarly that the incommensurability of knowledge systems was a significant factor in the context of the Hindmarsh Island dispute. She draws particular attention to the way that the Commission privileged literate modes of communication (which are accepted as reliable and constitutive of objective truth) over oral means of knowledge transfer, and attempts to reframe this binary by suggesting that “orality and literacy are part of a frequently overlapping continuum [where] neither… has an exclusive purchase on truth.”\textsuperscript{417} This argument resonates with Fiona Probyn’s characterisation of truth as a textile or fabric, “made up of differences, quotations, citations, things lost, things absent, things presented again, misrepresented, misquoted.”\textsuperscript{418} Probyn draws this metaphor out in order to argue compellingly that the “postcolonial embrace of fabrication… reflects the status of truth as it negotiates with difference.”\textsuperscript{419} In other words, she highlights the complicatedness of truth and suggests that, in the process of “negotiating with difference”, the Commission drew attention to its own constructedness. I will explore these ideas in greater detail in the remainder of the chapter.

\textbf{Deconstructing the Report of the Hindmarsh Island Bridge Royal Commission – Discourse Theory and ‘Law and Literature’}:

This chapter’s analysis of the \textit{Report of the Hindmarsh Island Bridge Royal Commission} is informed by both ‘law and literature’ studies and discourse theory. It adopts a deconstructive methodology in order to reflect on the role of legal language – how it constructs good and bad, true and false, ‘authentic’ traditions and ‘fabricated’ ones – and to interrogate the way that


\textsuperscript{417} C. Nicholls, ‘Literacy and Gender’, 1996, p. 64.

\textsuperscript{418} F. Probyn, ‘A Poetics of Failure is no Bad Thing’, 2002, p. 19.

\textsuperscript{419} F. Probyn, ‘A Poetics of Failure is no Bad Thing’, 2002, p. 25.
power circulates through the pages of the report. The chapter is also influenced by the insights of Terry Threadgold, Penelope Pether and Peter Goodrich who, through their critical legal studies perspectives, provide a foundation for this kind of analysis. Pether, for instance, champions a “schizophrenic” reading of law in order to destabilise and, potentially, recast its monologic language, while Threadgold, who refers repeatedly to Deleuze and Guattari’s concept of ‘assemblage’ in her writing, conceives of legal texts as textiles – they are intertextual, relational and dialogic. In this light, it is possible to engage with the concept of ‘fabrication’, which is at the heart of the Hindmarsh Island Bridge dispute, as a textual metaphor for the constructedness of the Royal Commission’s report. Before proceeding to a close reading, I will first reflect briefly on what is meant by discourse theory, and then expand on the text as fabric metaphor.

Discourse theory refers to a broad and multi-disciplinary theoretical framework that emerged in the 1970s in response to the problematization of mainstream theory initiated by the cultural turn. Described as “open, contingent and theoretically polyvalent”, it incorporates the insights of postmodernism and poststructuralism (for example, deconstruction) and focuses on the way that power relations shape the construction of texts – both conversational and written. This interest in power – how it is exercised, the way that it marginalises, its relationship with knowledge – reflects the influence of Foucault in discourse theory. His argument that, in “basically any society” there are manifold relations of power which “permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the

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422 The new movement rejected positivism, a philosophical system that recognises empirical and scientific knowledge as truth.
423 Torfing describes discourse theory as “undogmatic” and suggests that this was central to its appeal – it could be applied (with adjustment and reinterpretation) in a range of different contexts. See: J. Torfing, ‘Discourse Theory: Achievements, Arguments and Challenges’ in D. Howarth & J. Torfing (eds), Discourse Theory in European Politics, Palgrave Macmillan, New York, 2005, p. 1.
production, accumulation, circulation and functioning of a discourse”, 424 is now salient in cultural studies and shapes a view of power and discourse as mutually constitutive.

As I have indicated, Probyn adopts the fabric metaphor in relation to the Hindmarsh Island Bridge Royal Commission in order to point to the instability of singular meaning within texts, and to highlight the role of the author (or, in the context of the report, the Commissioner) as a “combiner of different threads”, rather than as its singular producer.425 This reading of the text as textile (constituted by different parts – “of quotations, citations, things lost, things absent”426) fits within a tradition of deconstruction, which highlights the constructedness of texts, their functional purpose, and the way that power moves through them. It can also be likened to Terry Threadgold’s invocation of Deleuze and Guattari’s notion of ‘assemblage’, and so presents a useful prism through which to consider the relational and intertextual nature of the report genre. According to Threadgold, legal texts (and all texts in general) can be described as an assemblage because they “share the structural characteristics of always being interwoven with, in dialogue with, and contained by other networks of texts.”427 They are, in other words, comprised of a multiplicity of components that are “both known and integral to its existence.”428

A Functionalist and Fabricated Document:

This view of text as fabric (or as an assemblage) has particular implications for the report genre, which can be said to exemplify the textile analogy

425 Probyn’s analysis should not be thought of as a close-reading per se, but rather, as a study of the way that the fabrication metaphor draws attention to how issues relating to cultural difference and truth are negotiated in the report. See: F. Probyn, ‘A Poetics of Failure is No Bad Thing’, 2002, p. 19.
426 K. Benterrak, S. Muecke & P. Roe (eds), Reading the Country: An Introduction to Nomadology, 1984, p. 21
427 Threadgold also describes an assemblage as being a network that includes texts and documents, social practices, formal and informal laws, as well as institutional forms of organisation. See: T. Threadgold, ‘Law as/of Property’, 1999, pp. 372-373, 371.
through its multi-source composition. The *Report of the Hindmarsh Island Bridge Royal Commission* cites 299 individual ‘exhibits’ and sources of evidence, which are engaged with and scrutinised in its processes of deliberation. These range from the oral testimony received through cross-examination, to the minutes of meetings, newspaper articles, letters and other forms of official and informal correspondence, the records of government agencies, ethnographies and other archival documents.\(^{429}\) Presented with this cross-section of evidence, the Commissioner, as “combiner of different threads”, must meticulously mediate the various components through the language of the law in order to produce a coherent and convincing narrative that is organised in a cogent and logical way.

The report is, in other words, a functionalist document subject to protocol and procedure. We see evidence of this careful deliberation throughout the report where the Commissioner weighs the merits of competing narratives in order to make reasoned judgments about the nature and circulation of ‘women’s business’. The following example sets out the complexity of this negotiation:

Dorothy Wilson said that Doreen Kartinyeri was the only one at the meeting who knew about the ‘women’s business’ on the Island… Veronica Brodie told Dorothy Wilson that she had not been told anything about Hindmarsh Island… This evidence is consistent with Dr Fergie’s evidence that Doreen Kartinyeri had been her key informant and the only person to tell her about the ‘women’s business’… *On the other hand*, Veronica Brodie said in her evidence [to the Commission] that she knew that ‘women’s business’ had existed… however she said that it was not secret… Veronica Brodie said that she had a conversation with Dr Fergie and that she told Dr Fergie that ‘women’s business’ did exist and it was handed down to her before her sister died… In the circumstances it would seem unlikely that Dr Fergie would overlook, or omit to mention… in her evidence

\(^{429}\) Evidently, literate sources carry the greatest weight in the report.
before the Commission, references to first-hand information she had been given... Insofar as there exists any conflict... the evidence of Dorothy Wilson is, in all the circumstances, the most reliable.430

This excerpt represents a judicious ‘working through’ of the evidence by the Commissioner, who attempts to weave incongruent ‘threads’ of testimony into a coherent narrative of events. In so doing, she makes judgments about the quality of evidence, and discards that which cannot be reconciled against the preponderance of proof.

**Reading the Report of the Hindmarsh Island Bridge Royal Commission**

– A ‘Law and Literature’ Perspective:

In her writing on ‘law and literature’, Penelope Pether advocates a “schizophrenic” reading of legal texts; this would, she suggests, destabilise their meaning and deconstruct the “conventionally monologic language of the law.”431 Pether is influenced in her writing by Peter Goodrich, whose claim that “law is a genre of rhetoric which represses its moments of invention or of fiction” and that the “law is a language which hides its indeterminacy in the justificatory discourse of judgment”, draws attention to the constructedness of legal language, and also to the possibility of the collapse of its “unitary pretension” through the processes of deconstruction.432 This approach, it is said, would provide for the reappraisal and revisioning of legal texts from the perspective of those whose experience has been marginalised or excluded; it reflects, in other words, a narrative jurisprudence analysis. In this context, I argue that it is productive to employ a ‘law and literature’ approach to examine and deconstruct the issues raised (such as the conflict between oral

432 Goodrich describes a paradoxical situation where legal judgments, which he suggests are based upon analogy, metaphor and repetition, are claimed to be made up of “cold and disembodied prose.” See: P. Goodrich, *Law in the Courts of Love*, 1996, p. 112.
and literate modes of knowledge transmission in law) in the *Report of the Hindmarsh Island Bridge Royal Commission*.

Central to Goodrich’s thinking on ‘law and literature’ is the claim that legal texts are characterised by an absence, or by something not said.\(^{433}\) This “absence” is evidence, he suggests, of the law’s foundation in literature, which, if uncovered, would destabilise the law’s claims to unitary authority. In this light, Goodrich insists that a “literary reading must offer an analysis in the strongest of senses. It must listen to what the subject does not wish to address, the symptoms or lapses which hide that which the law seeks to forget.”\(^{434}\) In this chapter, I argue that the *Report of the Hindmarsh Island Bridge Royal Commission* is similarly characterised by an absence, which is the omission of the ‘proponent’ women’s statement to the Commission. Their address, which was tendered by a legal representative, is a clearly articulated statement of objection to the inquiry itself, and to the legal framework supporting the inquiry. It reads (in abbreviated form):

> We, as Ngarrindjeri women believe the women's business, the subject of the Royal Commission into Hindmarsh Island is true. We are deeply offended that a Government in this day and age has the audacity to order an inquiry into our secret, sacred, spiritual beliefs. Never before have any group of people had their spiritual beliefs scrutinized in this way… Our law for Aboriginal women prohibits us from talking about this business, not only to any men, but also to those not privileged to be given that information… We do not seek to be represented at this Royal Commission. We do not recognise the authority of this Royal Commission to debate and ultimately to conclude that women's business relating to Hindmarsh Island exists. We know women's business exists and is true. We do not recognise you, Madam Commissioner, as a custodian of law in our society. We shall continue to practice our customs and law

according to our customs and law as Aboriginal people have since time began and especially since the invasion. We refuse outright to recognise your Commission as having any right to decide whether we have fabricated anything, when we know that we have not.\textsuperscript{435}

While the report acknowledges its receipt of this statement, and references the ‘proponent’ women’s objection to the interrogation of their belief system, it is silent on the matter of the women’s total rejection of the legitimacy of the Commission itself; it seeks to mask, in other words, what would ultimately undermine its authority.

In a similar way, it can be argued that the report’s treatment of the ‘proponent’ women’s non-participation is characterised by a particular lack of clarity and a circular tautology. The report refers, for example, to the ‘proponent’ women’s lawyer “being permitted to read a statement setting out their objections” and suggests that this was “an unusual course [which] was adopted so that the Commission had before it some information on which to assess their explanation for refusing to give evidence.”\textsuperscript{436} In other words, the Commission effectively circles around, and attempts to avoid naming, the proponent women’s explicit challenge to its legitimacy. It does this while also describing their non-participation as a “deliberate flouting” of the inquiry’s jurisdiction; in effect, the women are presented as being disrespectful of process and as “boycotters.”\textsuperscript{437} By contrast, the ‘dissident’ women are characterised as being committed to the causes of truth and justice, and are praised for giving evidence in a climate of high tension and intimidation.\textsuperscript{438}

\textsuperscript{437} The Commissioner emphasises that the ‘proponent’ women (it makes use of the terms adopted by the media to distinguish between the groups) “never had to withstand cross-examination in the witness box.” See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, pp. 17-18, 20.
\textsuperscript{438} It is reported that the hearings were occasionally attended by “a small group of women” who were “assertive and disruptive while the hearings were in progress.” See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 19.
Absences and Silences – ‘Women’s Business’ and Inference in the context of the Royal Commission:

In her writing on the Hindmarsh Island Affair, Marcia Langton situates ‘women’s business’ within its broader cultural context in order to explain its significance. Importantly, she describes it as “esoteric” and “gendered”, but also likens it to a system of religious belief for which there are specific responsibilities for adherents. Knowledge is held, she contends, by “appropriate elders” and passed on “in a most careful way.” Accordingly, this “productive order” ensures the inviolability of:

Sacred meanings of the local landscapes and their relevance to the people of that land for the purposes of the procreation of species; the peculiarities of ecologies; and a range of matters of importance to social and economic life and death as a journey, and as a recycling of the essences of our environment as bequeathed by the ancestors.

The ‘restrictedness’ of this knowledge is, therefore, central to its preservation and to the stability of social order. David Turnbull reflects on the sacredness of this knowledge by suggesting that it is “embedded in place, time and protocol” and that it can “only be spoken of by acknowledged and trusted owners and elders...” This is because “making it public requires careful examination of the protocols governing its revelation.”

As a result of the ‘proponent’ women’s non-participation, and the Commissioner’s decision not to compel the ‘secret’ envelopes as evidence, the Commission was forced to draw inferences about the nature of the Ngarrindjeri ‘women’s business’. These were based largely on the evidence provided by anthropologists, government departments and the fourteen

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‘dissident’ women. Remarkably, the Commission also used as a source of inference the evidence that was the subject of “various objections” in public hearings – precisely because it was presumed to be a matter of a “confidential and restricted nature.” In other words, and according to the Commissioner’s logic, this evidence represented the truest reflection of the ‘women’s business’ because of the sensitivity with which it was regarded. As a methodology this is particularly problematic, and it exposes the way that the “commission’s finding was contingent upon the production of a fabricated account of the ‘women’s business’ in and by the commission itself.”

Despite conceding a “lack of direct evidence”, the Commissioner proceeds by outlining her understanding of the content of Ngarrindjeri ‘women’s business’. She suggests, based on what Deane Fergie has described as “conjecture” and “untested assumption”, that ‘women’s business’ refers to a set of practices and beliefs concerning Hindmarsh Island, Mundoo Island, the waters of the Goolwa Channel, Lake Alexandrina and the mouth of the Murray River. More specifically, she proposes that ‘women’s business’ presumes that there is an analogous relationship between this landscape and the form of a woman’s reproductive organs, and that this relationship governs the ecological and biological sustenance of the Ngarrindjeri people.

Having given an account of (its understanding of) ‘women’s business’, the Commission continues its work by deliberating on evidence and drawing conclusions about particular aspects of the case in relation to the overriding question of fabrication. It rejects outright, for example, the suggestion that

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447 The report speculates on the these relationships in some detail; the Murray Mouth was said to be analogous to the vagina, “Hindmarsh Island as the womb, Mundoo Island as the egg and the river.” In turn, these relationships facilitated “the flow of menstrual blood into the earth; fertility and reproduction; birth and midwifery.” See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, pp. 237-238.
448 According to the methodology section of the report, the terms of reference for the Hindmarsh Island Bridge Royal Commission were silent on the standard of proof to be applied over the course of the inquiry. As a result, it was determined that “facts (would) be proved to the reasonable satisfaction of the Commissioner” and with reference to the “preponderance of probability with due regard to the
there could be an analogous relationship “of great antiquity” between the shape of the mouth of the Murray River and a woman’s reproductive organs. It draws this conclusion on the grounds that, “during the period of Aboriginal occupation the landscape has been and remains a constantly changing one”, and also by referencing an absence of description or evidence “in any configuration in the extensive literature relating to the area”. Accordingly, the Commissioner determines that this is a fabrication of recent invention, and it takes a similar view about the claim that the construction of a bridge between the mainland and Hindmarsh Island would lead to the sterility of Ngarrindjeri women and their cosmos. Again, this is a presumed component of the ‘women’s business’, taken to be so because of the Commissioner’s assumptions about the “likely” evidence given by Doreen Kartinyeri to Deane Fergie in her consultancy role.

In the process of deconstructing the picture of ‘women’s business’ that it has (effectively) set up, the Commission observes that:

The threat of injury or desecration said to be posed by the construction of the bridge, [is] not supported by any form of logic, [n]or by what was already known of Ngarrindjeri culture.

The casting of the ‘proponent’ women’s claims here as illogical (this is the implication of the statement) reveals something about the approach of the Commission to systems of knowledge; it demonstrates an inherent importance of the particular issue being determined.” See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 7.

The report’s claim that geological adaptation “does not allow for” a consistent analogy with female reproductive organs over “thousands of years” is undermined somewhat by the fact that the Commission uses a “bundle of press reports” as the basis for its claim about the “great antiquity” of the ‘women’s business’. It is also undermined by Doreen Kartinyeri’s assertion in her autobiography that she had “never” said that “the island and its surrounding waters represented a woman’s vagina.” See: footnote 25 of Chapter Six; Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 241; D. Kartinyeri & S. Anderson, My Ngarrindjeri Calling, 2006, p. 157.


Deane Fergie maintains that the Commission’s conception of ‘women’s business’ represents only “out of context fragments” of the “signposts” already circulating in the public domain. See: D. Fergie, ‘Secret Envelopes and Inferential Tautologies’, 1996, p. 15.

assumption of reason and rationality and a particular claim to, or purchase on, truth. Irene Watson engages with this question when she observes about the Hindmarsh Island Affair that, “Commissioner Iris Stevens reaches [her] conclusion based upon ‘logic’ and what was ‘known’ of Ngarrindjeri culture. But whose knowledge and whose logic?”[453] This question is pertinent in the context of the Royal Commission and will be reflected upon in the section to follow.

**Putting Black History on White Paper – Knowledge, Power and Incommensurability:**

In her autobiography, released more than a decade after the Royal Commission delivered its findings, ‘proponent’ woman Doreen Kartinyeri reflects on the scandal by suggesting that it confirmed for her the “old people’s” adage that “you should never put black words on white paper.”[454] This observation speaks in a very direct way to the question of incommensurability that has dominated critical engagement with the Hindmarsh Island inquiry. It highlights, in essence, that the Ngarrindjeri people were always in an impossible position – even before the announcement of the Royal Commission – by virtue of the fact that, in order to protect (what they claimed as) their tradition and culture, they were required to divulge sensitive information and to translate this knowledge into a framework recognisable to the dominant system of Australian law. For Kartinyeri, this process of translation is both problematic and “demeaning” for Indigenous peoples because of the way that it demands, she suggests, that their oral history be spoken about “as if it is nothing.”[455] In other words, it reduces complex and highly evolved relationships into simple, comprehensible ideas and/or categories. Indigenous scholar Irene Watson adopts a more comprehensive perspective in order to speculate on the

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source of epistemological disjuncture between Indigenous and non-Indigenous cultures. She argues that:

In explaining to the state... our passion and desire to protect our law and our territories, we have had to translate into the English language ideas that have been alien to westerners for thousands of years. And this problem is not just one of language, but it is also one of distance. That is, non-Indigenous peoples are much further removed from the knowledge and philosophy of their own Indigenous identities and relationships to the land than what Indigenous people are. It is a two thousand year track back for many non-Indigenous peoples to the source of their own Indigeneity. Whereas Indigenous peoples of this country still carry the law and the knowledge.456

This is an interesting position because it effectively locates the source of philosophical difference in time; it sets up a continuum whereby the capacity of “westerners” to comprehend Indigenous relationships with land, and to understand the ways in which “the entire landscape is filled with the sacredness of the creator’s laws”457 is diminished as the distance grows between non-Indigenous communities and their Indigenous pasts.458 In the light of Watson’s arguments, it is clear that there are occasions where it will not be possible to reconcile Indigenous epistemology with or inside of a non-Indigenous legal framework. This is particularly so in cases where there are no ‘visible’ physical signs of a relationship, but also when tradition forbids knowledge from entering the public domain (as was the case in the Hindmarsh Island Affair).

458 Others, however, reject the notion of incommensurability of knowledge and argue that it is possible to bridge gaps in understanding or comprehension, so long as there is a transparent presentation of reasoning and evidence. Anthony Connolly argues (in a legal context) that, “it is theoretically possible for any judge to acquire any culturally different concept at any possible degree of conceptual difference, provided that over the course of the hearing she is subject to conditions which enable her to cognitively appropriate evidence and reason in a manner causal of the acquisition of that concept.” See: A. Connolly, ‘The Boundaries of Difference in Law’, 25th IVR World Congress: Law, Science and Technology Paper Series, Goethe Universitat, Frankfurt am Main, 2012, online.
At the centre of any discussion of ‘knowledge’ is its interaction with ‘power.’ This relationship has been theorised by Foucault, who describes the ‘hierarchising’ of knowledge, whereby certain knowledges are subjugated as a result of their (perceived) lack of scientificity. According to this scheme, a “low-ranking” knowledge is one that has been “disqualified” because it is deemed to be beneath the required level of cognition.\(^459\) Foucault describes the “domain of the law” as a "permanent agent of these relations of domination [and] these polymorphous techniques of subjugation” because of the way that it sets up a dichotomy between ‘erudite’ knowledge (legal language) and subjugated knowledge.\(^460\)

In the context of my argument, and the law more broadly, it can be argued that ‘oral’ knowledge is subjugated by ‘literate’ knowledge because it is deemed to be subjective, and therefore unverifiable. Within this framework, ‘expert’ opinion and academic history are positioned as sources of truth against which claims about Indigenous experience, knowledge and belief are tested. Mark Harris engages with this hierarchy when he describes (in a practical sense) the subordination of Indigenous knowledge within Western law: “even where Aboriginal peoples attempt to utilise the law to their advantage, the authoritative voices that dictate how the case will be conducted are non-Indigenous.”\(^461\) This power dynamic was played out in the Hindmarsh Island Affair where, in the process of seeking protection of cultural heritage, the Ngarrindjeri ‘proponent’ women were required to make ‘women’s business’ literate – that is, it had to be presented in terms legible to the Australian legal system, which assumed that there could be a literal ‘translation’ from one knowledge system to another. Probyn encapsulates this conflict by contending that:

> The commission brought two incommensurably different cultural views together and the loudest, most dominant voice, the voice of truth, logic, government, rationality and progress won, not

\(^{459}\) M. Foucault, ‘Two Lectures’, 1980, p. 82. Foucault gives as an example the hierarchising of the knowledge of the delinquent below the knowledge of the medical professional.
\(^{461}\) M. Harris, ‘The Narrative of Law in the Hindmarsh Island Royal Commission’, 1996, p. 119
through negotiation with difference but through a blanket refusal to recognise difference as difference.\footnote{462} Elsewhere, the Commission seeks to exert influence by determining the conditions in which it is “acceptable” for details of ‘secret’ Aboriginal culture to be circulated within and outside of the Indigenous community. In the process of reflecting on the means by which the proponents of ‘women’s business’ mobilised support, the Commissioner accuses the group of the “fragmentary leaking of so-called secret material for political ends.”\footnote{463} In other words, while the Commission concedes that secrecy is “acceptable” for “appropriate” Aboriginal tradition (whatever this is), it simultaneously warns that its divulgence for “political ends” may “undermine the veracity” of what is sought to be protected.\footnote{464} It is clear that this argument misses some of the complexity around the question of secrecy because it fails to register the volatility of what was an evolving situation requiring adaptability; the secrecy of ‘women’s business’ had to be compromised if it was to be protected. The Commissioner’s attempt to control the management of Indigenous culture represents, then, a further erosion of self-determination and a stripping of cultural autonomy.

In another example, where the report plots a ‘Brief History of the Ngarrindjeri People’ in order to “provide an outline of some aspects of traditional life prior to colonisation”,\footnote{465} we see evidence of the Commission’s desire to access and arbitrate all knowledge. Specifically, it focuses on the nature of gendered relationships and concludes with certainty that, “in contrast to other parts of Australia, gender-based differences, in the sense of inclusion or exclusion, in Ngarrindjeri religious and other affairs was minimal.”\footnote{466} In this instance (and also through its reference to the silence of “feminist anthropologist” Catherine

\footnote{462} F. Probyn, ‘A Poetics of Failure is No Bad Thing’, 2002, pp. 22.
\footnote{463} Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 139.
\footnote{466} Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 40. The report bases this conclusion, and all of the assertions in the chapter, on five resources (exhibits 1-5). These include the reports of Philip Clarke (anthropologist at the South Australian Museum), Rod Lucas (a consultant anthropologist appointed by the developers), and Cheryl Saunders (appointed by Minister Tickner), as well as the PhD thesis of Philip Clarke and the Berndt’s ethnographic account, A World That Was.
Berndt on the question of ‘women’s business’) the Commission effectively lays the foundations for its eventual fabrication finding. It implies that, if a feminist anthropologist with an interest in the “female realm” has no recorded knowledge of ‘women’s business’, then it is likely a subject of recent invention.

In a similar way, the casting of the Ngurunderi creation story (which describes an ancestral being whose activities led to the creation of the River Murray and associated landscapes) as “without doubt the primary symbol of the people and their land”, has the effect of discrediting any alternative mythological claims made in relation to the area – such as those by the ‘proponent’ women. Finally, as though to foreclose the possibility of the existence of ‘women’s business’ entirely (or any other traditional knowledge not known to ‘experts’), the Commission emphasises the “shattering” impact of dispossession on Ngarrindjeri society. It suggests that, by the 1980s, “knowledge of Dreaming stories had suffered” to the point where “only a couple of elderly people” were familiar with the associated mythologies.

Rather than entertaining the possibility that the ‘women’s business’ had been concealed successfully from the sight of ‘expert’ observers (and from members of the Ngarrindjeri community), the Commissioner forms the opinion that it had never existed in the first place.

It can be argued, therefore, that the Royal Commission operated under the false assumption that it could engage with Ngarrindjeri epistemology in much the same way that it would engage with a non-Indigenous knowledge system, and moreover, that the Commission exercised an entitlement which involved bringing ‘women’s business’ (whether accurately reflected or not) into its domain for the purposes of adjudication – it refused to accept that there could be knowledge which was outside of its scope of understanding. This background provides context not only for the Commission’s reliance on academic history and ethnography as a basis for its understanding of

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Ngarrindjeri culture, but also for its discrediting of ‘women’s business’ as a plausible system of knowledge.

“Necessarily Unreliable” – the Role of Oral and Literate Evidence in the Report:

Central to the Commission’s bringing together of incommensurate knowledges is its engagement with ‘oral’ and ‘literate’ modes of evidence. In the context of the Royal Commission, ‘oral’ is taken to mean the non-literate means through which knowledge and culture are explicated (through dreaming stories and initiation rituals, for instance), while ‘literate’ refers to the written texts underlining a separate tradition of social organisation. Historically, both sets of knowledge have been approached in rather different ways; where ‘literate’ knowledge has been valued as objective, empirical and capable of substantiation, ‘oral’ knowledge has been viewed as mythical and primitive, unverifiable and fallible. These assumptions, and this hierarchy, have important implications for how the two modes were engaged by the Royal Commission.

The Commission’s attitude to oral knowledge is made explicit through its casting of ‘women’s business’ as “hearsay” – that is, as a kind of unsubstantiated and unverifiable form of evidence. It draws this comparison while reflecting on the inquiry’s terms of reference, which, we are told, “begged” for oral testimony because, if ‘women’s business’ existed, “it

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469 It is important to note that the use of one mode does not imply or indicate incompetence in the other, and moreover, that oral knowledge is not the same as oral testimony, which refers in this context to the oral evidence presented to the Royal Commission.

470 In her article, ‘Literacy and Gender’, Christine Nicholls suggests that the Royal Commission’s treatment of ‘oral’ and ‘literate’ knowledges reflects a broader disenfranchisement of Indigenous knowledge within the law. She argues that the Commission dismissed the oral mode as “illegitimate, emotional and fallible” while simultaneously privileging the literate mode as objectively reliable. Nicholls also provides a helpful summary of the ways in which the two modes have been viewed as dichotomous. See: C. Nicholls, ‘Literacy and Gender’, 1996, pp. 59, 61.

471 Although quasi-courts, such as Royal Commissions, have significant flexibility in terms of the ways in which they negotiate with oral evidence or hearsay, Paul Gready asserts that this type of testimony continues to present a challenge to the report genre, which must “combine acknowledgment of the experiential validity of testimonies from all sides… (while also) identifying facts and adjudicating between competing claims. See: P. Gready, ‘Novel Truths: Literature and Truth Commissions’, 2009, p. 163.
was by its very nature a matter of hearsay.\textsuperscript{472} I argue that the branding of ‘women’s business’ as hearsay taints both the Ngarrindjeri ‘proponent’ women and their claim because of the many assumptions built into the term; not only does it imply rumour, gossip and fallibility, but it also has the effect of situating ‘women’s business’ within the realm of fiction – that is, as a subject of the imagination, unscientific and inherently suspect. It can also be argued that the designation of ‘women’s business’ as hearsay confirms the hierarchy of knowledges previously described, whereby, because of its non-literate foundation, the ‘proponent’ women’s claim (to knowledge) is subordinated to the authority of the law.\textsuperscript{473}

An additional consequence of this framing is that the report’s tone is characterised at times by a level of cynicism which compromises the Commission’s integrity. In particular, the Commissioner is especially cynical in her approach to Deane Fergie’s evidence, and to the possibility that she could have been the first ‘expert’ to record details of Ngarrindjeri ‘women’s business’. The report casts doubt on all of Fergie’s evidence when it asserts that, “the fact that ['women’s business'] remained hidden from all but Dr. Fergie, when she made her significant anthropological discovery in 1994, is inexplicable.”\textsuperscript{474} In a separate instance, the Commissioner demonstrates a great deal of cynicism when referencing a television interview given by Lindy Warrell, an anthropologist specialising in women’s business in northern Australia. Warrell was questioned in the interview about a meeting that she had with Tom and Ellen Trevorrow (a Ngarrindjeri couple and exponents of the existence of ‘women’s business’), at which time ‘women’s business’ was raised in a non-specific sense. Presented with the evidence, the Commissioner reflects:

\textsuperscript{473} The oral/literate binary is complicated somewhat by the fact that the ‘expert’ evidence of Deane Fergie (which was submitted in both oral and documentary form) is subjected to sustained scrutiny in the absence of the ‘proponent’ women. Fergie’s fieldwork is described by the Commission as lacking in rigour (she is accused of having “completely misunderstood” the fact that Hindmarsh Island had previously been connected to the mainland by a series of barrages), and her evidence is dismissed as “necessarily unreliable.” See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, pp. 243, 156.
The juxtaposition of this incident with the fact of the emergence of secret ‘women’s business’ two weeks or so later may be just another coincidence. [Or], on the other hand, it may have been the occasion on which the seed of ‘women’s business’ was planted.475

“Spill his guts about everything” – Testimony in the Hindmarsh Island Bridge Royal Commission:

The following section reflects on the way that testimony (along with other forms of evidence) is used within the Report of the Hindmarsh Island Bridge Royal Commission to impugn the character of individuals associated with the ‘proponent’ group. Essentially, I argue that the effect of these imputations (which are set out as the Commission claims to expose a narrative of fabrication) was to seriously undermine the credibility of both Ngarrindjeri ‘women’s business’ and its adherents. In particular, the analysis is focused on Chapter Five of the report, titled ‘Narrative of Aboriginal Objection to Bridge Construction’, which presents a dialogue between the exhibited evidence and the Commissioner, whose language is both persuasive and authoritative.

It may be helpful at this point to return to Peter Goodrich, whose examination of the links between law and rhetoric has provided a useful framework for this chapter’s reading and deconstruction of the quasi-judicial text. As I have already suggested, Goodrich’s work is influential because it outlines clearly the way that the lawyer is “a rhetorician, someone who uses the modes and figures of argument to persuade the audience of the appropriate course of action or judgment to be made.”476 His argument is relevant within the context of this discussion because it points to the way that language is used

(within the law) to shape opinion and to influence how a person feels. It can be used, for example, to create a picture of the ‘proponent’ women as untrustworthy, and as agents of fabrication.

This is most evident in relation to the report’s characterisation of Doreen Kartinyeri, who, through her often volatile behaviour, became the public face of a previously restricted and controlled knowledge. Over the course of the inquiry, the Commission received (and subsequently cited) a number of depositions relating to the character of Kartinyeri. This is unsurprising since she was the person to first circulate information about ‘women’s business.’ Given the inquiry’s terms of reference, it was important for her role in the Affair to be considered closely. The report begins its analysis of Kartinyeri’s character by citing the testimony of her colleague at the South Australian Museum, Philip Clarke, who describes the impression he was given when Kartinyeri called him in April 1994 seeking information relating to ‘women’s business’ and the Ngarrindjeri people. The Commission reads Clarke’s evidence, which is, at best, inference – “…she gave me this very strong impression that she had nothing, or next to nothing” – as a sign that Kartinyeri sought to substantiate an emerging lie, rather than, perhaps, as evidence of her being evasive or attempting to obscure her own knowledge (which would have been an entirely natural response).

Later in the report, the Commission cites a newspaper article which describes Kartinyeri as being “agitated” and “abusive” at a protest rally in the days leading to Minister Tickner’s invocation of section 9 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. Rather than reflecting on the high stakes of the rally, and the pressures that Kartinyeri faced, this evidence is allowed to stand as a reflection on her apparently poor character. In a separate deposition, this time by Deane Fergie, Kartinyeri is described as “going berserk” at a man who had submitted a letter to the local paper claiming to outline the nature of the Ngarrindjeri ‘women’s business.’

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479 The non-Indigenous man, Rocky Marshall, belonged to the ‘Friends of Goolwa’ group and had been a supporter of the ‘proponent’ women. His letter to the editor claimed that he had been made aware of
Based on Kartinyeri’s response, it is clear that the man’s intervention was read as an uninvited violation; what’s more, it is likely that this was recognised as having the potential to compromise an impending decision by the Minister in relation to Section 10 of the Heritage Protection Act. The Commissioner’s silence on these questions facilitates a picture of Kartinyeri as an hysterical woman. In a similar way, accounts of Kartinyeri’s “rude and threatening” behaviour give the impression that she represents, within the context of the inquiry, an obstacle to truth. This contrasts with the characterisation of Dorothy Wilson, who, because of her participation in the Royal Commission (her evidence is used to corroborate documentary evidence and ‘expert’ opinion) is presented as a valuable and trustworthy witness – unlike Kartinyeri, she is of good character. This impression is confirmed by the Commissioner, who declares on two occasions that, “insofar as any conflict exists, the evidence of Dorothy Wilson is, in all the circumstances, the most reliable.”

The Commission also pays considerable attention to developing the character of Doug Milera, a Ngarrindjeri man who had originally supported the ‘proponent’ women, but later retracted his support, only to eventually retract his retraction. Rather than focusing on the nature of his support for ‘women’s business’, the Commission reflects instead on Milera’s statement of retraction, which was tendered as evidence in his absence from the Royal Commission. The statement of retraction was prepared for Milera by Kym Denver and Chris Kenny (a farmer and journalist respectively, both non-Indigenous), both of whom were engaged after Milera changed his position and admitted publically that, in his opinion, the ‘women’s business’ was “… a load of crap.” His statement read as follows:

details of the ‘women’s business’ from his distant ancestors, who had been some of the first settlers in the Goolwa area. See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 145.


Like the ‘proponent’ women, Milera refused to participate in the inquiry, despite having told Dorothy Wilson that he had planned to go “to the Royal Commission if they have [one] and spill his guts out about everything.” See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 204.

The quote attributed to Milera was received in evidence from Ngarrindjeri man Allan Campbell who deposed to a conversation that the pair had had. See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, p. 186.
“I feel I have been used by others to further their causes and not our cause. People we considered to be our friends, unionists, the Friends of Kumarangk and other bridge protestors used my Aboriginal heritage for the purpose of stopping a project they were unsuccessful at stopping.

My wife and I were swept along with the current and we got in so deep it was hard to get out again.”

The statement ends with the claim that “the bridge would do more for reconciliation than what the government is doing.” This picture of the bridge as a source for reconciliation seems rather fanciful, especially given the strength of opposition from the ‘proponent’ women. It also raises serious questions about the integrity of Kym Denver and his role in drafting the letter. Despite all of this, the Commissioner considers Milera’s statement against his subsequent retraction and holds it to be the more credible of the two sources, first, because it can be corroborated by Denver and Kenny, but also because the second retraction, which is described as being “unsigned”, “lacking in detail” and unconvincing, was thought to have been forced on Milera as a result of significant community pressure. It is ironic that, despite the report’s representation of Milera as an unpredictable and unreliable witness, his retraction forms the basis of the Commission’s finding of fabrication.

486 Denver was a friend of Tom and Wendy Chapman of Binalong Holdings Pty. Ltd. The Commissioner also considers other complicating matters in relation to Milera’s statement and character. These include questions about his consumption of alcohol prior to the signing of the retraction, and a payment of $200, which was made by Kenny to Milera. See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, pp. 186-197.
487 A number of witnesses testified to the Royal Commission that they were aware of examples of Milera being pressured to withdraw his statement. See: Report of the Hindmarsh Island Bridge Royal Commission, 1995, pp. 202-205.
Conclusion:

This chapter has used a deconstructive methodology in order to reflect on the role of legal language in the textual assemblage that is the *Report of the Hindmarsh Island Bridge Royal Commission*. In particular, it has considered the ways that this rhetoric informs ideas of good and bad, true and false, ‘authentic’ traditions and fabricated ones, while also paying attention to the negotiation of power within the report and its treatment of oral and literate modes of knowledge transmission. The Hindmarsh Island Affair demonstrated that, even in a post-*Mabo* Australia, Indigenous epistemologies remain subordinate to the prevailing legal culture, and that, for this reason, the path to reconciliation (which was, undoubtedly, complicated by the saga) would be both long and divisive.
Caught in a Whirlwind: *Home* in a Post-*Mabo* Australia

This chapter considers the way that Larissa Behrendt’s first novel, *Home*, engages with the legal and historiographical debates taking place in post-*Mabo* Australia. It argues that, by telling the story of Candice Brecht’s ‘homecoming’ to her ancestral country – “the place where the rivers meet” – Behrendt redraws the narrative of Australian colonialism to highlight the way that the gaps and silences of the law contribute to a culture of forgetting in Australia. The chapter also suggests that, by invoking Bertolt Brecht’s philosophy of aesthetic estrangement (which positions the reader as a consciously critical observer), Behrendt sets up a theoretical framework for the novel’s analysis, which is complicated by her representation of Candice’s absorption in a world of classical romance. In the following, I propose that this narrative configuration provides scope for both an exploration of the consequences of the ‘stolen generations’, and the articulation of an Indigenous narrative jurisprudence.


In the past two decades, Larissa Behrendt, who is a member of the Eualeyai and Kamilarioi nations and also a Professor of Law, has established herself as one of Australia’s most prolific Indigenous writers. Her work – which uses both creative and critical forms – is focused primarily at the junction between Indigeneity and the law, and considers such themes as native title, criminal justice and constitutional recognition. It is also concerned with the explication of Indigenous legal cultures, the promotion of the politics of Indigenous self-determination and advocacy for practical ways of reconciling Indigenous and non-Indigenous legal systems.\(^{488}\) As a writer of fiction (both short stories and

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novels), Behrendt has achieved critical acclaim, winning the David Unaipon Award for Best Unpublished Manuscript by an Indigenous Author in 2002 for *Home*, and the Victorian Premier’s Literary Award for Indigenous Writing in 2010 for her second novel, *Legacy.*

Since its publication by UQP in 2004, *Home* has received significant critical and scholarly attention, being described variously as “skilful and compelling”, “intelligent and inspirational”, “emotionally stirring” and as “a story that badly needs to be told.” This praise suggests that critics recognise the text’s cultural significance, and also points to a climate receptive to the voices of Indigenous storytellers. This critical receptivity is particularly important given that the novel was published in the middle of the intensely political ‘sorry’ debates, where Prime Minister John Howard refused to make a formal, public apology to Indigenous Australians for the actions of past governments, and specifically, for the practice of forcibly removing Indigenous children from their families. *Home* can be read (and has been read), therefore, as belonging to a tradition of ‘stolen generations narratives’ which, according to Kay Schaffer, are characterised by confident narrators telling truth to power.

While I do not intend to limit the terms of discussion of the novel by approaching it solely as a ‘stolen generations narrative’ (as I will show, *Home* has also been described as a ‘sorry novel’ and a ‘genealogical narrative’), I...
feel that it is important to flag at the beginning of the chapter the way that the experience of the ‘stolen generations’ feeds into both Behrendt’s personal story and her writing. Behrendt herself has articulated these influences in the following terms:

I wanted to make sure that people couldn’t silence those voices. While my novel is a fictional account of the impact of the removal policy, it remains faithful to the experiences of my family. It attempts to show that there were more than just 1 in 10 people who were affected by the policy – that statistic ignores the impact on parents, grandparents, aunts and uncles, brothers and sisters. And it also attempts to show that, whether you want to call it cultural genocide or not, this policy still affects Aboriginal families today; that is a legacy that is with us even now.493

It is in this context that Oona Frawley and Sue Kossew propose that *Home* should be approached as a ‘sorry novel’ – which is to say, as a “peculiarly post-colonial fictional genre whose main feature is to rework, rewrite or re-imagine history in order to make a political point about the present.”494 They argue compellingly that these novels “reinstate Indigenous history by literally and figuratively inserting it into the narratives of the contemporary nation.”495 We see this ‘reinstatement’ in the opening scene of Behrendt’s novel as Candice reads (in a book produced by the Walgett Historical Society) about the “shooting down” of a group of “about three hundred men, women and piccaninnies” by the town’s early colonists.496 This story’s intrusion into the 1990s is a reminder for Candice that these “unmentionable crimes stain the landscape.” It is also consistent with Frawley and Kossew’s conceptualisation

494 Frawley and Kossew refer specifically to Doris Pilkington-Garimara’s *Follow the Rabbit Proof Fence* and Behrendt’s *Home* as clear examples of this genre. Their use of the term ‘sorry’ invokes the ‘sorry debates’ which dominated national discourse in the aftermath of the release of the *Bringing Them Home* report. It also gestures to the sorrow felt by (and the sorrow that should be felt by) Indigenous and non-Indigenous Australians. See: O. Frawley & S. Kossew, ‘Irish and Australian Historical Fiction’ in *Exhuming Passions: The Pressure of the Past in Ireland and Australia*, UWA Publishing, Crawley, 2011, p. 191.
of the ‘sorry novel’ as being effective at engaging communities in conversation about aspects of the past that have been repressed or erased. This conceptualisation of the ‘sorry novel’ is shaped in turn, I suggest, by Indigenous life-writing, which has been a focus of considerable scholarly attention in the past two decades. Like the ‘sorry novel’, which is said to reflect on history in order to make a political intervention in the present, Indigenous life-writing is always also political. Reflecting on the conditions of its production, Michele Grossman has argued that life-writing is “poised between historical recall and evocation of the impact of successive government policies on the one hand, and the current cultural and policy contexts in which they have been written on the other.” By invoking the work of bell hooks, she contends that the resistance ‘acted out’ through Indigenous life-writing, “challenges the politics of domination that would render [marginalised peoples, people of colour] nameless and voiceless.” Accordingly, Grossman argues that the consequence of this resistance is that, Aboriginal life-writing has increasingly come to be viewed as a genre that, in its ability to counter-narrativise the national record and reach out to broad audiences, has become part and parcel of one kind or level of ‘self-determination’ as it plays out in the cross-cultural domain.

While it could be argued, based on the way that Home is engaged in the political work of revisioning narratives of Australia’s past, that Behrendt’s text

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498 The life-writing genre is taken to include, for instance, autobiography, biography, testimonial writing, essays and fiction. For further detail, see: M. Grossman, ‘When they Write what we Read’, 2006, online.


should be conceived of as either a ‘sorry novel’ or as an example of Indigenous life-writing, I contend that it is also profitable to read the narrative in relation to what has been described as the ‘genealogical novel’. According to Ken Gelder and Paul Salzman, the ‘genealogical novel’ is one of the primary genres in contemporary Australian literary fiction and is concerned, as the name suggests, with the charting of family histories.\(^{502}\) They argue that *Home* is a genealogical novel because it “pursues a ‘concept of home’ by turning back to family and community”, and additionally, that the fracturing brought about by dispossession works paradoxically in the novel to give Candice a strengthened sense of belonging.\(^{503}\) This feeling of belonging is articulated clearly in the narrative as Candice arrives at Dungalear Station and declares: “I sense that after my grandmother left this spot the land just waited patiently for me to arrive.”\(^{504}\)

Gelder and Salzman expand their discussion of the ‘genealogical novel’ to explain that it sometimes works to shore up local connections and a defensive sense of homeliness in the nation, and that it also “tends to undo localness as a construct” by emphasising global networks and the porousness of place.\(^{505}\) This characterisation of the ‘genealogical novel’ as ‘undoing localness’, and as representing an outward-looking world, speaks to the way that global networks are established in *Home* as a result of the effects of dispossession: Candice’s paternal grandfather leaves Germany as anti-Communist sentiment takes hold; two of her uncles leave Australia for Europe around the time of the Second World War; and fifty years later, Candice herself travels to Europe in search of intellectual enlightenment. It also points to an irony in the naming of the novel. As well as connoting localness and domesticity, the concept of ‘home’ is expanded in Behrendt’s narrative to reflect the internationalism of the modern world and the new


\(^{503}\) K. Gelder & P. Salzman, *After the Celebration*, 2009, p. 61. Gelder and Salzman’s argument accords roughly with Stefanie Convery’s reading of *Home*, in which she suggests that the reader is “carried on a journey of cultural and familial discovery along with the protagonist who (acts) as a bridge between significantly different ways of experiencing the world.” See: S. Convery, *Literature as Political Activism: Literary Representations of Indigenous Australia by Anglo and Indigenous Writers*, 2012, p. 29.


ways in which people conceive of ‘home’. These are points that I will return to in subsequent sections of the chapter. Now I will offer a brief narrative synopsis before turning to a consideration of how critiques of Behrendt’s writing as “overly didactic” facilitate an engagement with *Home* in terms of Bertolt Brecht’s theory of estrangement.

**A Whirlwind of Time and Place:**

In her novel, Behrendt maps a complicated web of family and community ties centred on the immediate descendants of Garibooli – a Eualeyai woman born in 1904 who is forcibly removed from her family at the age of fourteen. The narrative’s focus shifts temporally and geographically across the novel in order to document the consequences of this dislocation from country and family, and to chart the inter-generational impacts of this act of dispossession.

I begin this narrative synopsis by noting that the translation into English of Garibooli’s name – it means ‘whirlwind’\(^{506}\) – is important in *Home* because of the way that it functions both symbolically and narratologically. Significantly, it symbolises the arrival of a new and unpredictable force, taking the form of white society, in the lives of the Eualeyai people. The turbulence and volatility brought on by this event is acted out across the narrative and across generations. The novel begins, for example, with Candice’s journey to Dungalear Station, which is the location of (the ironically named) Temperance Creek, a backdrop to the 1881 massacre of more than four hundred Eualeyai men, women and children, and also an emblem of the trauma precipitated by the whirlwind of white colonialism.\(^{507}\) It ends with Candice at the same place, as she pictures herself standing as a witness to, and a casualty of, the trail of destruction wrought by this same whirlwind:

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\(^{506}\) The translation is made explicit by Granny at the end of the novel, when she explains to Candice that her grandmother’s name is the Eualeyai word for whirlwind. The connection is also made in an earlier scene in the narrative: “Garibooli. The sound of my name reminds me. Another time, another place, another me. I could run fast, through the grass, amongst the trees, like the wind. Garibooli. My name means whirlwind.” See: L. Behrendt, *Home*, 2004, pp. 287, 88.

Here now stand three generations of my family, aware of how much has been dislocated and lost, yet still standing on our land, at the place where the rivers meet... I can only imagine what has happened to all those who share my blood.\(^{508}\)

At a narratological level, the imagery of the whirlwind functions to foreshadow shifts in focus in the narrative; it is reflective of the pace and structure of the novel, which although chronological, is marked by discontinuities in time and place.\(^{509}\) This is evident, for instance, in the novel’s introductory chapter, set in 1995, where the feeling of “the warm wind sweep[ing] across the knee-length grass, across [Candice’s] legs” calls Garibooli’s story, first set in 1918, into being.

**Dungalear Station and Beyond:**

Between 1904 and 1918, Garibooli lives with her family on a reserve at Dungalear Station, which is located on the outskirts of Walgett in northern New South Wales. Here her movements are restricted, her food is rationed and her language is forbidden. Confined and controlled on land that is now “not safe for children with dark skin”, Garibooli lives in constant fear – the threat of being taken from her family is ever-present, “a fear lurking in the darkest shadows.”\(^{510}\) On the day of her removal Garibooli is alone and vulnerable. She is gathered up by two policemen (who have transitioned, the narrative observes, from “horses to cars, from killers to thieves”\(^{511}\)) and driven away. In capturing the trauma of this event, Behrendt describes the way that, “the sound of her pain filled the country. It filled the soil. It filled the grasses and the empty riverbeds. It hung in the air for all time.”\(^{512}\)

\(^{509}\) For instance, chapters 13 to 16 shift chronologically between 1929 and 1946, then to 1960 before returning to 1943.  
Hired as a domestic in the town of Parkes by Edward and Lydia Howard, a well-to-do couple from established colonial families, Garibooli (who has been renamed Elizabeth) is eventually sent away to Sydney to give birth to a baby boy; she has become pregnant after being raped by Edward Howard. Elizabeth returns to the town without her baby boy, who has been removed from her care with the assurance that he will be given “a better life than the one he would have had.”[^513] The retention of Elizabeth at the house, which is intended by Lydia Howard to “humble” her husband, creates an environment of “oppressive humidity”[^514] and contributes to a fraying of tensions between the women in the home. Frances Grainger, a white housekeeper who has harboured romantic feelings for Edward Howard, becomes resentful of Elizabeth. In her frustration, she chooses to focus her attention outside of the home, and on fighting the spread of communism in Australia, which has recently arrived from Europe. Her repudiation of Marxist politics foreshadows the arrival of Grigor Brecht, a German immigrant who presents himself as a messenger of the proletariat.

Elizabeth and Grigor marry in 1922 after first meeting at the Parkes general store. She identifies with his ‘foreignness’ (“like her, he was from far away, displaced”) and is intrigued by the romantic way with which he speaks about Europe and communism. Despite emerging from a privileged mercantile family, Grigor’s exposure to the writings of Karl Marx and Friedrich Engels shapes his political philosophies:

> Grigor could not express his sense of wonder at the working class until he read the words of Marx and Engels – a language that articulated the principled humanity of working class struggle... And as he read the text, he knew that this was him, identified and described: a communist – ally and vanguard, friend of the proletariat, unmasker of his own bourgeois culture.^[515]

This enthusiasm infects his relationship with Elizabeth, in whose life, the reader is told, Grigor feels compelled to intervene – “she was [a representative of] the oppressed class he longed to rescue... the outcast he wanted to prove he accepted.”516 Between 1922 and 1942 the couple have six children together, but grow distant in their marriage. Grigor’s investment in communist politics leaves Elizabeth feeling alone and despondent, and her children with an absent father. She dies in 1942, longing for her lost son, Euroke, her estranged sons, Thomas and William (who have enlisted in the army and travel to Europe), and for “the place where the rivers meet.”

Following the death of the text’s central character, the novel slips chronologically back to 1929 and shifts its focus to Euroke, the brother of Garibooli, who now works as a shearer at a sheep station. Behrendt uses this chapter to shed light on the experiences of the Eualeyai people after 1918, and, in particular, to consider the way that the practice of traditional culture is compromised by the effects of dispossession. Despite insisting that he has continued to observe culture “at times when there was no one who could see him but his ancestors”, Euroke is forced to concede that “the weave of the clan’s social and cultural life began to loosen” upon the Eualeyai’s dislocation from their traditional lands.517 Behrendt uses the frame of Euroke’s story to introduce important contextual detail to the narrative – including references to the work of the Australian Aborigine Progressive Association and the Aboriginal Advancement League, both of whom campaigned for full citizenship and equality before the law, land rights, the defence of Aboriginal culture and for an end to the practice of the forcible removal of children.518 The advocacy of these groups is inspiring for Euroke.

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516 L. Behrendt, Home, 2004, p. 110. Grigor’s belief in his own “intellectual superiority” over his wife infects their relationship; he is in love with the idea of Elizabeth (as an outcast to be saved).
518 The Australian Aborigines Progressive Association (AAPA) was established in 1924 under the leadership of Frederick Maynard. It is recognised as the first united Aboriginal activist group in Australia. The AAPA held street rallies, wrote petitions and mobilised support with the assistance of sympathetic publishers who were willing to distribute the political manifestos produced by Aboriginal writers. It held three national conferences and eventually dissolved in 1927. The Aboriginal Advancement League was formed in the 1930s and was led by William Cooper. Between 1934 and 1936, the organisation issued a nine-point-plan which called for: the transfer of Aboriginal affairs away from the states and to the Commonwealth; an increase in funding and a positive policy of ‘uplift’; the end of discrimination between ‘full’ and ‘part’ Aborigines, and between Aboriginal people and Europeans; and access to education and parliamentary representation (based on the New Zealand model). There is not space here to consider either of these organisations in greater detail. For further
in the 1930s, and its legacy inspires Candice’s father Bob fifty years later, when he meets with his mother’s brother’s family for the first time.

Elsewhere in regional New South Wales, Garibooli’s six children with Grigor – William, Patricia, Thomas, Bob, Daisy and Danny – adjust to life without their mother. The two eldest boys, William and Thomas, respond by enlisting to fight a war in Europe (never to return to Australia), while Patricia is weighed down by the responsibility of caring for her three remaining siblings. After his wife’s death, Grigor withdraws into himself and “casts an ominous shadow” over the family’s home. Eventually, he requests that the Aborigines Protection Board take his three youngest children into care. Following a move to Sydney, where she takes up a job as a seamstress, Patricia continues to visit her siblings in the children’s home, and brings books so that they can imagine a life on the outside. Bob, for instance, recognises himself in Mary Shelley’s “loathsome creature” and questions “why he had been created in a way that had meant that people would not like him.”

Across a number of years, Patricia uses the leverage she has built at her workplace to negotiate the apprenticing of each of her younger siblings, with the eventual aim of achieving the reconciliation of her family. She is not fully prepared for, however, the impacts of institutionalisation and the way that her siblings’ sense of abandonment will manifest itself in a number of devastating and destructive ways.

The story of the family’s disintegration intersects with the story of Bob’s eventual reconciliation (as an adult) with his Aboriginality, and with his
maternal ancestors. This reconciliation forms the basis of Candice’s journey to Walgett in 1995.

**Didacticism and *Home* - Brecht’s Estrangement and Candice’s Romantic Immersion:**

Criticisms of *Home* have focused primarily on the novel’s didacticism, which is regularly regarded as an aesthetic flaw in narratives where a text’s ‘instruction’ is deemed to be “somehow too overt.” According to Anita Heiss, Behrendt’s incorporation of “too many obvious history lessons” and “slabs of lecture” into the novel is its greatest fault, although she does concede that this reflects a pressure felt by all Indigenous authors to sketch out diverse and representative Indigenous histories in their writing. Similarly, Frances Cruickshank criticises the tendency of the novel’s “theoretical and ideological bones to poke through the flesh of the fiction”, while Sarah Vassos describes the form of the writing as both “pedagogical” and “sometimes pedantic.” In other words, these criticisms suggest that *Home* is characterised by an explicit didacticism which impacts on the novel’s aesthetic effect. Vassos is most strident in her criticisms of Behrendt in this regard, proposing that, “the feeling of the reader is that she is writing to show off her general knowledge rather than trying to create justice for the Aboriginal cause.” Rather than reading the novel’s didactism as a flaw, I suggest that it should be approached as a deliberate strategy employed by Behrendt to achieve an aesthetic distancing between the text and the reader. This estrangement can, in turn, be read as confirming the link that Behrendt

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523 Didacticism refers to a philosophy of art and literature that emphasises the capacity of creative work to convey information or instruction. According to Charles Repp, this has the effect (for some readers) of providing evidence of an author’s “epistemic vices, such as intellectual arrogance, dogmatism and prejudice which... compromise the work’s value as a source of instruction.” See: C. Repp, ‘What’s wrong with didactism?’, *British Journal of Aesthetics*, Vol. 52, No. 3, 2012, p. 272.


526 Vassos’ observation that Behrendt’s writing is ‘sometimes pedantic’ suggests that she views its attempts to educate as somewhat laboured. See: S. Vassos, *The Importance of Place in the Definition of Aboriginality in Aboriginal Women’s Fiction*, Masters Thesis, Padova University, Italy, 2013, p. 92.

appears to draw (by naming her novel’s protagonist Candice Brecht) between her narrative and the Marxist philosopher Bertolt Brecht.

Brecht was a German philosopher and dramaturg who espoused an ideal of estrangement or alienation (Verfremdung) between reader and text. Writing in the first half of the twentieth century, and influenced by Marxist politics, Brecht intended for his works to “break the illusion of the play’s world” through jolting reminders of the play’s artificiality. This was, in other words, “an aesthetic principle with an ideological goal”, and it aimed to allow the audience to more easily deconstruct the “workings of capitalist society” by demonstrating the mechanisms of social conditioning. Douglas Robinson suggests that the didacticism of Brecht’s plays reflects, therefore, a “Marxist inclination towards… dogmatism”, while Silvija Jestrovic argues that they demonstrate a “simplicity that brings meaning closer to the audience’s understanding.” Based on these accounts, it is clear that Brecht intended for his works to inculcate particular thematic and moral concerns, and for these to be applied by the audience in order to promote social and political change. I argue that, by invoking the German philosopher in her writing, Behrendt intends to do the same. This didacticism occurs on two planes in *Home*; first, through the novel’s utilisation of law-stories to transmit ideas about social responsibility; and second, at the level of Candice’s first-person narration, where first-person voice is used to create an aesthetic distance between the reader and text (rather than to act as a device for readerly identification).

According to Behrendt, ‘law-story’ is a term used to describe the implicit and inextricable relationship between law and story. She explains that, in

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529 S. Jestrovic, *Theatre of Estrangement: Theory, Practice, Ideology*, University of Toronto Press, 2006, p. 104. Brecht’s strategies included having the actors in a play step out of character to lecture or summarise, captions or illustrations projected on a screen and the visible presence of ropes and lights, for instance, to remind the audience that they were, in fact, in a theatre.


Aboriginal culture, “laws are told as stories, often presented for children. These cultural stories actually explain our worldview, value systems, and rights and responsibilities, and they explain our connection to land.” It is interesting, then, to consider the way that Eualeyai law-stories first appear in *Home*, which is in the context of Garibooli’s childhood at Dungalear Station. The narrative describes how Kooradgie, who is an “old storyteller… with a gift for healing”, visits the camp “sporadically” to tell Eualeyai stories “in the lilting sound of his own language.” These stories, which are italicised and presented with a slight indent in Behrendt’s printed text, are used as morality tales and provide explicit lessons on social responsibility and ethical behaviour. They are, in other words, allegorical. The story of the *Biggabilla* man, for instance, is a lesson on selfishness; an old man is beaten for his failure to share the meat of a kangaroo (bundar) with his camp:

*As he hobbled off, his legs broken, the men threw spears at him. The old man crawled over the land and his spears turned to spikes, his back legs faced inwards because of the broken bones. You can see them in the footprints of the biggabilla who is forever a reminder of the selfishness of the old man.*

Garibooli remembers these stories as they take relevance in her life. She tells the story of *Googar* and his two wives, *Mutay* and *Kukughagha*, to Grigor, and takes confidence from its message that Eualeyai people will always care for their children: “You see, we are taught to watch children. And I need to remember that when I wonder why my family has not come for me yet. They are most likely trying to find a way to meet me.” It can be argued, then, that law-stories work on two levels in the narrative: first and primarily, they articulate Eualeyai legal philosophy (aimed at shaping behaviour); and second, they are absorbed by Garibooli, as I have shown, so that she has

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534 L. Behrendt, *Home*, 2004, p. 31. The story is pertinent in the context of Garibooli’s childhood, which is characterised by deprivation as a result of the callousness of the colonisers.
535 *Mutay and Kukughagha* are drowned as punishment for leaving their offspring unattended when they embark on a hunting trip.
some way of making sense of her isolation. At both levels, the work of the law-story is didactic.

As I have indicated, Candice’s first-person narrative also functions in a particularly didactic way. This is evident in the text’s reframing of legal debates on native title and land rights, where critical distance is inserted between the reader and the narrative. By re-reading the judgment of Justice Blackburn in *Milirrpum v Nabalco*, Candice attempts to show the reader that, rather than dismissing the possibility of native title in common law (which is how it was taught to her), the case actually lays the foundations for its recognition. She argues that, by observing “a subtle and elaborate system highly adapted to the country in which the people led their lives”, Blackburn effectively “saw” a “system of laws”, but is forced to concede that “he was held prisoner by the weight of legal precedent, his hands tied by colonial law.” Candice invites the reader to think critically about the case by reminding them that, “when you scratch the surface, you will find many subversive narratives, overlooked, forgotten, smothered by the dominant story.”

This invitation speaks broadly to the novel’s revisionist inclinations, and can also be read as an example of the way that estrangement functions in the narrative to demand from the reader a conscious, critical engagement with questions about history and justice.

Behrendt’s use of Brechtian distancing techniques is also evident in a scene where Candice reflects on the way that stories of colonisation and occupation are told and retold in Australian schools. In challenging the absence of

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537 *Milirrpum v Nabalco Pty Ltd [1971]*, also known as the Gove Land Rights case, was the first native title litigation in Australia and involved an unsuccessful claim by members of the Yolngu people for recognition of native title over the Gove Peninsula in the Northern Territory. In ruling against the plaintiffs, who sought to stop the mining of bauxite in their traditional lands, Justice Blackburn held that, in order for the common law to recognise native title, the plaintiffs would have to show a proprietary interest in the land, such as the outward demonstration of “such interests as the right to use and enjoy land, the right to exclude others and the right to alienate. In his view, the plaintiffs’ claim did not demonstrate those attributes existed in the case.” See: M. Weir, ‘The story of native title’, *The National Legal Eagle*, Vol. 8, No. 1, 2002, p. 1; *Milirrpum v Nabalco Pty Ltd [1971]*; 17 FLR 141 (1971).


540 The novel is also especially didactic when, in Bob’s attempts to reconcile with his Aboriginality, he meets (by chance) historian Peter Read at the New South Wales State Library. The intersection of their stories – Read introduces the idea of the ‘stolen generations’ as a phenomenon to the narrative and to the nation’s political vocabulary – provides the ground for the novel’s most concise articulation of the politics of the ‘stolen generations’. See: L. Behrendt, *Home*, 2004, p. 279.
Aboriginal people in these stories (“I always knew that we didn’t just disappear into the ether”\footnote{L. Behrendt, \textit{Home}, 2004, p. 299.}), she speaks directly to the reader in an intervention that can be read as an aside in the chapter: “So don’t think I sat there and let them tell me a version of a history that I didn’t agree with.”\footnote{L. Behrendt, \textit{Home}, 2004, p. 300.} By insisting on her own assertiveness, Candice effectively shakes the reader out of their passive absorption in Behrendt’s novel and the stories of Australian nationhood that it critiques. In other words, the didacticism and estrangement creates an aesthetic distance which forces the reader to think critically about their role in the reproduction and transmission of these narratives.

\textbf{Estrangement and Absorption – Complicating Narrative Frameworks:}

In this section, I will explore how the alienation effect established in \textit{Home} between the reader and the represented world is complicated by Candice’s own absorption in the classic romance novels of the 19\textsuperscript{th} and 20\textsuperscript{th} centuries. I mean to show, in other words, that by highlighting Candice’s immersion in the romance mode (the novel is at once a love story and a work of historical fiction, where Candice’s turn to romance reflects a desire to transcend the social realities of her world), Behrendt brings two methods for engaging with texts into sharp relief, and also provides a lens through which her protagonist can attempt to make sense of her place in a post-\textit{Mabo} Australia. Before considering the way that romance functions in \textit{Home}, and how it is set apart from estrangement as a reading method, I will first briefly outline some of the conventional features of the genre.

According to Jean-Michel Ganteau, romance as a literary mode is interested in disclosing alternative worlds, and not in observing “this world.”\footnote{J.M. Ganteau, ‘Fantastic, but Truthful: The Ethics of Romance’, \textit{The Cambridge Quarterly}, Vol. 32, No. 3, 2003, p. 227.} It is, he suggests, “concerned with things foreign… (with) the realm of the Other”, and so goes beyond “horizontal” descriptions of the phenomenal world to probe
the transcendental mysteries of the unknown and unexplored instead.\textsuperscript{544} Romance is distinguished from realism, Ganteau argues, by being used as an “instrument of fictionalisation” to “heighten platitudinous texts” and to “prolong investigation into zones that remain notoriously out of the reach of realist texts.”\textsuperscript{545} He expands on this differentiation by suggesting that romance is:

[...] more interested in probing the unknown – what is out of direct reach – than in clearly accounting for the phenomenally accessible. In this respect, romance turns its back on the realistic tradition and the realist idiom to suggest an alternative field of investigation and an alternative way of presenting as opposed to representing, a way of creatively questioning mimesis.\textsuperscript{546}

Importantly, and perhaps foundationally, the romance mode is invested in telling stories of desire and struggle – not only for love, but also for redemption, justice, home, power and transformation.\textsuperscript{547} Behrendt’s engagement with romance in \textit{Home} is interesting for the way that it marks a point of departure from the distance created through the use of techniques aimed at estrangement – specifically because Candice pursues critical ‘closeness’ with books (particularly in her childhood) in order to distance herself from the circumstances of the society in which she lives:

As I slipped into worlds created by Jane Austen, Charles Dickens, Henry James and the Brontë sisters, I had my own retorts and strategies to the restrained or bubbling emotions of

\textsuperscript{544} J.M. Ganteau, ‘Fantastic, but Truthful’, 2003, p. 226.
\textsuperscript{546} J.M. Ganteau, ‘Fantastic, but Truthful’, 2003, p. 237.
the characters I met. None of them, in my mind, mistook me as exotically Other. No mention was made of my skin colour.\footnote{L. Behrendt, \textit{Home}, 2004, p. 11. Candice concedes that her “romanticism would have surprised anyone who knew her cynical self.”} As this excerpt suggests, Candice looks to the romance mode for sanctuary in the context of her overwhelming isolation – it is implied that the novel provides a ‘safe’ space for racial and cultural ‘others.’ This is important for Candice, who is alienated because she dares to challenge the mythic stories of Australia’s frontier: “I liked to speak out in my martyr voice, about the dead black voices buried beneath the heroic tales of white men struggling to cross craggy mountain ranges to discover inland treasures.”\footnote{L. Behrendt, \textit{Home}, 2004, p. 11. It is noteworthy that the stories that Candice attempts to debunk have their own romantic ‘flavour’ – they are stories of courage and bravery, the tales of men forging ‘new’ paths in a ‘new’ land.} Perhaps most interestingly, Candice also recognises herself, and her struggle, in the character of Heathcliff from \textit{Wuthering Heights}; she identifies with his brooding anger and is inspired by the novel’s passion and its suggestion of a triumphant ending:

\begin{quote}
I understood the meanness that grew out of him, how the crimes of one generation leave a legacy of bitterness and the stigma of prejudice and, for some, the hope of reconciliation. I relished a passionate, epic struggle and a calm hope-filled ending, a triumph.\footnote{L. Behrendt, \textit{Home}, 2004, p. 12.}
\end{quote}

While it could be argued, then, that \textit{Home}'s conclusion also reflects this romantic desire for a triumphant end to struggle (the novel concludes, “I can tell you a story of triumph: that to this spot, where my grandmother was torn from, I return, nearly ninety years later\footnote{L. Behrendt, \textit{Home}, 2004, p. 313.}”), I suggest that it instead reveals a perceptible shift in the nature of Candice’s critical thinking. Specifically, her romantic vision of the world is supplemented (but not displaced entirely\footnote{The love affair between Candice and Christoph, which frames the novel and reaches its climax in the final pages of the narrative, suggests that romance remains central to Candice’s understanding of the world. This remains so, even in a context of trauma and discrimination.}) by
the political philosophies of Marx and Michel Foucault. Through Foucault’s writings, Candice is given the ability to articulate the ways that “power names and then dispossesses.” She uses this knowledge as a framework to interrogate the ways in which, and the reasons for why, her Indigeneity has been ‘othered’ and the stories of her people have been submerged.

**Legal Stories in *Home*:**

Central to Candice’s coming-to-terms—with her Indigenous identity is her turn to the law, which occurs in the context of an insatiable need to know and a crisis in Indigenous deaths in custody. Through first-person narrative, she describes, “reach[ing] for the knowledge of the law... [with] passionate and explosive enthusiasm”, but also admits to being worn down by its “disheartening realities.” The following excerpt is a concise articulation of Candice’s philosophising on legal language. It also underlines how she conceives of the relationship between power and rhetoric in Western law:

Law is a language. It becomes less mysterious the more you study it and speak it. You come to understand what the jargon means and how the arguments counter each other. You can understand how power flows through society if you understand the power of legal rhetoric. Legal language is bewildering until it becomes familiar, falling into place, and you then can use the words, get comfortable with them and employ them to show that you belong, that you have mastered the language. Then you rarely, if ever, stop to recognise the bewilderment on the faces

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553 This shift reflects the way that Candice has been hardened and wearied by personal experience relating to race; she is simultaneously fetishized and shamed as a black woman, and so forms the view that she will never be able (through romance) to escape the colour of her skin: “I will tell you just one lesson I learnt at university: no matter how many degrees you have, how clever you are, how well you speak, how many books you read, you cannot get away from the skin thing.” See: L. Behrendt, *Home*, 2004, p. 304.


555 In developing this critical consciousness, Candice reflects: “I knew there were stories that we didn’t hear at school, stories beneath the stories we were being told.” See: L. Behrendt, *Home*, 2004, p. 299.

556 L. Behrendt, *Home*, 2004, pp. 12-13. Her brother Kingsley, who is also a lawyer, is described as approaching the law with “measured and analytical determination.”
of others. It is too ambitious to think that you are going to change the world if you understand the language – and you have to be careful that the language does not seduce you – but you are better able to recognise what is going on, to find a name for it. It’s just a matter of putting flesh on a skeleton.557

Here, through an examination of legal language, Candice effectively identifies the possibilities and limits of legal power. Her analysis also feeds into a discussion of *Mabo*, and the analogy constructed in that case by Justice Brennan, who compared Australian law to a skeleton (that is, to a structure of integrated principles) and suggested that the introduction of contemporary notions of social justice and human rights to its framework could lead to its fracturing.558 More than this, Candice’s analysis facilitates a *reworking* of the text of Brennan’s judgment. In other words, she recognises the judge’s rhetoric as a mask of justification (by suggesting that a departure from principle could result in the fragmentation of the law’s foundation, the case effectively set limits on the recognition of native title), but also observes that it presents possibilities for a reconfiguration of the law’s basic framework: “… you have to find a way to put the flesh on while keeping the skeleton intact.”559 I suggest that this account of the working of legal language should be read in terms of both Behrendt’s advocacy for the intervention of narrative in law (to put flesh on bones is to particularise, or give detail to, the underlying structure of a framework) and also as a sign of

558 Justice Brennan warned against “the adoption of rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. See: *Mabo v Queensland (No. 2) [1992]*, HCA 23; 175 CLR 1 (3 June 1992) at 29.  
The skeleton analogy drawn by Brennan has been interrogated by a number of legal and cultural studies scholars in the past two decades: Irene Watson challenges the existence of the “skeleton” itself by describing it as “mythical” and suggesting that its recognition by a white legal culture conceals a history of genocide; Penelope Pether describes Brennan’s “skeleton” reference as a “sinister metaphor” and suggests that it reflects a “consciousness of the fragility… on which (the Australian nation’s)… power rests”; while Judith Pryor proposes that Brennan’s skeleton analogy is a central part of the way that Australian law re-states itself after *Mabo*. For more, see: I. Watson, *Aboriginal Peoples, Colonialism and International Law: Rau Law*, p. 62; P. Pether, “Principles or Skeletons?”, 1998, p. 123; J. Pryor, *Constitutions: Writing Nations, Reading Difference*, Birkbeck Law Press, London, 2008, p. 152.  
559 L. Behrendt, *Home*, 2004, p. 14. Candice explains the case and rules of precedent (in a particularly didactic way) to the reader: “He had to explain when the courts can and can’t move away from what they have said in the past and then determine how far they can go if they want to take the law in a different direction.” See: p. 304.
her understanding of law as a narrative art. In seeking to put “flesh” on the skeleton of law, Behrendt is effectively narrating a new (or revisioning an old) legal history, and *Home* is central to this process; it both explicates an Indigenous jurisprudence (through the inclusion of law-stories) and also provides a critique of existing and dominant Australian legal narratives. Candice gestures to this possibility – that narrative introspection has the potential to contribute to a recasting of the law – when she observes that, by “scratch[ing] the surface” of the law, “you will find many subversive narratives, overlooked, forgotten, smothered by the dominant story.”

**History and Story in the terms of Past, Present and Future:**

The final chapters of *Home* draw attention to the way that the novel is a story about the processes of time: despite being (ostensibly) set in the present, the narrative spends much of its time interrogating the past with a view to shaping the future. As a result of this orientation, Behrendt’s novel opens up a space for both acknowledging what is currently possible under the law and imagining (through literature or ethical reflection) what may be possible in the future. While it is the case that Candice reflects perceptively on a number of these questions – “as we started to try to implement and expand the findings of the *Mabo* case, we found that it was not the trigger to get land… we had first thought it would be” I argue that there is also an expectation, by virtue of the novel’s didacticism, that the reader will enter this space and think critically about what has been and what could be.

As I have previously argued, Behrendt’s narrative is deeply invested in the process of revisiting and revising the stories that form the bedrock of Australia’s legal system. These are stories of the invisibility of Indigenous peoples and of a land absent of law and culture. Bob engages with these narratives in *Home* by critiquing the “continual attempt to tell the story that he

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560 As I have outlined in this thesis’ introduction, there is a significant body of work (by both Indigenous and non-Indigenous scholars) that recognises the intricate relationship between law and story.


and his family had simply vanished into the mists of time, inevitably overcome by the superiority of whites.” He also recognises the work of revisionist historians, who, he suggests, form “a new way of telling history.”

In this light, it is possible to read Behrendt’s narrative – and the re-framed histories that it presents – as counter-stories. According to critical race studies scholars, counter-stories are told by the subaltern in order to “attack or correct a society’s dominant and prejudicial narratives”, and as a means to achieve the psychic self-preservation of a marginalised group. In 1995 – a post-Mabo context – Candice reflects on the transformative potential of counter-stories in the following way:

I could understand why people were frightened of those counter-stories, but in my youth I always thought that if people heard them, they would understand the world better and their cruelty to other people, their hatred for no reason, would disappear.

Despite spelling out (and believing in) the ways that “sand-shifting stories” can effect change, Candice is forced to concede that her assumptions have been “wrong” and that the nation has not changed in the ways that she would have liked. This is a dispiriting observation in the immediate aftermath of the Mabo case, which can be recognised fundamentally as a counter-story because of the way that it explains the Meriam people’s relationship with their land. Its contribution to the dismantling of the dominant ‘fiction’ of terra nullius was both substantive and transformative in a legal sense, and yet, as Candice outlines, it also opened up “virulent” political and social antagonisms that caused harm in a number of important ways. Behrendt’s narrative, and much of the other material that I consider in this thesis, begins a

conversation about what this revisioning means in both a legal and moral sense:

At the time I am writing this, I do not know whether the courts will continue to narrowly define native title and whether, in the years to come, a federal government will pass amendments to the Native Title Act that will extinguish and erode native title rights across the country.\(^{567}\)

At a different level, *Home*’s engagement with (and thinking about) the future occurs primarily through the prism of Candice’s first-person narrative perspective. Specifically, the novel uses the character of Kate (who is vaguely developed and figures as an emblem of Candice’s past\(^ {568} \)) as a window for looking into the future. This is highlighted when, in a particularly self-reflexive and candid observation about her own absorption in the literary world, Candice explains:

Kate didn’t need books to see beyond her fences like I did… she could see so far beyond all she had inherited… she saw the bigger picture and the possibilities beyond… Kate always looked to the future, dreaming further ahead than seemed real… she would do so with such conviction that I never doubted what she saw was true.\(^ {569} \)

It is possible to read the character of Kate, and her ability to see into the future, as a supplement to the scope of Candice’s vision, which has been narrowed by a lived experience which has taught her that power is not necessarily changed by story, that *Mabo* will not necessarily bring justice and that knowledge and learning do not necessarily end racism. Within the narrative, Kate provides a double perspective so that Candice (with the reader) is able to imagine a different, fairer future.


\(^{568}\) Kate is a childhood friend who is identified as an “outsider” and an “other” and spoken about in absentia. See: L. Behrendt, *Home*, 2004, pp. 13, 298.

Conclusion – the Story of the Dinewan and Goomblegubbon:

Behrendt’s novel closes with a reflection on the politics of history, and by setting up a division between the terms *historie* and *geschichte* – the former said to refer to the “the telling of past happenings” (it is tied etymologically to the word ‘story’), and the latter denoting “the processes of past, present and future.”\(^570\) Candice begins her reflection by promising to narrate a *historie* – “I can tell you a story” – but this pledge is recast in order for the novel to invoke the term *geschichte* as a way of thinking about history as a future process (it cites Marx’s belief that the “products of our history are part of our present and will shape the future”\(^571\)). Rather than reflecting on history, then, as a science for telling stories about the past, *Home* approaches it as an evolving process – a “complex of events.”\(^572\) This is evident insofar as the novel is engaged in the processes of revisioning the foundational (legal) narratives of the nation’s past, and in imagining a new future. It urges, in other words, for the reader to reflect on history not just as a story of the past, but rather, as something that lives with us today, a heavily-carried burden – particularly in the context of the ‘sorry’ debates.

At Dungalear Station, the site of her grandmother’s removal in 1914, Candice is overwhelmed by a pervading sense of stillness. She describes feeling as though, at this location, “everything has collapsed in on itself, as if everyone who has been here throughout time now exists side by side.”\(^573\) The idea of the timelessness of this place is significant because of the way that it subverts assumptions about the linearity of time; it implies that past, present

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\(^{570}\) The terms are introduced to the text in a textual aside that resembles an example of Brechtian distanciation. See: L. Behrendt, *Home*, 2005, p. 316.


\(^{572}\) While there is a general lack of clarity in relation to the precise meaning of the two terms (according to the German Dictionary, the *Duden*, both refer in a broad sense to history), they have been distinguished by Paul Ricoeur, who suggests that *historie* refers to knowledge, narrative or historical science and that *geschichte* refers to a “complex of events.” Ricoeur’s description of *geschichte* is largely consistent with the *Duden*’s (extended) definition, which suggests that the term denotes the political, cultural and social processes of a developing event. In other words, it reflects an active process, or an evolving narrative. Ricoeur also notes that *geschichte* shares assonances with the German words for ‘fate’ and ‘destiny’ (*schicksal* and *geschick*), which is revealing in the context of Candice’s homecoming to Dungalear Station. See: www.duden.de; P. Ricoeur, *Memory, History, Forgetting*, trans. K. Blamey & D. Pellauer, The University of Chicago Press, Chicago, 2004, pp. 299, 378.

and future co-exist in a constant interaction with each other, and can be taken as an acknowledgement of the way that processes of the past have a direct bearing on the present and future.\(^{574}\) In Behrendt’s narrative, Candice is humbled by the significance of this connection: “I sense that after my grandmother left this spot the land just waited patiently for me to arrive.”\(^{575}\) Further, Candice’s observation about the stillness of Dungalear Station is important because it can be read as signalling an end (in a narratological sense) to the whirlwind that has swept through Behrendt’s narrative, beginning with the removal of Garibooli, and concluding with Candice’s reconciliation with her ancestral lands. As she searches through the ruins of the one hundred-year-old camp (“sticks, bark and pieces of metal firmly planted into the soil” are lingering artefacts of her family’s presence\(^{576}\)), Candice’s bitterness “at all that is missing... all that has happened” is complicated by the joy she feels for having returned, and for her successes, as well as by a sense of despondence for those whom she will never know, and who will never return home.

The novel ends with Granny’s sharing of a law-story with Candice. The story, which can be conceived of as a morality tale, takes on a number of important meanings, particularly when read in the light of the ‘sorry’ debates taking place as Behrendt wrote *Home*. Granny begins by identifying Garibooli as a Dinewan – an emu. In her story, the Dinewan is acknowledged as being the leader of the birds, stronger than the Goomblegubbon (a bustard), who is cunning and smaller in stature. The Goomblegubbon mother is jealous of how high the Dinewan can fly, and so devises a plan (taking advantage of the Dinewan’s vanity) to have the emu sacrifice her wings – and the wings of her children – as a test of her strength. If she is strong, she will be able to fly even without her wings. Realising the consequences of what she has done, Dinewan seeks revenge by plotting to strip Goomblegubbon of her most treasured possession – her twelve children. Dinewan approaches her plan by convincing the Goomblegubbon that, if she kills all but two of her children,

\(^{574}\) It can also be interpreted as a gesture to the way that the narrative itself is a compressed record of the stories of “everyone who has been here throughout time.”
they will grow to be strong. Convinced of the rightness of this proposition, Goomblegubbon kills ten of her children, and is shocked when she realises that she has been deceived. Dinewan moralises:

You are a very bad mother… I would not kill any of my children, even to get my wings back… You can look at them all and think of the children that you have slaughtered. You will be reminded of what your ambition and jealously have made you do. By your trickery and deceit you made the Dinewan lose their wings, but for as long as we cannot fly, you will only ever have two children at a time. You can have your wings, but I will have my children.\textsuperscript{577}

When Granny has finished her story, she turns to Candice and speaks to its (moral) substance: “Whatever tricks people play on you, whatever they do to you out of jealousy and spite, we will always have our children. They will always be ours.”\textsuperscript{578} Read in the context of the experience of the ‘stolen generations’, the story points to the resilience of familial bonds and suggests that they survive forced separations and dislocations. It also, however, offers Candice a sense of her belonging within Eualeyai society, in that she is effectively incorporated within an Aboriginal tradition of storytelling (by being exposed to this law-story) while simultaneously establishing for herself a sense of belonging in a world from which she has felt increasingly isolated: “As I stand here, all I have inside me is so strong, so much a part of me, that it could never be erased… there is always a part of me that remains untouchable.”\textsuperscript{579} In an important exchange, Granny taps on her chest and pinches the skin on her arm in order to affirm for Candice that, “it’s what’s in here that matters… not how dark this is.”\textsuperscript{580} The gesture to Candice’s “light”-coloured skin speaks to her greatest vulnerability (that is, her identification as an Aboriginal person\textsuperscript{581}) and facilitates the “shedding” of her “weakest, most

\textsuperscript{581} Across the narrative, Candice reflects on the way that her Aboriginality has been received by white Australians, as the implications of this for her own sense of self-worth: “I don’t mind being mistaken for
confused and insecure” parts on the soil “where grief had begun to bleed generations ago.”582

someone from somewhere else, but I mind when the realization is met with disappointment, confusion or even disgust. I mind when the person observing me feels betrayed by my lightness.” See: L. Behrendt, *Home*, 2005, p. 5.
In this chapter, I will argue that Terri Janke uses the story of the misappropriation of a pearl brooch in her novel *Butterfly Song* as a metaphor for the dispossession of Indigenous lands in Australia. I will show that, by setting her novel in the immediate aftermath of the *Mabo* judgment – in which the story of the claim for the return of the brooch is mimetic of the famous *Mabo* case – Janke both envisions a productive relationship for Indigenous Australians with (and within) the law, and also encourages the reader to reflect on the politics of ownership and belonging by using story and song to propose possibilities for the reshaping of law and legal culture.

Critical Survey:

Terri Janke is a descendant of the Meriam peoples of the Torres Strait Islands and the Wuthathi people of mainland Australia. She works as a solicitor and specialises in intellectual property, copyright law and the protection of Indigenous cultural heritage. A prolific writer, she has published widely in the legal and creative fields. *Butterfly Song* – published by Penguin in 2005 – is Janke’s first novel, and tells the story of Tarena Shaw, a law graduate who has returned to her mother’s ancestral home of Thursday Island in order to reclaim a pearl brooch (a family heirloom) which

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583 Since 2000, Janke has been the director of Terri Janke and Associates, an Indigenous-owned legal firm offering advice on commercial law, governance and dispute resolution.

has been misappropriated and is now for sale in an antique store. In the process of reclaiming the pearl, and establishing her credentials as a junior lawyer, Tarena must confront her family’s difficult past as well as her own trepidation in the face of the law.

Like the other novels considered in this thesis, Butterfly Song has received only limited critical attention, having been reviewed in a small number of newspapers and literary journals, and subjected to critical analysis by an even smaller number of literary studies scholars. The majority of this commentary has focused (perhaps inevitably) on the similarities between Janke’s story and her own life, rather than on the parallels between the narrative and the Mabo judgment itself. This broad failure to draw a line of reference between the two texts presents, I suggest, something of an oversight, given that Mabo provides a particularly productive lens through which to read the novel, and because Janke herself has envisioned Butterfly Song as performing a potentially didactic function, explaining that, “I don’t think you could get too many people to sit down and read the Mabo judgment, but they might read a story.”

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587 The tendency for reviewers and critics to read Butterfly Song as a literary representation of Janke’s life is perhaps understandable given the many echoes between their stories; the novel depicts a young woman with family ties to the Torres Straits qualifying as a lawyer in Sydney around the time of the Mabo judgment. In acknowledging these similarities, Janke has observed that, “much of the story is autobiographical… I used the vehicle of fictionalising a court case and quest for (the) return of a butterfly brooch to give (an) emotional connection to the past, to my mother, and to my grandparents.” See: T. Janke, ‘Writing about family: Terri Janke talks about writing Butterfly Song’, *Ngoonjook: A Journal of Australian Indigenous Issues*, No. 30, 2007, pp. 52-53.
While this blurring of the lines – by Janke’s own admission – between fiction and autobiography facilitates a reading of *Butterfly Song* as an instance of Indigenous life-writing (Katelyn Barney makes this case in her analysis of the text[589]), it also suggests that *Butterfly Song* can be approached in a stylistic and thematic sense as an Aboriginal *Bildungsroman*. The Aboriginal *Bildungsroman* has been established as a literary category in recent years by Wiradjuri scholar Jeanine Leane, who has reflected on the ways in which Aboriginal writers adapt the form of the *Bildungsroman* to tell Aboriginal stories. Leane suggests that, where the traditional European *Bildungsroman* is concerned with the individual, [590] the Aboriginal *Bildungsroman* is distinguished by its focus on the development of collective and community identities, wherein “belonging and [establishing] a sense of place [are] integral and essential parts of identity construction.” [591] In this light, the Aboriginal *Bildungsroman* reads as a particularly subversive genre (according to Brenda Machosky it represents a “reverse colonisation by literary means”[592]), and so provides an interesting lens through which to frame an analysis of Janke’s novel.


[590] *Bildungsroman* is a technical term describing a novel of formation. According to the Marxist theorist George Lukács, it typically traces the “reconciliation of the problematic individual… with concrete social reality.” Joseph Slaughter argues further that the scope of the *Bildungsroman* has expanded in recent years to include any novel that “narrates the struggle between the rebellious inclinations of the individual and the conformist demands of society.” It has also undergone an expansion of concerns and constituencies since women’s liberation, civil rights struggles, decolonisation and globalisation. See: J. Slaughter, ‘*Bildungsroman* / *Künstlerroman*’ in P. Logan et al. (eds.), *The Encyclopedia of the Novel*, Wiley-Blackwell, Oxford, 2011, pp. 93-95.


[592] Machosky argues that the *Bildungsroman* has ‘burst’ its European origins and entered the postcolonial world, and that it is now a prime example of how Indigenous peoples have used European literary forms as a part of “their own arsenal of cultural resistance.” See: B. Machosky, ‘Kim Scott’s *True Country* as Aboriginal *Bildungsroman*’ in B. Wheeler (ed), *A Companion to the Works of Kim Scott*, Camden House, New York, 2016, p. 25.
Style, Structure and Storytelling:

Janke’s novel is divided into five parts, each containing a number of short chapters, 3-5 pages in length. These are, except for the first and final chapters, signposted with location and date ‘stamps’ (for example, Thursday Island, 1941; Cairns, 1983) which situate the narrative temporally and spatially, and also orient the reader and contextualise the plot. As a literary device this is particularly important, given the way that the narrative skips across time and space, for example, between Sydney in the early 1990s and wartime in the Torres Straits, and between Canberra in the 1980s and Cairns in the 1970s.

*Butterfly Song*’s narrative is made cohesive in the face of these spatial and temporal shifts by the use of simultaneous (present tense, first-person) and ulterior (past tense, third-person) narration, whereby a series of stories is embedded within the broad frame of the text. In other words, Tarena’s journey to Thursday Island frames the story of her enrolment in and graduation from law school, which frames the story of her adolescence, which frames the story of her family’s history in Cairns and on Thursday Island, which in turn frames the love story of her grandparents and the sad circumstances around the misappropriation of the pearl brooch. As the novel’s primary protagonist, Tarena functions as the autodiegetic narrator, anchoring transitions between narrative ‘levels’ and simultaneously framing shifts in narrative focus (the ulterior frame serves to foreshadow plot development in subsequent chapters). According to Estelle Castro, this narratological arrangement has the effect of drawing the reader into close proximity with the narrator, however, I would argue that it also filters and

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593 The presence of the so-called date stamp facilitates a reading of the text as a diary or journal, since this is a stylistic convention of that genre.
595 I use the term ‘autodiegetic’ according to Genette’s scheme (where the narrator tells his or her own story, using first-person narrative voice). For an explanation of this schema, see: L. Herman & B. Vervaeck (eds), *Handbook of Narrative Analysis*, University of Nebraska, Lincoln, 2001, p. 85. The reader is made aware of the events leading to Francesca’s death, for example, through the ulterior frame (which is prior to its explication by Tarena in the simultaneous frame).
596 She argues further that the use of the personal pronoun ‘I’ facilitates an emotional closeness between Tarena and the reader.
focalises the story through the prism of Tarena’s lived experience of law and culture.

Janke’s style has been described in reviews of the novel as both “understated” and “gentle”, as well as “overly expilciatory” and “lacking in confidence”. 

Bernadette Brennan, by contrast, reflects more favourably on the novel in her review for JASAL, by describing Butterfly Song as “powerful” and by lauding Janke as having a “deft facility with language.” Her claim that the “fragmentary” structure of the novel (its short, shifting chapters) allows for the interweaving of personal and national stories hints, I suggest, at the potential for Butterfly Song to be read with reference to, or as analogous to, the Mabo case. Crucially, Brennan’s praise for Janke’s writing as “lucid” and “agile” stands in contrast to Deborah Forster’s claim that “the story deserves either a better writer or a better editor because it is not well served with its short, declaratory sentences and lame dialogue.”

Aside from being overstated, I suggest that these criticisms discount the purposefulness of Janke’s writing, which has been rationalised (by Janke herself) in the following terms: “I like to write short sentences because people talk short.”

By conceptualising her novel as belonging to, and as a continuation of, an Aboriginal storytelling tradition (she explains, “Indigenous people have such a strong oral tradition… I tried to be a bit freer in the style of writing… to allow Indigenous modes of storytelling to form”), Janke identifies Butterfly Song as a “form [for] expressing culture.” Moreover, she attributes the inclusion of poems and the ‘Butterfly Song’ itself, which takes on a particular significance in the narrative, to a desire to allow the reader to “hear a strong oral voice.”

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In this light, it is interesting to reflect on the novel’s clever integration of, for instance, the (oral) stories of the frangipani and poinciana women, who are both described as “wild spirit women” and whose stories are told (and have been told for generations) on Thursday Island and in Torres Strait diasporic communities in order to moderate the behaviour of young women. The frangipani woman’s flesh, heart and breath have been absorbed into the trunk, branches, flowers and petals of the frangipani tree, while the poinciana woman is a beautiful “devil woman” who captures and extracts the youth and beauty from the flesh and bones of girls who walk beneath her branches.\(^\text{603}\)

The invocation of these stories in the novel – and the invocation of their associated mythologies – can be read as part of Janke’s explication of an Indigenous narrative jurisprudence. In other words, they provide evidence of the ways in which Indigenous communities use story to explicate law, and also show how Indigenous writers use narrative in a contemporary setting to describe traditional legal stories.

**Indigenous Law and Cosmology:**

Janke begins *Butterfly Song* by articulating a particular philosophical understanding of the universe. The text opens in the following way:

They say if you live on an island for too long, you merge with it. Your bones become the sands, your blood the ocean. Your flesh is the fertile ground. Your heart becomes the stories dances and songs. The island is part of your makeup. The earth. The trees. The reef. The fish. The music. The people. The sun, moon and stars surround you. You are only part of the integral world called life. You and those who follow you will always be part of it.\(^\text{604}\)

\(^{603}\) T. Janke, *Butterfly Song*, 2005, pp. 31-32, 42. Janke uses the frangipani tree as a recurring motif in the novel – it is where Francesca waits for Kit to return home from the sea and it is a comforting presence in the front yard of Tarena’s Cairns childhood home.

It continues,

They say that when you leave, the sounds of the waves stay with you. The smell of the sea is a constant, never-ending reminder. The island calls you, and your children, and their children. It will beg for you to dream it, and know it, forever. No matter where you or your children travel, the island is home.\textsuperscript{605}

This passage works, I suggest, to situate the text within an Indigenous epistemological and cosmological framework. It also represents, rather concisely, Janke’s articulation of an Indigenous narrative jurisprudence.\textsuperscript{606} At this point, it is helpful to introduce Christine Black’s definition of cosmology, which describes, she suggests, “a theory (or) story of how things happen… this is no different from the creation story, as it is a particular group’s theory of how things came to be and, more specifically, how to live in a particular place.”\textsuperscript{607} Black expands on this argument by proposing that cosmology (as story) shapes the principles, ideas, values and philosophies of societies, which in turn “inform the legal regime.”\textsuperscript{608} Larissa Behrendt has made similar observations, arguing that: “We [Indigenous people] bond with the universe and the land and everything else that exists on the land. Everyone is bonded to everything.”\textsuperscript{609} These descriptions of the connectedness of people with place match the novel’s descriptions of the depth of relationality between person and environment. They also evoke an embodied connection – “your bones become the sand… your heart becomes the stories, dances and songs” – which signals an embeddedness in place. Specifically, the reference to the ‘metamorphosing’ of the heart (which becomes story, dance and song) symbolises the emotional connection running through people with place. The prologue can be read, therefore, as underlining and foreshadowing Tarena’s relationality with Thursday Island, and also as being a tribute to the Thursday Island diaspora, who remain, the speaker suggests,

\begin{footnotesize}
\begin{enumerate}
\item T. Janke, \textit{Butterfly Song}, 2005, p. 3.
\item It can also be read, along with the narrative’s coda, as the prologue (and epilogue) to the novel.
\item C. Black (Morris), \textit{A Dialogical Encounter with an Indigenous Jurisprudence}, 2007, p. 6.
\item C. Black, \textit{A Dialogical Encounter}, 2007, p. 6.
\item L. Behrendt, \textit{Aboriginal Dispute Resolution}, 1995, p. 16.
\end{enumerate}
\end{footnotesize}
attached to the physical space in an emotional and spiritual sense – “no matter where [they] or [their] children travel.” These statements have an anchoring effect in the novel – they imply that Tarena’s belonging to the land can never be extinguished.

The narrative’s conclusion also offers a similarly profound philosophical account of Indigenous identity in Australia.

They say that each generation draws strength from the spiritual strength of those who came before. We might not know them in this physical space, but their lessons are timeless. Their wisdom compounds. Our mentors are our mothers, our fathers. Our places, our lands, our waters. Our homes, our ways. Our stories, our songs. The things we all long to dream about. It’s a cycle, a cultural cycle, and when the time comes, my dear great-great-grandchildren, you will remember my story, you will draw from my strength, and you will know I will always be there with you.611

In this excerpt, the repeated use of the possessive plural “our” stresses an ownership of material (“our places, our lands, our waters”) and non-material (“our stories, our songs”) aspects of cultural knowledge, while the reference to a cyclical time scheme, “… their lessons are timeless… it’s a cycle”, can be interpreted broadly as gesturing to the novel’s (roughly) cyclical structure. This reading is consistent with Janke’s stated desire to resist “western methods of telling story in a linear time frame”612 – possibly because a linear chronology suggests finality (a beginning, middle and end) whereas cyclical rhythms point to the future and imply timelessness and continuity.

610 T. Janke, Butterfly Song, 2005, pp. 3, 4. Tarena’s mother (who was born in Cairns) has ‘clung to’ her mother’s connection to Thursday Island.
Thursday Island:

Tarena Shaw is a twenty-something law student whose family hails from Thursday Island in the Torres Strait. Since 1988 she has lived in Sydney after moving from Cairns to study law, but now, late in 1992, is asked to attend a tombstone opening on Thursday Island.\footnote{Tombstone openings are unique to Torres Strait Islander culture, and occur usually three years after a death, when the stone on a grave is unveiled and members of the community gather to commemorate the deceased person’s life: “… mourning is over, the spirit of the deceased is released and so too the family released from mourning.” See: T. Graham, ‘Eddie Mabo’s Tombstone Opening’, \textit{Mabo: The Native Title Revolution}, June 1995, online.} Having completed her final exams (and anxious for her results), she travels north from Sydney to the small island between Queensland and Papua New Guinea. As the plane hovers above Cairns, Tarena reflects on the lives of her grandparents, who lived on Thursday Island in the 1940s at a time when their freedoms were restricted and “they were forced to be invisible.”\footnote{Tarena suggests that this control, invested in the Director of Native Affairs (and enshrined in the \textit{Aboriginals Protection and Preservation Act 1939 (Qld)}) extended over “where they could live, work, shop, study, go to the movies…” See: T. Janke, \textit{Butterfly Song}, 2005, p. 12.} Her arrival fifty years later (she wears “strappy heels”, a “black dress” and “dark sunglasses” in order to emphasise her visibility) coincides with the window of time – which Janke has described as “a happy place in legal history”\footnote{N. Cica, ‘Find a Happy Place in Legal History’, \textit{Law Society Journal}, Vol. 43, 2005, p. 25.} – between the \textit{Mabo} decision itself and the legislative enactment of the \textit{Native Title Act 1993}.

On Thursday Island, the Plata family is lifted by the success of Eddie Mabo’s litigation; they impress on Tarena the significance of the pearl carving to the family’s story, and the importance, therefore, of reclaiming it. The carving – which is now advertised for sale as a “rare jewel of antiquity”\footnote{T. Janke, \textit{Butterfly Song}, 2005, p. 16.} by a Cairns antique store – is representative of the love between Kit and Francesca Plata (Tarena’s maternal grandparents), and the connection of the family to the Torres Strait. The family – Tarena’s mother Lily, her uncle Tally and great-uncle Ron – allege that the pearl was taken illegally, and seek to launch legal proceedings against the antique dealer and Cynthia Nash, who has inherited the brooch from her father, a doctor at the Cairns Hospital in the 1950s. Lily and Tally pledge to work with Tarena to assemble evidence to show that Francesca Plata was the original owner of the pearl (and that it was carved
by their father), and that, because of its theft, they have been denied their hereditary right to the pendant itself, and the stories associated with its creation. Though *Mabo* is never explicitly invoked in relation to the pearl, I suggest that the narrative uses the case as a template for the Plata family’s litigation: their appeal to the law to adjudicate on the matter suggests that they trust it to deliver justice to the community in the same way that they have seen the High Court do for the Murray Islanders in *Mabo* (by acknowledging prior ownership of land).

**Learning Law:**

Janke uses *Butterfly Song* as a vehicle, I suggest, to reflect on legal pedagogy and the role of the law as an instrument of colonial power in Australia. By situating this critique against the backdrop of Australia’s bicentenary and the *Mabo* judgment (Tarena’s study at law school is bookended by significant cultural and legal events for Indigenous people in Australia617), the narrative is able to bring the perceived injustices of the law to light. In order to make this point, the novel focuses on a sequence of lectures delivered across the duration of Tarena’s degree, relating to tort law, the law of negligence, criminal law and property law.618

In her first ever class, the law is identified as an “inherited” system – it is birthed from British law and requires a “new language” and a “new way of thinking” to be understood. 619 Such a purposefully exclusionary characterisation forces Tarena to question whether the law is hers to inherit

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617 These developments include the *Royal Commission into Aboriginal Deaths in Custody* (1987-1991), which studied deaths in custody and brought statistical data relating to the over-representation of Indigenous people in Australian gaols to mainstream attention; marches facilitated and attended (in unprecedented numbers) by Indigenous Australians on the day of the bicentenary to symbolise Aboriginal and Torres Strait Islander survival; the popular success of the song 'Treaty' by Yothu Yindi (a band comprised of Aboriginal and non-Aboriginal members from the Northern Territory) which called for Prime Minister Hawke to honour his 1988 commitment to a treaty recognising traditional ownership by Indigenous Australians; and the *Mabo v Queensland (No. 2)* High Court judgment.

618 These episodes show explicitly how Janke’s novel can be read in relation to the theoretical concerns of ‘law and literature’ – it opens a window to legal themes and initiates a conversation about the operation of the law.

619 T. Janke, *Butterfly Song*, 2005, p. 23. This description is provided by Professor Carlson, who is caricatured by Janke – described as ‘expressionless’ and speaking with the resonance of ‘BBC radio presenter’, he embodies the ‘stuffiness’ and heritage of the law.
at all: “I don’t know if I’ll understand a word people are saying. I’m not smart enough to do this.”

Despite dedicating herself to learning to read and speak its language, she remains conscious of her marginality within the system:

We study criminal law in second year... 'The number of Aboriginal people in our gaols is disproportionate to the general population figures,' says our lecturer... I’m the only black person in the class... Am I on the right side of the law?

In other lessons, Tarena is introduced to the concepts of tort law and in particular the law of negligence. In his lectures, Professor Carlson describes a tort as, “a wrongdoing, intended or not, which causes harm for which the injured party can claim compensation.” He cites “a very old English case from the 1800s” to illustrate the purpose of rules of negligence: “we owe a duty of care to each other to avoid acts of omissions which one can reasonably foresee would be likely to injure others.” Read against the *Mabo* case, the text’s allusions to aspects of civil law prompt the reader to consider ‘wrongdoing’ and ‘duty of care’ in relation to land politics; they are drawn to recognise dispossession as an act of ‘injury’ (it is comparable to trespass or theft) and to reflect on the injustice of this process.

**Critiquing Law:**

Away from her family, Tarena is drawn to the solidarity offered by the Aboriginal Student Centre at the University of Sydney; the building housing the Centre is figured as a space of resistance within an overwhelmingly white culture. Here the students organise rallies to protest bicentenary celebrations (they protest the ritualised ‘remembering’ of a white Australia and the fiction of *terra nullius*), and also reflect on the frustration of sitting through classes

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where lecturers frame their discussions of property law in Australia through the lens of *terra nullius*. In 1988, Tarena’s friend Jessie voices her frustration:

(Professor) Carlson’s still going through the *terra nullius* doctrine. Still telling everyone that blackfellas weren’t here when Captain Cook got here. The whole law’s fucked. It’s based on a lie. What am I doing here?\(^{623}\)

In 1992, when discussion of native title looms over national debates, the law school’s rhetoric is unchanged. Again Jessie complains:

I failed property law last year. I’m not going to fail two years in a row. It’s useless. How can we learn about the law that dispossessed and controlled us blackfellas... What about the concept of *terra nullius*? Shall I tell them that this blackfella has a problem with the concept of *terra-fucking-nullius*?\(^{624}\)

Tarena holds similar concerns and asks lamentingly, “I’m the only black person in this class... what does that say about our legal system?”\(^{625}\) Her sense of isolation in this setting speaks more broadly to the marginalisation of Indigenous women (and white women, people of colour and sexual minorities, for instance) in the administration of the law, but also invites a reading of the novel in relation to critical legal studies, which argues that the lived experience of groups who have suffered through history “can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”\(^{626}\) Indeed, Mari Matsuda, who is a key theorist in the field, speaks directly to Tarena’s reservations – “maybe we are crazy to think we can learn and work within a legal system that has disregarded us”\(^{627}\) – by insisting that, “To those who believe that law is a cage within which radical social transformation is impossible, the critical legal


\(^{625}\) T. Janke, *Butterfly Song*, 2005, p. 68. The novel suggests, ultimately, that the judicial resistance to recognition of prior ownership is a factor in the numerical under-representation.


scholar can respond with the sophisticated confidence born of a significant body of scholarship. Matsuda’s remarks accord broadly with Janke’s own statements about the importance of Indigenous participation in the law, and the potential for this to bring about its deconstruction:

I do believe that you have to be in the system to change it and I think that when the Mabo case came out I saw how cases of this scale can change a whole established legal framework… Before Mabo, I’d go in there and think, “am I going to come out indoctrinated by the ideologies of this world?,” because the law is seen as a tool of that.  

*Butterfly Song* charts, therefore, the struggle by Indigenous peoples for recognition in the legal system. It uses the form of the Aboriginal *Bildungsroman* (which is focused on community identity constructions, and so diverges from the traditional *Bildungsroman* in a number of important respects) in order to chart the difficulties of this process, as well as transitions in the way that Indigenous (and non-Indigenous) characters respond to the law in a pre-*Mabo* and post-*Mabo* context. We see, for instance, the way that Tarena and her colleagues first voice trepidation at the prospect of intervening in the law in a pre-*Mabo* context (Tarena is subject to exclusion and racism, and questions whether she can overcome this to function as a lawyer—“I have so many questions… I’m scared that the words will get stuck in my throat”), but then become, in the aftermath of the June 1992 judgment, encouraged and inspired. The confidence that this legal recognition instils is felt in a very real (and practical) way in the lives of the

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630 Jeanine Leane suggests that the Aboriginal *Bildungsroman* subverts the presumption of agency which characterises the traditional *Bildungsroman*. She argues that, while political agency is a birthright of whites, it is not necessarily inherited by Indigenous subjects. As a result, the Aboriginal *Bildungsroman* has a different set of concerns, such as: “the right to an education, the right to a safe, stable living environment, the right to make one’s own decisions about the future, and most importantly the right to belong may be taken for granted by non-Aboriginal Australians.” See: J. Leane, ‘Rites/Rights/Writes of Passage’, 2013, p. 108; N. Birns, *Contemporary Australian Literature: A World Not Yet Dead*, Sydney University Press, Sydney, 2015, pp. 148-149.
characters in the novel, and is expressed in the following terms: “Who knows, I might have a chance to pass that exam after all.”

**The Pearl:**

As she sets about collecting evidence to make a compelling case for the magistrate, Tarena becomes immersed in her family’s story. By the author’s design, the reader is also immersed in this story as the narrative frame shifts between ulterior and simultaneous narration. This ‘slippage’ (of time, space, voice) has the effect of furnishing the reader’s understanding of the family’s history by providing greater context and perspective than Tarena’s first-person narration could ever allow. For instance, the chapters that are set in the Torres Strait in the 1940s describe (through third person narrative voice) Kit’s experiences as a diver, and also outline the circumstances around the pearl’s accidental discovery. \(^633\) Left wading in choppy waters by the captain of the pearl lugger, Kit swims to shore and dislodges a “deep purple, almost blue” coloured pearl. \(^634\) The next day, he begins carving the shell to present to Francesca. This episode is revisited more than fifty years later (through the frame of the simultaneous narrative) as Tarena meets with Horatio Hondu on Thursday Island to gather evidence – in the form of an affidavit – to support her case. With Horatio’s assistance (he was present on the night that the pearl was discovered), she can establish a timeline of custodianship of the pearl by recording oral histories to present to the court. \(^635\) Under oath, Horatio Hondu testifies that “Kit carved the shell into the shape of a butterfly. He gave it to his girlfriend, known to me as Francesca Plata.”

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\(^{633}\) Kit takes work as a diver, rather than as a cane cutter on the mainland, in order to impress Francesca’s brother Essa, who does not approve of his sister’s relationship – primarily because Kit is of mixed ancestry (both Malay and mainland Aboriginal) and because he plays guitar music (which Essa views as being inconsistent with Thursday Islander culture).


A Song for the Diaspora:

On Thursday Island, Tarena meets and begins a romantic relationship with Sam Silva, who is a local musician. Together, they travel to Cairns, where Sam plays at a community concert. Midway through his set, he stops to introduce the next song: “I want to sing a song I was taught by members of the Castaway Cruisers from Ti.” As soon as he begins to strum the guitar, Tarena instantly recognises the tune; it is, she suggests, “not sad, but with a melancholy edge… the lyrics… make my skin tingle.” Sam sings a verse of ‘Butterfly Song’ to the crowd who have assembled in the converted shed:

Spread your wings
Cover all the ocean
Butterfly, it’s time to try
Touch the sun
Set your dreams in motion
Butterfly, it’s time to fly
And I’ll be there with you
Yes, I’ll be there with you
I’ll always be there with you
My butterfly.

The lyrics of the song are vaguely familiar to Tarena, who has memories of her mother humming the tune from when she was a child. In an important scene, she thanks Sam for “giving the words back” to her family. His singing of ‘Butterfly Song’ fifty years after it was first performed suggests that it continues to resonate with Thursday Islanders, and moreover, that the song has established itself within Thursday Island cultural practice.

637 The parallels in the relationships between Tarena and Sam and Francesca and Kit are obvious – both women fall in love with guitar-playing outsiders (neither Kit nor Sam is native to Thursday Island).
640 T. Janke, *Butterfly Song*, 2005, p. 135. The sentiment of the song speaks directly to the *Bildungsroman* genre, which is about growth through intellectual and spiritual development.
In attempting to understand the complexities of the impending litigation, Sam asks Tarena abruptly, “How can you prove that you own a pearl shell that was found on the ocean floor?” Through her response, in which she effectively comes to terms with the vocabulary of law, Tarena invokes principles of private property and cultural heritage to argue that her family has “a better claim [to the pearl] than the Nashes” on the basis that her grandfather Kit put “skill and labour into making it his own thing.” She also introduces (by way of paraphrase) the legal philosophy of John Locke, whose conceptualisation of private ownership as a reward for individual labour underlines this claim. Central to Locke’s seventeenth-century argument, which continues to shape ideas about private property as a natural right, is the suggestion that, wherever an individual mixes their labour with “whatsoever he removes out of the state that nature hath provided”, they are entitled to exclusive possession of that property. In Butterfly Song, Tarena implies that her grandfather owns the pearl because of the labour he has invested in its production. More than this, however, she emphasises the emotional value of the item to her family – “that’s not an artefact, it’s part of our family’s heritage” – and suggests that it represents a critical aspect of their cultural heritage and intangible cultural property.

It is significant that the stripping of the Plata family’s ownership of the pearl (which occurred in a practical sense when Francesca was treated by Dr. Nash in hospital and had the pearl removed from her clasped, dying hand) closely resembles what

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642 T. Janke, Butterfly Song, 2005, p. 137.
643 T. Janke, Butterfly Song, 2005, p. 137.
644 Locke’s theory is outlined in chapter 5 of his political manifesto, the Second Treatise of Government (first published in 1690). In his writing, Locke proposed that, “God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience... As much land as man tills, plants, improves, cultivates and can use as the product of, so much is his property.” See: J. Locke, The Second Treatise of Government and a Letter Concerning Toleration, Dover Publications, London, 2012, pp. 30, 34.
645 According to Margaret Davies, Locke’s approach to property is “first and foremost a theory of and justification for enclosure, not only in Britain, not only in the so-called ‘new world’, but everywhere, anywhere, and for all time.” It was, in other words, a model for appropriation, which in application had particular limits. Davies explains that “Locke’s self-owning man was basically the free capitalist accumulator: not his wife, his male or female servants, and agricultural labourers, and much less his slaves.” See: J. Locke, The Second Treatise of Government and a Letter Concerning Toleration, 2012, p. 31; M. Davies, Property: Meanings, Histories, Theories, Routledge, Oxford, 2007, pp. 88, 90.
646 In an important scene in the narrative, in which Tarena and her mother stare at the stars in the night sky, Lily links the pearl brooch to ancestral spirits by insisting, “The stars are the eyes of the spirits... They watch over us. That carved butterfly is very important to this family and we must have it back... I believe the ancestors look after us. They try to help us out, tell us things... To get the butterfly back.” See: T. Janke, Butterfly Song, 2005, p. 119.
Janke has described as the “unchecked plundering of Indigenous peoples’ heritage.”\(^{649}\) While advocating for improved legal protection for Indigenous cultural heritage (it can be argued that this is a key concern of the novel), Janke simultaneously draws a link between the loss of cultural property and “the dispossession and disenfranchisement experienced [by Indigenous peoples] in relation to land.”\(^{650}\)

### The Role of Memory:

In its representations of legal process, *Butterfly Song* reflects on the role of memory in the law and the way that it is central to the reclamation of cultural heritage. According to memory studies scholars, ‘history’ forms an integral component of this relationship, having been shaped by (but also shaping) law and memory. Austin Sarat and Thomas Kearns suggest that law is an “active participant” in the construction of memory and history. Together, they argue that it “provides lawyers and litigants with the opportunity to write and record history by creating narratives of present injustices, and to insist on memory in the face of denial.”\(^{651}\) The law, in turn, relies on both of these (history and memory) for its legitimacy.\(^{652}\) Speaking in broader terms, Kearns and Sarat expand their argument to describe the way that, “in the adjudication of every dispute, law traffics in the slippery terrain of memory as different versions of the past are presented for authoritative judgment.”\(^{653}\) This characterisation of the “slippery terrain of memory” speaks to its representation in *Butterfly Song*, where Tarena is enmeshed in the important process of restoring and

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651 T. Kearns & A. Sarat, ‘Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction’ in T. Kearns & A. Sarat (eds), *History, Memory and the Law*, The University of Michigan Press, Ann Arbor, 1999, p. 13. As in *Mabo*, where information relating to the customs and laws of the Meriam people (details of rights and obligations concerning the occupation and use of land) were presented in court to articulate a narrative of injustice, *Butterfly Song* relies on the same principles of defense. Based on this formulation, the ‘face of denial’ (against which memory must be ‘insisted’) can be interpreted in an Australian context as the standards of evidence and rules of hearsay against which Indigenous peoples must test evidence in land rights claims (and which often have the effect of disallowing important testimony).
653 T. Kearns & A. Sarat, ‘Writing History and Registering Memory’, 1999, p. 3.
reclaiming ‘memory’ in order to present it to the court for judgment. Aunty Sugar’s incomplete recollection of the story around the pearl, and the blindness and muteness of government bureaucrat Stanley Woods, embody this ‘slipperiness’ in the narrative.654 Tarena’s task is further complicated by her family’s dislocation from the Torres Strait, and so she effectively participates in a process of (re)connecting with community, customs, knowledge and law at the same time as she builds a case for the court – the butterfly pearl is bound up in her discovery of each of these.

In their analyses of the text, both Noela McNamara and Estelle Castro have acknowledged the central role of memory to the narrative. McNamara proposes that the “story is a spiritual journey through the character Tarena to trace family memories [in order to] reclaim and regenerate her cultural identity and connection to place and space”, and that, through its representation of the Torres Strait, Butterfly Song offers, “the opportunity to witness the literary gaps and silences that belie the economic and strategic importance of this tropical space.”655 Similarly, Castro suggests that Janke’s novel “highlights that writing and songs are able to capture and constitute the memories of generations.”656 Both emphasise, in other words, that Janke uses story as a means to restore the memories of a diasporic nation.

With reference to the relationship between storytelling and memory, Castro suggests that, by attempting to undermine “western methods of storytelling” (through gaps in the chronology of the story and the use of short sentences to mimic an oral culture), Janke effectively conflates “past, present and future [in order to] conjure experience, remembrance and a specific ontological and epistemological stance.”657 To pursue this argument to its logical conclusion suggests that it is possible to assume that Janke also attempts to challenge ‘western methods’ of engaging with land in her writing, and that she does this by imagining a connection to land and material possessions (the pearl

655 N. McNamara, ‘The Literary Transformation of Memory’, 2013, pp. 232, 235. There is not scope within this chapter to discuss cultural representations of the Torres Strait Islands.
brooch in the novel) which is separate from an understanding of land/property as capital, or as a resource to be exploited. This point is made explicit in the novel when Tarena recalls her lecturer’s explanations of property law:

In property law, we learn about the law of enclosures. Possession is nine-tenths of the law. Property and ownership is all about enclosing land, putting a big fence around it. You have to make something of the land, put it and your possessions to some use. If you don’t fence it off, the land has not been put to use. If you don’t make money out of it, realise its commercial value, then land is just open space.658

On reflection, Tarena challenges this ideological-philosophical position (her lecturer articulates the importance that the law places on turning land to account, and showing visible signs of its ownership) by questioning:

Does it matter who had it before? Or whether they looked after it? Is it of concern how that dispossess occurred? What if the person who currently possesses it doesn’t understand it, or doesn’t look after it?659

By expressing these concerns, the novel opens up a discussion about ways of understanding and possessing property, using the pearl brooch as a proxy for conversations about land. It questions, for instance, whether an emotional or ethical relationship with land and/or material possessions (such as that which characterises Tarena’s family’s relationship with the pearl brooch) is more or less important in the eyes of the law than an economic relationship, in which property is put to use, commodified and negotiated in economic terms. *Butterfly Song* suggests, ultimately, that while the law is silent on many of these questions, it is not incapable of response.

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The narrative also reflects on the nature and legitimacy of non-Indigenous connections with land. It does this by raising the spectre of dispossession, and by invoking the question of theft in relation to the brooch. Specifically, Tarena argues that Cynthia Nash’s title is defective because of the means by which she has come into possession of the pearl. She contends: “a thief has no title to the property he steals and can pass no title to a third party.” In this context, Tarena’s suggestion that the Nash family’s ownership of the pearl is based in a flawed titled can be said to cast doubt more broadly over the legitimacy of other aspects of white ownership in Australia.

**Law, Story, Song – Dispute Resolution:**

When the case is finally heard in court, Tarena must defend her capacity to act on behalf of the applicants – her mother and uncle. The lawyer for the respondents, Peter Fraser, urges Magistrate Griffiths to stand Tarena down, arguing that, “this is a rather grave matter. The allegations raised are quite serious. I don’t think it is appropriate that a law student present this case.” With some convincing (the rules of the court “permit non-lawyer representatives in circumstances where the applicant consents”), the magistrate is prepared for Tarena to take the stand. She outlines the details of the case in the following way:

> My mother and my uncle, er, that is, my clients… seek a declaration on the ownership of the brooch, which they have reason to believe belonged to their deceased mother, Francesca Plata, and now to them by virtue of their being her next of kin. It was created by their father, for their mother.

In response, Peter Fraser invokes the statute of limitations, and refers to the personal harm brought upon Mrs Cynthia Nash-Hill by the Plata family’s

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allegation: “Your worship, my client is most upset that her father has been called a thief. The brooch has been in her family for nearly forty years.”

Despite the lawyer’s attempt to recast the case in the terms of an accusation of theft (he implies that the plaintiffs’ case amounts to a smear of the Nash family’s reputation), the magistrate ultimately accepts Tarena’s framing of the matter as pertaining principally to the reclamation of property. She clarifies: “I do not think theft is being argued here. According to Ms Shaw, the issue is one of prior ownership, [and] also that Mrs Nash-Hill’s title to the brooch is defective.”

Having called both her mother and uncle for cross-examination, Tarena calls her final witness, Sam, to the witness box, which he approaches with a guitar in hand. In an important explication of the relationship between Kit Plata and Thursday Island, Sam explains to the court: “The old people tell us he wrote a song about a butterfly. The old people remember him. They sometimes play the song and I learned how to play it from listening to them.” In this scene, Sam emphasises the continuing and inter-generational presence of Kit Plata at Thursday Island; it suggests that he is present despite a more than fifty-year absence. Although it is described as “unconventional”, the magistrate asks Sam to play the song – ‘Butterfly Song’ – for the court. When he has finished, Tarena explains the purpose of the performance in the following way:

The point is, your worship, the gift of the butterfly was noted in the song that my grandfather, Kit Plata, wrote. That song is still sung by people in the Torres Strait today. It has remained with my family in spirit.

In a context where the ‘proof’ offered by Tally and Lily for their parents’ ownership of the pearl has been dismissed and diminished as hearsay, the

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665 T. Janke’s cautious framing of the case is in spite of her mother accusing Dr Nash of theft, “He stole that brooch. It belongs to us. It was my mother’s.” See: T. Janke, Butterfly Song, 2005, p. 189.
reference to the pearl in the song is taken as a more concrete evidence of ownership. By explaining the link between the song and a Torres Strait Island-specific cosmology, Tarena is able to point to the psychical connection between the butterfly pearl and her family. Even though it has been absent in its physical form, the emotional connection remains strong. To draw this metaphor further, the novel suggests that Indigenous peoples maintain connection to country in spite of dispossession and its disempowering effects – the pearl, and its associated song and mythology, continues to shape Thursday Island cultural practice.

After a short recess, Cynthia Nash-Hill is called to the witness box, where she asserts that the pearl has “always” been in the “custody” and “protection” of the Nash family, who have established a collection of handcrafted jewellery, including “primitive craft forms like the brooch.” In this instance, Tarena’s questioning is as adversarial as the lawyer for the respondent. She asks of Doctor Nash in relation to the butterfly pearl, “how did he acquire it… did he pay for it and do you hold the receipt?” In the absence of her father, Cynthia is only able to offer vague answers – “I don’t know. Possibly he may have paid for it. I’m not sure if there was ever a written receipt.” When Tarena is satisfied that she has made her point (that the Nash family’s possession of the brooch is based on a flawed title) she closes her argument by acknowledging Cynthia’s recent loss: “Mrs Nash-Hill, I offer my condolences to you and your family for the loss of your father.” This is a poignant scene in the narrative, and can be read as Tarena installing compassion to an otherwise adversarial (and often brutalising) legal culture.

669 The respondents’ lawyer, Peter Fraser, seeks to have Tally’s evidence dismissed on the grounds that it is hearsay. Australian law has adapted in the past thirty years in order to more readily accommodate what is described as hearsay evidence – particularly when it is given by Indigenous Australians in relation to the explication of customary laws and traditions. The Evidence Act 1995 outlines that, “the hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.” See: Evidence Act 1995 (Cth).
670 T. Janke, Butterfly Song, 2005, p. 269. Her reference to the pearl as a “primitive craft form” is revealing insofar as it suggests a particular attitude to Indigenous cultures.
672 T. Janke, Butterfly Song, 2005, p. 269.
673 T. Janke, Butterfly Song, 2005, p. 270.
As the case reaches its final stage, Magistrate Griffiths asks Cynthia Nash-Hill’s lawyer to respond on her behalf. In a rather desperate display (it is clear that he has lost the magistrate’s favour), the lawyer invokes the “issue of tenure of holding”:

The brooch has been in the possession of the Nash family for some forty years... Until now, no claim has ever been made by the Plata family; there are no police records of any claim for loss of property, and neither do the hospital records reflect any discord on the part of the family. I submit, your worship, that the brooch was abandoned. And possession is nine-tenths of the law.674

He proposes, in other words, that because the Plata family has failed to record the loss of the pearl through official channels (to police, staff at the hospital), they have forfeited their claim to its ownership. Tarena objects strongly to this provocation, and impresses upon the magistrate the strength of the Plata family’s claim: “That’s twelve years of prior possession by my family, and the song, the story of the brooch, has never left [her] family’s possession.”675 Here Tarena implies that the non-material aspects of the pearl carry an intrinsic value for the family, and that these are not easily recognisable to the court or to the respondents. By insisting that the song and story of the brooch has “never left [her] family’s possession”, Tarena also invokes the idea of continuity of connection, which in turn invites a reading of the story of the pearl in relation to the Mabo story, and native title law more broadly. In particular, the novel can be said to open up a discussion around the limiting legal conditions for proving continuity of connection to country; where native title law requires claimants to show continuity of connection to a ‘pre-sovereign’ time, Butterfly Song suggests that diasporic communities maintain their connections with place – regardless of a physical absence. In other words, though Tarena and her family have lost possession of the pearl,

their claim to its ownership survives because they maintain knowledge of the
stories bound up in its creation.

A Non-Judicial Resolution:

Shortly after the magistrate is presented with the butterfly brooch for viewing,
Uncle Essa (the brother of Francesca) enters the courtroom, promising to be
able to prove the truth of the Plata family’s claim. Standing in the aisle of the
court, and without being sworn in, he encourages the Magistrate to loosen
the clasp at the back of the pearl. Described as being ‘flustered’ by this
development, the lawyer for the respondent raises his objection to this
breach of process with the magistrate: “Would you believe the outburst of a
member of the public who’s just walked in off the street?”

Once in the witness box, Uncle Essa (who insists that he be referred to in
this way – perhaps in an effort to undermine the court’s convention and/or to
have his seniority within the Indigenous community recognised and
respected by this court of law) reflects on the nature of his relationship with
his sister Francesca and her husband Kit. Speaking directly and cathartically
to Tarena he concedes, “Your grandfather was a good man. I know that now
and I’m very sorry... We have lost a lot.” His use of the possessive plural
‘we’ gestures to the literal loss of the pearl (it is a ‘loss’ felt by many) and all
that it signifies – such as the ability to restore a fractured family. Following
this moment of reconciliation (where Essa’s entrance signals not just a
resolution to the legal dispute but also an end to the longstanding family
dispute, as well as a literal intervention of Indigenous culture in a white legal
process), Uncle Essa reveals to the magistrate that, “the carving on the back
of that butterfly is a guitar. I saw that brooch only once before... in 1942 on
Thursday Island. Before they both left.”

recognise the formality of the law and its institutions.
678 T. Janke, *Butterfly Song*, 2005, pp. 277, 92. Many Thursday Islanders (and Torres Strait Islanders
more generally) were transferred to the Australian mainland during WWII as “war moved into the
Pacific like the creep of coral rot.” This relocation, which resulted in the dislocation of people from their
the brooch is important within the context of the narrative because it references Kit’s guitar playing (which has been identified as a non-traditional expression of culture) and the way that this has been taken up on Thursday Island as a means for expressing and connecting with identity. The guitar symbolises, therefore, cultural adaptation, and so stands as a strident rejection of the so-called ‘frozen in time’ approach to tradition that has been taken in a number of important native title cases (such as Yorta Yorta). The pearl becomes, in this light, multi-functional, being both a means to reconciliation, a mimetic for cultural adaptation and the legal recognition of prior possession, as well as an object for imagining a more flexible and sympathetic future for legal claims within the white legal system.

When Magistrate Griffiths confirms that the pearl is indeed engraved with the etching of a guitar, the respondent turns to her lawyer and concedes, “I’ve heard enough… I want to give them back the brooch. It belongs to them.” With this concession (the evidence of the Plata family has convinced the respondent of the injustice of the loss of possession of the pearl), the magistrate concludes the case by declaring, “Let the record reflect that Mrs Nash-Hill wishes to withdraw the item from sale and has asked that it be returned to the immediate descendants of Kit and Francesca Plata.” At this moment, Cynthia and Lily engage in a symbolic handover, whereby the former literally relinquishes possession of the brooch and her title to it. The court is saved from adjudicating on the matter and the magistrate congratulates Tarena: “You persuaded Mrs Nash-Hill before I gave my decision.” The implication of the respondent’s return of the brooch is that the legal decision is effectively taken out of the hands of the law (the case reaches its resolution without judicial intervention) and that the court becomes, essentially, a space for the sharing of stories. Speaking to her lawyer, and described as ‘quivering’, Cynthia Nash-Hill insists, “I want to say...”

homelands, had the effect of severing ties between families (Essa’s estrangement from his sister began prior to this time, however).

681 T. Janke, Butterfly Song, 2005, p. 278.
682 T. Janke, Butterfly Song, 2005, p. 279.
sorry to this family.” Inviting Lily to refer to her by her first name, the two women embrace and the case is effectively closed.

**Conclusion:**

The implication of this ending – which reads as a fantasy of justice realised – is that justice prevails when courts are exposed to the stories of Indigenous dispossession (in the case of *Butterfly Song*, the brooch provides a ‘way in’ for readers to imagine dispossession more broadly). It links justice with truth and imagines that litigants will be moved to act with compassion and respond sympathetically when claims of injustice are presented in impassioned and narrativised terms. This vision is complicated somewhat in the novel’s conclusion, however, when Tarena is misrecognised by a magistrate as a defendant – rather than a lawyer – in a criminal case. The episode stands as a qualification to the narrative’s hopeful conclusion (it suggests that the whole world of the law in Australia has not been transformed) and as a reminder of the disempowering consequences of the law’s prejudices. Embarrassed but not deterred, Tarena composes herself and locates the correct court. She draws strength from the events of the past six months, and particularly her reconciliation with family, the restitution of the butterfly brooch (through which she has been introduced to the mythology of Thursday Island) and the successful prosecution of the case itself. These developments can be read within the broader terms of the *Aboriginal Bildungsroman* as representing Tarena’s ‘coming into being’ within the legal profession and her own cultural identity. Despite conceding that “it would be easy to run”, Tarena is finally convinced of her belonging in this (legal) place – “I will learn and I will get used to this.” Like a butterfly, she has grown and now she flies.

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684 Another aspect of the narrative’s resolution involves Tarena being healed of eczema, which occurs after she has been given a parting gift from Uncle Essa, which is an ‘island medicine’ paste made from the petals and roots of native, tropical plants. See: T. Janke, *Butterfly Song*, 2005, p. 285.
685 T. Janke, *Butterfly Song*, 2005, p. 292. Having been gifted the pearl by her mother, Tarena has had the brooch refashioned as a pendant attached to a necklace, which represents a new kind of cultural adaptation.
In the years since *Mabo*, Aboriginal writers have used fiction as one of a number of ways to respond to the evolution of native title and the politics of identity and sovereignty. In *The Boundary*, Nicole Watson provides a potent critique of native title, and suggests that it has failed to deliver justice to Indigenous communities (in the way that many expected it would). The novel, which is at once an example of crime fiction, legal drama, postcolonial detective fiction and magical realism, traces the mystery surrounding a series of inexplicable murders that occur in the shadow of a failed native title litigation. In this chapter – which represents the first substantive scholarly engagement with Watson’s text – I will explore the ways that Watson uses crime fiction and magical realism to explicate an Indigenous jurisprudence.

**Critical Survey:**

Nicole Watson is a Birri-Gubba woman of the Yugambeh language group and was admitted as a solicitor to the Supreme Court of Queensland in 1999. In the time since, she has worked as a lawyer (for the National Native Title Tribunal), researcher and teacher – most recently as a lecturer in law at the University of Sydney. In writing *The Boundary*, Watson draws on her knowledge of the law and her experience as an Aboriginal woman (she is uniquely placed to reflect on the complexities of the native title system) to construct a narrative about Indigenous dispossession which is both illuminating and a stinging social critique.

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Published by UQP in 2011, Watson’s debut novel has been well received without achieving significant scholarly attention.\footnote{N. Watson, The Boundary, University of Queensland Press, St Lucia, 2011. Watson won the David Unaipon Award for Best Unpublished Manuscript by an Indigenous Author in 2009.} It has, however, been favourably reviewed in a number of newspapers and literary blogs. Anita Heiss, for instance, credits Watson with presenting complex and difficult stories in a skilful and compelling way, while Linda Funnell describes The Boundary as “polemical, passionate and deeply felt... a novel of irresistible energy and an urgent cry for justice.”\footnote{See: A. Heiss, ‘Review: The Boundary by Nicole Watson’, Anita Heiss Blog, January 2012, online; L. Funnell, ‘Nicole Watson: The Boundary’, The Newtown Review of Books, March 2012, online.} The Boundary has also been critiqued by a small number of online (non-peer reviewed) crime fiction blogs, who praise the novel for its incorporation of supernatural elements in a “compelling and nicely understated way.”\footnote{See: B. Bean, ‘Review: The Boundary by Nicole Watson’, Fair Dinkum Crime, October 2011, online; ‘The Boundary: Nicole Watson’, AustCrime, June 2011, online.} In the Australian Women’s Book Review, Jacqueline Lamond highlights Watson’s use of “short, direct sentences [and] realistic dialogue” and suggests that this “gives the reader access to the minds of many of the characters.” She expands on this claim by arguing that, “the book is a thin veil of fiction thrown over many layers of fact, and dressed up with a touch of fantasy.”\footnote{J. Lamond, ‘Crossing the Boundary: Raising the Issues we Prefer to Ignore’, Australian Women’s Book Review, Vol. 23, No. 1, 2011, pp. 6-7. This is a fair criticism, given the way that the novel invokes – and disguises – real events, real people and real places (Musgrave Park in Brisbane becomes Meston Park, for example).} In his review, which is the least favourable, Dean Biron laments that, despite being a novel of promise, The Boundary “loses its way” and struggles under the weight of its “potpourri of genre.” In other words, he argues that Watson attempts to do too much in her debut novel.\footnote{D. Biron, ‘Genre Everything’, Australian Book Review, No. 334, 2011, p. 29.} In the deepest critical engagement with the text to date, Katrin Althans has drawn an incisive link (in an essay on Aboriginal gothic literature) between The Boundary and Sam Watson’s novel, The Kadaitcha Sung.\footnote{S. Watson, The Kadaitcha Sung, Penguin Books, Ringwood, 1990.} In doing so, she reflects on the role of the kadaitcha – a ritual executioner in Aboriginal mythology – in the narrative, and situates The Boundary within an emerging canon of Aboriginal gothic literature.\footnote{See: K. Althans, ‘White Shadows: The Gothic Tradition in Australian Aboriginal Literature’, 2013, p. 149.} These themes, and Althans commentary, will be developed in the analysis that follows.
In *The Boundary*, the (fictional) Corrowa people are the traditional owners of the land that is now metropolitan Brisbane. The novel is set in the city’s inner suburbs, and in particular at Meston Park, which is sandwiched between South Bank (Brisbane’s premier tourist district) and the rapidly gentrifying West End, which is divided from the north to the south by Boundary Street—a physical and psychological anchor in the narrative. Historically, West End has been “a catchment area for those who were not welcome in Brisbane’s middle class suburbs: immigrants, artists [and] Murris.”694 Today, however, Boundary Street is both a significant arterial road and the home to dozens of cafes, restaurants and other signs of Brisbane’s prosperity. This prosperity masks the misfortune and misery of the local population of Corrowa people, who fear that, because of the pace of change (which is framed as progress by developers and politicians), their voices will be muted and their stories of dispossession forgotten.

The narrative begins with the discovery of the bloodied body of a man, his “Crown” bare and pale, “skirted by tufts of black hair locked in a macabre dance with bloody tissue.”695 The presence of feathers at the crime scene, which circle the dead man’s head “like reefs surrounding an island”, emerge as a key clue in the search for the killer, and ultimately become the killer’s ‘calling card’ as the dead bodies multiply. Attending Detectives Andrew Higgins and Jason Matthews are surprised to learn that this is a judicial killing—“a rarity in Australia.”696 From this point, the temporal sequence of the narrative is disrupted, and the focus of the story shifts to the Federal Court thirteen hours earlier, where the Corrowa people’s claim for native title over Meston Park is rejected by the dead man, Justice Bruce Brosnan.

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695 N. Watson, *The Boundary*, 2011, p. 1. The term ‘Crown’ here is used as a metonym to imply the power of the judiciary and the authority of the state.
696 N. Watson, *The Boundary*, 2011, p. 2. In this context, a "judicial killing" refers to the murder of a member of the Australian judiciary.
(Postcolonial) Detective Fiction:

In their marketing of the text, University of Queensland Press draw upon the trope of concealment in order to declare that, “The Boundary is new Australian crime that will keep you guessing.” The influence of the detective fiction genre in the narrative is evident insomuch as it is a novel about the detection of a series of crimes, where the law is tested and justice is sought. In her commentary on the novel, Watson has reflected on the potential of detective fiction to act as a vehicle for the expression of political ideas. She explains:

In detective fiction, you tend to have flawed protagonists, you have a really quick pace, you always have something at stake, and because of all of that you can weave social commentary into your writing. Crime writers tend to reflect the big questions of the day in a very entertaining way.697

By drawing a link between crime fiction and politics, Watson effectively endorses the genre as a vehicle to explore issues of native title and land ownership in post-Mabo Australia, and, simultaneously, invites a reading of the text as an example of postcolonial detective fiction. As a preliminary to a close reading of The Boundary, I will outline the generic conventions of crime fiction, before proceeding to an analysis of the ways that Watson’s novel problematizes this genre.698

In his essay ‘The Detective as Reader: Narrativity and Reading Concepts in Detective Fiction’, Peter Huhn argues that detective fiction is characterised by a double-plot structure – that is, the story of the crime (concerned with action) and the story of the investigation (which is concerned with knowledge). Rather than being separate, the two ‘stories’ are interwoven and adhere generally to a prescribed sequence of narrative events which follow

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698 There is not scope within this thesis to develop a thorough analysis of the genre; instead I refer to critical material to make a number of broad observations.
the following pattern: a community in stable order; a crime, or series of
crimes, occurs; the crime becomes a destabilising event for the community
and the set of rules and regulations that has previously governed public order
is discredited (they have failed inasmuch as the crime has occurred); police
fail to apprehend the criminal/s; a detective takes charge and solves the
crime and in the process reveals a series of clues that have been concealed
from the reader; the narrative ends with the existing social order restored. 699
Because “every murderer inescapably leaves traces” and the “murder story is
always in some way imprinted on the world”, the detective (and reader) are
responsible for uncovering and reading the clues left by the murderer
(author), and for producing a coherent narrative – that is, one which ascribes
to the conventions outlined above. 700

In this chapter, I suggest that the structure of the detective fiction novel is
complicated by the emergence of the postcolonial crime narrative, which
proposes a re-reading of the genre with a view to examining both the function
of race within detective fiction and the influence of race and ethnicity on the
production of the text itself. 701 Accepting that detective fiction has been
historically an implement of the hegemonic processes of the Western nation
state, “tantalising readers with aberrant, irrational criminality while assuring
them that society ultimately coheres through a shared commitment to reason
and law,” 702 Matzke and Muhleisen argue that the postcolonial brings
“resistance, subversion and ethnicity to the genre of crime fiction.” 703
Elsewhere, Knight invokes Homi Bhabha’s theorisation of the processes of
“colonial imitation” (whereby colonised peoples adopt the coloniser’s

699 P. Huhn, ‘The Detective as Reader: Narrativity and Reading Concepts in Detective Fiction’, Modern
700 P. Huhn, ‘The Detective as Reader’, 1987, p. 454. For more on the structure and characteristics of
detective fiction (particularly the whodunit, thriller and suspense forms), see Tzvetan Todorov, ‘The
701 Stephen Knight has been at the centre of the study of postcolonial detective fiction in Australia. See:
S. Knight, Continent of Mystery: A Thematic History of Australian Crime Fiction, Melbourne University
1997, online.
702 N. Pearson & M. Singer (eds), Detective Fiction in a Postcolonial and Transnational World, Ashgate
iterations, detective fiction has connected the imposition of law and order to colonial and postcolonial
spaces.
703 C. Matzke & S. Muhleisen (eds), Postcolonial Postmortems: Crime Fiction from a Transcultural
discourse both as a means of resistance and as a way of identifying with power\textsuperscript{704} to argue convincingly that Aboriginal writing in the crime genre “is a striking example of the colonised possessing and using as a weapon the instruments of the coloniser.”\textsuperscript{705} In Australian postcolonial detective fiction, this subversiveness materialises in the use of the text as a vehicle for matters of political and social urgency, and also through the racialising of the detective figure – who has historically been white.\textsuperscript{706}

In *The Boundary*, questions of stolen land, stolen children and black deaths in custody are introduced and left unresolved, thereby subverting both the hegemony of the detective fiction genre and the Western nation state. For example, rather than being set in a society of stable social order (as convention demands), *The Boundary*’s West End is characterised by a self-evident lack of community order and social cohesion. This lack is characterised as “a war between the new rich and the old poor”,\textsuperscript{707} between the interests of the Corrowa and all others, where politicians and cultural elites act out of self-interest and for self-gain. Instead of introducing dysfunction to a socially cohesive society, crime functions in *The Boundary* to destabilise an already dysfunctional society, further bringing to the surface a series of existing social and political tensions. Within the narrative, the Corrowa’s unsuccessful native title claim is positioned as an explosive catalyst for events to come.

**A Series of Murders, Multiple Suspects:**

Following the discovery of the bloodied body of Justice Bruce Brosnan, a series of murders takes place – each successive killing highlighting the

\textsuperscript{705} S. Knight, ‘Crime Writing Australia’, 1997, online.
\textsuperscript{707} N. Watson, *The Boundary*, 2011, p. 73.
impotence of the police and the judiciary, whose power appears to have been usurped. Told primarily through the third-person mode, the narrative perspective in *The Boundary* shifts between characters across the text – all are deeply flawed and have a binding connection to the Corrowa community and/or the native title claim. As is typical of the detective fiction genre, the narrative is set up so that, for each murder, there are a number of suspects and a number of clues – a classic whodunit – which are revealed to the reader as the narrative evolves and pressure on the police escalates.

Miranda Eversley is the narrative’s primary protagonist: she is a Corrowa woman and native title lawyer who is left humiliated by the failure of the group’s claim over Meston Park. Her increasingly reckless behaviour (she is an alcoholic, exercises poor judgment in her private life) threatens to manifest itself as violence, and this is particularly so when she is found to be in possession of – and cannot explain away – a bloodied knife and red feathers on the morning after one of the murders. Her father Charlie is a high-profile Aboriginal activist who established a reputation as a radical in the 1970s. Having existed at the margins of the law since his youth (he has been witness to violent deaths in custody and has a deep distrust of institutions of white power), Charlie struggles to reconcile his politics with his daughter’s engagement with the dominant legal system. Through his knowledge of the link between the Corrowa people and the extinct Paradise Parrot (the source of the red feathers), Charlie becomes a secondary suspect in the investigation.

Aunty Ethel Cobb lives with Charlie in West End and appears as a key witness of the plaintiffs in the Corrowa peoples’ native title case. Her evidence (her claim to be a Corrowa woman and to have knowledge of the Corrowa peoples’ laws and customs) underpins the groups’ argument, but is rejected by the Federal Court because of doubt around her cultural identity.708 In the aftermath of the failed claim, Ethel is ‘visited’ by Red

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708 Ethel’s claim to be both Corrowa and the custodian of cultural knowledge is undermined by her having been orphaned at a young age – the court finds it implausible that she could have developed any kind of cultural knowledge after having spent her adolescence in a state-run mission.
Feathers (a cleverman or kadaitcha) and issues him with instructions in relation to vengeance killings. Because of her small frame and old age, she is dismissed as a suspect in the preliminary investigations.

The failure of police to resolve the initial crime contributes to a growing sense of panic as the number of inexplicable deaths escalates. Dick Payne’s murder is shockingly abrupt and comes as he scales the heights of political influence in Queensland. Through a proposal to cut welfare assistance to Aboriginal recipients he is endeared to the ruling class, but is simultaneously alienated from his own people (he is an Aurukun man) who perceive that they bear the burden of his search for personal advancement. Payne’s overriding political philosophy is one of ruthless pragmatism – “radicals dance on the floor of principle, but that [is] all they ever [do]. He on the other hand, live[s] and breathe[s] change” – and this places him at odds, for example, with Charlie Eversley.

The third victim is Senior Counsel Harrison McPherson, who is killed shortly after his promotion to the position of President of the National Native Title Tribunal. His appointment is especially galling for Ethel Cobb, given that McPherson has spent “hundreds of hours debating legal points that all share the aim of denying the Corrowa their identity.” As with the other murders, the killer leaves no signs of forced entry at McPherson’s home – only red feathers.

Detectives Andrew Higgins and Jason Matthews lead the police investigation – codenamed ‘Taskforce Themis’ – after the discovery of Justice Bruce Brosnan’s body. Higgins is brash, bitter and uncompromising in his policing, while Matthews is much less confident, and must negotiate a difficult path,

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709 N. Watson, The Boundary, 2011, p. 172. I will have more to say about this, and the role of the kadaitcha, later in the chapter.
being an Aboriginal officer of the law in a society where Indigenous peoples face structural and systemic disadvantage within the law. As the body count rises, and the link between the murders and the Corrowa native title litigation becomes harder to deny (up to this point, Detective Higgins has dismissed speculation about the deaths being vengeance killings as “voodoo bullshit”\(^\text{712}\)), Miranda Eversley is called in to represent Ethel as she gives evidence to Higgins and Matthews. She is instantly intrigued by the codename ‘Themis’ and asks Detective Matthews, “Didn’t she have something to do with the law?”\(^\text{713}\) There is an unacknowledged irony in the novel to the naming of the investigation after the ancient Greek symbol of divine law, which invokes concepts of justice and divinity.\(^\text{714}\) At McPherson’s home, where his dead body is found lifeless on a “black and white rug… overwhelmed by blood and feathers”, \(^\text{715}\) Themis is invoked literally (a statue of the Greek goddess sits at the foot of a staircase) to code the lawyer’s death as an example of divine vengeance.\(^\text{716}\) This framing invites a cross-reading of criminal law with a transcendental natural law. It also complicates a reading of Detectives Higgins and Matthews as agents of justice, responsible for defending a system of law under siege. By recasting the deaths of Brosnan, Payne and McPherson as episodes of divine vengeance, the novel exposes the conceits of the dominant legal system (each of the men engages in unethical and/or illegal behaviour) and also issues a challenge to the legal authority of the Australian nation state.

The police investigation takes place against a backdrop of hostile race relations in inner city Brisbane, where radio commentators and opposition politicians exploit the possibility of the involvement of the Corrowa community in the killings, and simultaneously warn against the re-emergence of a radical black politic in the absence of the ‘moderating’ influence of Dick Payne (who is described by Miranda as a “poster boy for the new assimilation

\(^\text{714}\) Miranda’s “curved lips” and “half-smile” suggest that she is conscious of this irony and perhaps, of much more. See: N. Watson, *The Boundary*, 2011, p. 148.
\(^\text{716}\) Natural law argues that law originates in a divine proclamation, or is inscribed in the natural world. It is often distinguished from the theory of positive law, or legal positivism, which says that law originates in the command of a sovereign.
agenda”). In the state parliament, the Leader of the Opposition challenges the authority of the Premier, who has been unable to negotiate with an increasingly agitated assembly of Corrowa people gathered at Meston Park:

For the past week, members of the Corrowa tribe have been living in tents in Meston Park. Their leader, the notorious radical Charlie Eversley, insists that Meston Park belongs to them. Surely, we cannot allow this anarchy to continue. The Federal Court determined that the Corrowa People’s native title was extinguished. I ask the Premier, when will the Corrowa People be forced to respect the umpire’s decision?

The Opposition Leader’s framing of this matter as a question of respect for the rule of law points to a perception of injustice felt by white Australians since the decision of the High Court in *Mabo* (and later cases, such as *Wik*). The invocation of anarchy supposes lawlessness (which becomes a viable fear to exploit following the string of judicial killings), and also reflects a paranoia about entitlement to land and property. Crime fiction scholar Stephen Knight describes this paranoia as a distinctively postcolonial anxiety, which manifests as a fear of the power of the land and that which cannot be seen. He argues that this reflects a “curious displacement of human agency onto the land, as if it has itself become the law, as if having declared *terra nullius* has given that *terra* a quasi-human power of its own.” While Knight’s argument is compelling, it unfortunately discounts the ontological experience of Indigenous Australians, for whom the land has always already had this capacity: according to Larissa Behrendt, “land was always, and continues to be, the source of social, spiritual and legal arrangements.” The novel’s engagement with these questions enlarges

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the narrative’s discursive framework and situates the politics of race in a larger political frame.

**The Boundary as Legal Drama – the ‘Washing Away’ of Native Title:**

Through its representation of the Corrowa native title litigation, *The Boundary* engages in a dialogue on the justness of the justice system, and uses this to provoke reflection on the implications of native title for Indigenous communities. The narrative reflects on the hardness of the law, for example, by characterising cross-examination as being like “opening your skull and inviting a stranger to dissect everything within it”, while also describing litigation as “a swimming carnival where, in order to win, [you can't] get wet.”

Through metaphor, Watson emphasises the difficulty of effective engagement in the legal process (she implies that it is, in fact, impossible) and situates the Corrowa people as outsiders in a system where they “bristle on the periphery.” In its descriptions of the scene at the Federal Court, the narrative invokes an arena of combat: the Corrowa – who fight a “losing battle” – line up against a “battalion” of bureaucrats who “guard the public interest”. Claims are “bludgeoned” with “jackhammers” disguised by “eloquent legalese”, and lawyers “fire bullets” unthinkingly at other lawyers.

This scene suggests that the native title process is chaotic and violent – rather than an embodiment of the legal ideal of rational debate – and that the Corrowa are effectively sidelined from the machinations of decision-making.

In dismissing the Corrowa case, Justice Brosnan invokes Justice Brennan in *Mabo* to declare, in relation to the question of native title, that “it is not the business of this Court to attempt to correct history by appealing to contemporary notions of social justice.” Brosnan’s invocation and refusal of Brennan’s ruling points both to a conservative reading of the law, and to an

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725 N. Watson, *The Boundary*, 2011, p. 6. Brennan had argued for the capacity of the court to modify the legal system “to bring it into conformity with contemporary notions of justice and human rights” but also warned against destroying its basic fabric. See: *Mabo v Queensland (No. 2) [1992]* at 29.
unwillingness to apply principles of human rights and justice to the Corrowa people. More broadly, the case also references the unsuccessful *Yorta Yorta* litigation, in which Justice Olney of the Victorian Federal Court ruled that the traditional connection to country of the Yorta Yorta people had been ‘washed away’ by the “tide of history.” According to David Ritter, this justification casts colonisation as a “natural and inevitable force” of the past, and provides for an exculpation of white guilt. In *The Boundary*, Justice Brosnan echoes Olney’s judgment by judging that:

In light of what we now know about Queensland’s former Aboriginal reserves, it is highly unlikely that the Corrowa would have been able to continue to practise their traditional laws and customs… Ultimately, I find that the Corrowa ceased to practise their traditional laws and customs soon after they were removed to the Manoah Mission. Therefore, the claim must fail.

To validate and historicise the Court’s decision (that the Corrowa peoples’ displacement from their traditional lands has sufficiently eroded connection to country), Brosnan refers to the unpublished memoir (circa 1920s) of mounted policeman Horace Downer. His writing is presented as “the most reliable evidence of the content of the traditional laws and customs of the Corrowa” and is used as a framework against which to compare the contemporary cultural practises of the claimants, as well as to account for the movement of the Corrowa people away from their lands. The novel does this to highlight the problematic assumption that the Corrowa people must exist ‘in a vacuum’ in order for the law to recognise their connection to country (a ‘frozen in time’ approach), and to draw attention to the flawed process whereby settler narratives are called on to provide a picture of an

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726 See: *Yorta Yorta v Victoria (1998)* at 126.
728 N. Watson, *The Boundary*, 2011, p. 9. This reflects the law’s privileging of the written (white) word over Indigenous oral traditions/histories.
729 Downer’s narrative is recast later in the novel when the story of frontier conflict is told from the perspective of the Corrowa people.
‘authentic’ Aboriginality. In this instance, The Boundary can be seen to echo the Yorta Yorta case and its use of the diary of the prominent pastoralist Edward Curr, which effectively denied contemporary Indigenous claimants native title to their land. Like Olney in Yorta Yorta, the fictional Justice Brosnan can be said to err by viewing the writings of Downer as “transparent windows on historical reality” – the result of which is to place Downer in a position to (once more) smother Corrowa resistance.

**Reading Law in The Boundary:**

Miranda responds to the Federal Court’s rejection of the Corrowa application by losing faith in the capacity of the law to deliver just outcomes to Indigenous Australians. She verbalises this disillusionment by explaining to Detective Matthews that the longer she stays in the law, “the less [she] cares for its blunt instruments.” In a later episode, when Miranda’s lawyer-friend Jonathon proposes a toast to the law, praising the “noble people” who attempt to “inject compassion” into it, Miranda expresses doubt by asking if this is possible. These statements about the law’s violence (and the need to “inject” it with compassion) can be read through the prism of ‘law and literature’ scholarship, which proposes that the ‘ethical void’ of legal discourse can be addressed by reading (or practicing) law with regard to the complexities of human experience. Based on this exchange, it is clear that Miranda and Jonathon view themselves as agents of a compassion-based law; this approach is contrasted with that of Justice Brosnan, who, by distancing the court from “contemporary notions of social justice”,

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731 Samuel Furphy has argued that the ‘tide of history’ argument has become a telling metaphor for the general path of native title jurisprudence in Australia: “if applicants do not win the historiography (then) they will lose the case.” See: S. Furphy, ‘Our Civilisation has rolled over thee: Edward M. Curr and the Yorta Yorta Native Title Case’, History Australia, Vol. 7, No. 3, 2010, p. 2.


733 S. Furphy, ‘Our Civilisation has rolled over thee’, 2010, p. 10. Furphy suggests that this reliance on the gentleman’s memoir reflects an unimaginative and empirically flawed methodology.


simultaneously appeals to the formalism of the law and absents Corrowa experience from the native title litigation.

In *The Boundary*, Watson uses Miranda’s father Charlie as the vehicle through which to present its most forceful critique of native title. His promotion of the politics of civil disobedience (Charlie rallies the Corrowa community by reflecting on the radical politics of his youth: “When we were calling out, ‘what do we want?’ I don’t remember anyone answering, ‘native title!’”736), for instance, signals his role as an ‘outsider’ in the law, and also provides a template for alternative activism in the novel.737 As he organises a tent embassy at Meston Park (a potent symbol of Indigenous sovereignty vis-à-vis a reclaiming of Corrowa land), Charlie reminds the crowd that, “on this very piece of land, our ancestors fought a brave battle against the native mounted police.”738 Importantly, he suggests that the surviving Corrowa people should “stay true to the values of our fallen warriors – our judges.”739 In other words, he urges resistance to native title – which he describes as a “poisonous diversion”740 – and instead advocates the politics of sovereignty, which is a particularly subversive political position in the context of Watson’s Brisbane (his eventual death in custody makes this clear). In a further statement of resistance to native title, the novel presents (in italics for emphasis) a radical critique from the perspective of Miranda:

No sound bites of screaming kids, no mass casualties. No eyes of the world staring in indignation. Native title is the most sophisticated weapon they have fired at us yet. Break our minds with invisible bullets, until we can no longer believe that we are who we say we are. This judgment will poison our insides like Agent Orange. Deform our children before they are born, so that they will never see their own reflection, only the distorted image

737 This has the effect of distinguishing Charlie from his daughter who, by virtue of being a lawyer, can be said to work ‘inside’ of the law. Charlie is uncomfortable about this, and reminds Miranda that she “was a Corrowa before she was a lawyer.” N. Watson, *The Boundary*, 2011, p. 130.
the law sees fit to provide them. If we no longer have our traditional connection to country, then who are we? Refugees who have never left our own land?  

Here the novelist calls on contemporary cultural theory, as well as a human rights discourse, to reflect on native title as a disguised form of genocide. Watson’s reference to “invisible bullets” can be read as an inference to Stephen Greenblatt’s essay, ‘Invisible Bullets: Renaissance Authority and its Subversion’, in which he reflects on subversiveness and containment, and the “Machiavellian influence” of religion in colonial Virginia (specifically the imposition of Christianity on the native Algonkian people). The Boundary uses Greenblatt’s argument to reflect on the way that political agendas are disguised in order to manipulate and compel obedience, and to draw a link between this deception and native title, which is cast as an ‘invisible bullet’ that inflicts carnage on communities. A major element of this destructiveness is, according to Miranda, the distorted picture that native title reflects back to claimants. Here, Watson can be said to make an oblique reference to Lacan, and his critical reading of Freud’s mirror stage, which refers to the processes of psychical development and perceptions of selfhood. The implication of this is that the native title process contributes to a disfiguring of Indigenous identity, and in particular, a reshaping of Aboriginality in order to suit the political agenda of the Australian nation state. Finally, Watson appeals to the language of human rights in order to reflect on an absence of rights in the native title process; she condemns the silence of the international community (“no eyes of the world staring in indignation”) and casts claimants as refugees – thereby implying their statelessness.

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Reading Magical Realism in *The Boundary*:

Magical realism has been used as a productive lens through which to read texts that combine elements of the real and the fantastic in such a way that surreal events and environments are presented as real. It marks a radical departure from the postcolonial detective fiction genre, which, while being capable of delivering a critique of law and epistemology, is limited in terms of its ability to make sense of the model of reality presented in *The Boundary*. This is largely because its emphasis on empirical evidence and scientific rationality forecloses engagement with (what is described in the novel as) “blackfella business.” In the following section, I will introduce a number of theoretical approaches to magical realism, and consider its links with postcolonialism and detective fiction through a close reading of *The Boundary*.

Literary scholar Stephen Slemon argues that, “the concept of magic realism is a troubled one for literary theory.” This is because, he suggests, it has failed to distinguish itself from neighbouring literary genres, such as metafiction, the fantastic, the uncanny and the marvellous. In her writing, Wendy Faris has attempted to address this perceived lack of critical definition by outlining five characteristics of the mode, which are said to be: an irreducible element of magic; a strong presence of the phenomenal world; the merging of two ‘realms’ within the narrative (the magical and the non-magical); the disruption of received ideas about space, time and identity; and the requirement of the reader to reconcile two contradictory understandings of events in their reading of the text. Although Faris’ conceptualisation has been criticised for oversimplifying the genre, I suggest that it provides a

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747 Kenneth Reeds has suggested that Faris contributes to a ‘remystification’ of magical realism primarily because her definition is too inclusive (it includes the fantastic). Similarly, Tamas Benyei has likened Faris’ defining of magical realism to the processes of postcolonial reappropriation – to name it, commodify it and other it. For more, see: K. Reeds, *What is Magical Realism? An Explanation of a
useful and introductory framework for understanding what is a particularly complex literary mode.

Tamas Benyei and Kenneth Reeds are more strident in their articulation of the need for magical realism to be distinguished from the fantastic (which is characterised by the descent or eruption into reality of the supernatural from an ontologically different realm). Benyei argues convincingly that, in magical realist texts the “supernatural element is immanent: it can be a hidden property of reality, belong to the human psyche, or be created by the encounter between the two, but it always grows organically out of the represented world.” 748 His definition is expanded to suggest that abnormal and experientially impossible events take place within the magical realist mode in a purely natural way, “as if they had always already been there; their abnormality normalised from the moment that their magic realist worlds were imagined.” 749 In this way, the ‘supernatural element’ (or that which is empirically unverifiable) is naturalised and largely unremarkable within the otherwise social realist text – it is presented as a reality of the narrative.

There is also a substantial body of scholarship which links postcolonial studies to magical realism, and identifies magic realism as a postcolonial discourse. This is chiefly because magical realism emerged out of the postcolonial world (specifically Latin America), and because it is regarded as politically interventionist. According to Kate Hall, magical realism has been “annexed” by postcolonial critics and theorists, who view it as providing “exemplary literary instances of marginal resistance to colonial hegemony.” 750 In particular, it is said to challenge the authoritative genre of

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749 T. Benyei, ‘Re-Reading Magic Realism’, 1997, p. 152. According to Benyei, magical realism is a literary mode and not a literary genre because the term ‘mode’ is “narrow enough not to define the phenomenon as a genre, and broad enough to go beyond the identification of narrowly interpreted stylistic features.”
realism and the totalising systems of generic classification by introducing elements of magic and claiming them as real.\textsuperscript{751} Stephen Slemon engages with this argument by noting that the structure of magical realist narratives (which are characterised by a tension between the real and the fantastic) reflects the tension between the ever-present and ever-opposed colonised and colonialist discourses in a postcolonial context.\textsuperscript{752}

\textbf{“How much of this is real?” – Reading the (un)Real in The Boundary:}

In an Australian context, Alison Ravenscroft has warned against reading the real and unreal according to an ontological and epistemological binary, where the ‘real’ is associated with the coloniser and magic with the colonised. In her view, this reinforces and perpetuates an ‘othering’ of the colonial subject.\textsuperscript{753} Ravenscroft asserts that, rather than attempting to draw what is designated as fantastic or magical into a non-Indigenous frame of reference, readers must accept that there are limits to their vision:

Time and again [Indigenous] Law falls out of the scene of white Western imagining, it falls out of the scene we can see or know… the Law is very precisely unreadable to a white reader, and our efforts at translation must always fail… My world and the world from which Indigenous Law emanates… are incommensurable… the Law cannot appear to us, it belongs to another scene.\textsuperscript{754}

\textsuperscript{751} K. Reeds, \textit{What is Magical Realism?}, 2012, p. 26. Reeds argues convincingly that magical realism ‘recasts’ history in its use of fiction, thereby providing perspectives on the past that have been historically marginalised or ignored. When magical realism is framed in this light, I am drawn to reflect on its similarities with critical race theory – both seek to reposition voices of colour, for instance.


\textsuperscript{753} Ravenscroft engages with the work of Slemon and Australian scholar Suzanne Baker, who identify magic and realism as oppositional systems. Baker suggests that Aboriginal writers use magical realism as a literary strategy to create a ‘dual spatiality’ where “alternative realities and different perceptions of the world can be conceived.” Where Ravenscroft conceptualises the genre as centring on a binary, for Baker it is a ‘duality’ – which suggests a greater level of flexibility. See: A. Ravenscroft, ‘Dreaming of Others: Carpentaria and its Critics’, 2010, p. 201; S. Baker, ‘Binarisms and Duality: Magic Realism and Postcolonialism’, \textit{Journal of the South Pacific Association for Commonwealth Literature and Language Studies}, No. 36, 1993, online.

This is a point echoed by Russell West-Pavlov, who advises (on reading practices):

When reading an Aboriginal text, the most appropriate response for a white reader may be to accept partial incomprehension... Here the reader-text-author relationship needs to be understood in a larger socio-political framework, and the power of the reader curtailed so as to avoid replicating an ongoing history of expropriation of Indigenous cultural self-determination.\textsuperscript{755}

Both scholars make important and influential arguments about the limits of vision (which is based largely in Western presuppositions of material reality) and the boundaries of knowledge available to readers of magical realist narratives.\textsuperscript{756} It is important to note, however, that in order to engage with \textit{The Boundary} in a meaningful way, it is necessary to both acknowledge these limitations and to engage with the text in its broader cultural and scholarly context. This can be done by reading the narrative – and in particular the character of Red Feathers – with reference to the kadaitcha man (a subject of considerable reporting and analysis), who is recognised in Aboriginal mythology as a ritual executioner. To do so is not necessarily to contribute to an expropriation of Indigenous culture, but instead to engage with a text that has been placed in the public sphere for the purposes of being read.\textsuperscript{757} To this end, it is possible to argue that magical realism provides a framework through which to bridge the ‘gap’ between the (postcolonial) detective fiction genre and the kadaitcha plot.\textsuperscript{758}


\textsuperscript{756} The ‘boundary’ motif exists in the narrative at a number of levels – most notably as a physical representation of the border(s) governing access to space for Indigenous inhabitants of metropolitan Brisbane for much of the 19\textsuperscript{th} and 20\textsuperscript{th} centuries. It also represents the social and political barriers dividing racial and ethnic groups, and, as I have implied, a boundary of knowledge limiting an understanding of culture and Indigenous mythology.

\textsuperscript{757} Ken Gelder prefaces his engagement with \textit{The Kadaitcha Sung} by explaining that, although he is aware of the complexities of dealing with ‘the sacred’ in Indigenous texts, he feels capable of doing so because the narrative has been placed in the public sphere by its Indigenous author (Sam Watson) for the purpose of being read and critiqued. See: K. Gelder, ‘The Politics of the Sacred’, \textit{World Literature Today}, Vol. 67, No. 3, 1993, p. 499.

\textsuperscript{758} It is also possible, as Katrin Althans does, to read the kadaitcha in terms of the gothic tradition.
**Red Feathers:**

Red Feathers is introduced to the narrative in a literal sense through his connection to the Paradise Parrot, whose feathers are found at the scene of each crime – despite the bird being presumed extinct since 1927.\(^{759}\) He appears again (only to Ethel and not for the first time) on the afternoon of the Corrowa’s native title defeat, as she sits in contemplation at Meston Park. Described as hulking and physically imposing – a “ridiculous sight”\(^{760}\) – the narrative uses Red Feathers as a means through which to outline the historical significance of the park to the Corrowa people; it is “the place where he [Red Feathers] and the other men had charged against the police, the curfew, the boundary, over a century ago.”\(^{761}\) Deprived of his human form (after being shot down by Horace Downer, the policeman responsible for guarding ‘the boundary’ in colonial Brisbane), Red Feathers now exists as a spirit man, having been taken “home” by the water spirit and “returned to the bosom of Meanjin.”\(^{762}\) Now that he is able to “see everything – the living and the dead”, Red Feathers assumes an omnipresent role in *The Boundary* – he is compelled to return to West End (and the physical world) because he realises that “the boundary remains.”\(^{763}\)

Red Feathers is therefore both embodied and disembodied, being simultaneously visible to Ethel and ostensibly invisible to investigators (he leaves no signs or marks – other than feathers – of his presence in West End).\(^{764}\) This shifting between a corporeal and non-corporeal state is best

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\(^{759}\) Red Feathers is identified in the novel as both a ‘he’ and as Ethel’s maternal grandfather. His dialogue and action is effectively mediated through Ethel across the narrative. The presumption of the extinction of the Paradise Parrot speaks to the experience of Ethel’s grandfather – who was killed circa 1927 and now returns (in much the same way as the feathers of the paradise parrot). See: N. Watson, *The Boundary*, 2011, p. 171.

\(^{760}\) N. Watson, *The Boundary*, 2011, p. 46.

\(^{761}\) N. Watson, *The Boundary*, 2011, p. 47. Red Feathers is shot dead while attempting to shield his wife from a bullet.

\(^{762}\) N. Watson, *The Boundary*, 2011, p. 47. ‘Meanjin’ is the traditional name for the land now known as Brisbane. In the language of the Turrbal people, who are the area’s traditional owners, the name translates roughly to mean ‘place shaped like a spike.” See: ‘History’, Turrbal Aboriginal Nation, 2016, online.

\(^{763}\) N. Watson, *The Boundary*, 2011, p. 48. This statement implies that the discrimination of colonial Brisbane (at which time an actual boundary existed and policed the movements of Indigenous peoples) has been carried into the future. It also indicates that Red Feathers responds to the displacement and dispossession of the Corrowa people – particularly because it reflects his own experience.

\(^{764}\) Red Feathers’ return can be read as a literalisation of the past haunting the present, or, in a similar vein, as a return of the repressed (this reading complies with Ken Gelder and Jane Jacobs’ argument
represented in the description of Red Feathers’ body disappearing from Ethel’s view: “At first, his left arm faded from her sight. Then his feet, followed by his legs, until finally even his head disappeared.” The inexplicability of his physicality (which is baffling for the reader and for characters in the text) is highlighted in an episode where Dick and Sherene Payne visit Mount Isa in Aurukun country. In a chilling incident (which is described to police after Dick’s death), Sherene recalls the appearance of a man – “I don’t know who or what he was” – emerging from the depths of a creek and staring “icily” at her husband: “The water must be ten feet deep, but that man is standing.” Despite being visibly shaken by the sight, Dick Payne admonishes Sherene for her enquiries and insists that: “Clever men aren’t real. Just another stupid blackfella myth.”

The suggestion that “the business has begun” echoes across The Boundary, becoming an ominous warning and a repeated motif. It is rephrased by Ethel when she insists that “you can’t mess with blackfella business”, and deployed again in an attempt to rationalise the deaths of Bruce Brosnan, Dick Payne and Harrison McPherson: “what happened to those three was blackfella business. None of us have any control over that.” The implication of this is that ‘blackfella business’ is a kind of retaliatory justice that is beyond the control of judicial authority and/or white systems of power. This linking of the deaths with “blackfella business” invokes Aboriginal mythology, and so situates The Boundary within a Dreaming story. Specifically, the narrative refers to the creation story of Biamee and the emergence of the clever man. According to the story:

about native title as an ‘uncanny’ event insomuch as it can be said to render the familiar unfamiliar – by shaking the foundations of white possession of land). See: K. Gelder & J. Jacobs (eds), Uncanny Australia: Sacredness and Identity in a Postcolonial Nation, 1988, p. 23.

768 N. Watson, The Boundary, 2011, p. 94. This scene is pre-emptive insofar as it links Red Feathers to the mythology of the cleverman and foreshadows Red Feathers’ arrival in West End.
769 N. Watson, The Boundary, 2011, pp. 48, 47.
771 N. Watson, The Boundary, 2011, p. 151. In this instance Miranda considers whether she has erred by indulging Ethel’s stories. She is also simultaneously awed by the prospect of a higher power and the possibility of avenging the political and legal systems which have denied Corrowa identity in the most fundamental way.
It was Biamee’s fingers that carved the people, his genius the source of the millions of beings who swam, flew and scurried across the landscapes every colour of the sunsets he painted. Biamee loved them so dearly that he created the clever men. The clever men had promised to protect them from the newcomers.\textsuperscript{772}

This story, in turn, facilitates a reading of Red Feathers as a clever man, or a kadaitcha man, who is recognised in Aboriginal mythology as a “tribal bounty hunter”\textsuperscript{773} responsible for administering punishment, justice and death.

**Red Feathers – a Kadaitcha Man:**

If we are to read Red Feathers as a kadaitcha man, it is important to first outline its role in Aboriginal mythology, and in particular, its connection to law and justice. According to Sam Watson, the kadaitcha is:

> The foundation of black strength and black power, the most powerful figure within traditional Australian society... a tribal executioner, tribal sheriff, tribal bounty hunter, who would take up your case for you and... visit revenge upon your enemies.\textsuperscript{774}

Watson’s description of the kadaitcha (which is the subject of his 1990 fantasy novel, *The Kadaitcha Sung*) suggests its importance to Aboriginal societies. It also emphasises its role in the administration of traditional justice – which is a particularly violent kind.\textsuperscript{775} According to Kim Akerman,

\textsuperscript{772} N. Watson, *The Boundary*, 2011, p. 170. Biamee is recognised as a creator spirit in the Dreamings of a number of Aboriginal groups of the southeast coast of Australia. Biamee’s creation story is told in published accounts of Aboriginal mythology, and also in Sam Watson’s *The Kadaitcha Sung*. See: ‘Marmoo and Biami’, told with permission by P.E. McLeod in *Gadi Mirrabooka Story Book of Aboriginal Stories: Australian Aboriginal Dreamtime Stories and Mythology*, online.


\textsuperscript{775} Derrick Pounder outlines three ‘principal elements’ of the ‘classic’ kadaitcha killing. These are: 1) a rendering of the victim temporarily unconscious; 2) the infliction of a wound; 3) the death of the victim after an interval of one to three days. See: D. Pounder, ‘A New Perspective on Kadaitja Killings’, *Oceania*, Vol. 56, No. 1, 1985, p. 79.
‘kadaitcha’ is an Arrernte term (the language of central Australia) that has “now entered the general Australian vocabulary.” Though there are many regional and language group-specific variations of kadaitcha mythology, it is generally reported that it refers to an “an evil spirit, sorcerer or assassin endowed with magical powers and bent on vengeance for some perceived wrongdoing.” In most accounts the kadaitcha is described as wearing some kind of footwear – usually feathered – to disguise its movements. This link between feathers and the kadaitcha is critical in the context of The Boundary, where feathers are left at the site of each crime. It also allows the reader to draw an explicit association between the murders and Red Feathers, who is likely a kadaitcha man.

In explaining that the kadaitcha will “take up your case for you”, Sam Watson implies the involvement of an ‘accomplice’ in the business of the kadaitcha; this is revealing in the context of The Boundary, where Ethel is in a position to both give warning to potential victims and issue instructions to Red Feathers. In an encounter between Ethel and Lesley Tagem (who is described as an “ethically flexible” Corrowa woman), the former warns the latter that, “He’s coming for you.” Lesley’s dismissal of this rather menacing threat – she laughs, “Who, a clever man? ... I’m sorry, but you really have to leave that stuff alone. No one believes you, Ethel... Because that mob never existed” – becomes a fatal mistake. It also signals to the way that, in the context of a magical realist narrative, a secular and empirical understanding of the world (such as that exemplified by Lesley, who appeals to the rationalism of science in order to diagnose Ethel’s claims about the cleverman as a symptom of psychiatric distress – “You need help, Ethel. Go

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778 K. Akerman, ‘Shoes of invisibility and invisible shoes’, 2005, p. 60. Akerman explains that individual identity is also concealed by the use of ochre body painting and feathered ornamentation on the face and body.
779 Emphasis added.
to the medical service"\textsuperscript{783}\textsuperscript{7} is limiting insofar as it cannot bring a resolution to the crimes that have occurred in Brisbane, nor is it capable of making sense of an alternative version of reality. Lesley is killed, in effect, because of her betrayal of Ethel, \textit{and} because of her refusal of the possibility of an alternative epistemology \textendash; that of “blackfella business.”

In a separate, disturbing episode, the Premier is taken in a taxi by a black driver described as having a “thick and long” neck and “woolly brown curls cut to the edge of his scalp.”\textsuperscript{784}\textsuperscript{7} He is joined by Lesley Tagem, and the two are held in what could best be described as a liminal space (between life and death). In a particularly surreal sequence (which marks a departure from the predominately realist narrative), both stand naked as the Premier cries repeatedly to Lesley: “You can’t mess with the business.”\textsuperscript{785}\textsuperscript{7} This reflects an invocation of the extra-judicial authority of “blackfella business”, and specifically, the kadaitcha. They are joined in this state by Dick Payne (presumed dead for at least the past fortnight), who addresses the Premier by asserting that, “The black man has been ruined… The black is a child, carried for so long on the back of its indulgent mother that he has forgotten how to walk.”\textsuperscript{786}\textsuperscript{7} His repetition of the word “Anathema a-n-a-t-h-e-m-a”\textsuperscript{787}\textsuperscript{7} signals both something that is repugnant \textendash; or something that the narrative identifies as repugnant, such as Dick Payne’s politics \textendash; and Lesley and Dick’s ‘excommunication’ from the Corrowa community: they are punished because they facilitate the failure of the native title claim. In this liminal space, the three kneel before a monstrous and grotesque figure (“built as he is tall… arms out of proportion with his body, hands lie on the ground like two ends of a scarf. A belt of leather clothes his loins”)\textsuperscript{788}\textsuperscript{7} and are forced to surrender to its authority as they are stripped of their own. In this state of

\textsuperscript{783} N. Watson, \textit{The Boundary}, 2011, p. 106. The novel also highlights the limitations of detective fiction as a genre; its validation of empirical science as a means to solve crime is challenged in the narrative where, for instance, DNA tests are incapable of tracing the murderer.

\textsuperscript{784} N. Watson, \textit{The Boundary}, 2011, pp. 196-197.

\textsuperscript{785} N. Watson, \textit{The Boundary}, 2011, p. 217.

\textsuperscript{786} N. Watson, \textit{The Boundary}, 2011, p. 219. Dick’s rhetoric here is consistent with that which he has used to climb the political ladder and achieve political influence.

\textsuperscript{787} N. Watson, \textit{The Boundary}, 2011, p. 219.

\textsuperscript{788} N. Watson, \textit{The Boundary}, 2011, p. 220.
confusion, the Premier speaks for the reader when he asks, “How much of this is real?”

The ‘gothicising’ of the kadaitcha in this episode speaks broadly to Katrin Althans’ claim about *The Boundary* as belonging to an emerging tradition of Aboriginal gothic literature. Specifically, Althans argues that Indigenous authors have adapted the gothic mode in subversive and transgressive ways in order to reclaim identity. With reference to *The Kadaitcha Sung*, she contends that the gothic mode assists to “bring forth Aboriginal culture from the shadows.” This is an interesting analysis, particularly in the context of *The Boundary*, where Red Feathers is identified as a clever man and so linked to the creation story of Biamee. According to this story, he has a duty to “protect” the old people from “newcomers.” The deaths of Brosnan, Payne and McPherson, therefore, represent an avenging of the systemic injustice meted out by white legal processes – both native title law and dispossession more generally. In this light, it can be argued that the novel invites a reading of the murders (which are framed as acts of retributive justice) as an assertion of the strength of Indigenous law in the face of an unsympathetic Australian polity and legal system. They become a means for achieving redress when native title law is seen to fail those whom it was presumed to empower.

**Crime Solved, Questions Unresolved?**

In the final chapters of the narrative, following the death-in-custody of Charlie Eversley and the continuing violence and hostility at Meston Park (where the
Corrowa maintain their embassy), Ethel confesses her role in the murders to Miranda. Pulling a blooded knife from her handbag she appeals to her niece: “It won’t be easy for you to hear this, but you must. I killed all of them.”

This comes as a great surprise to Miranda, who has dismissed Ethel’s rather vague references to Red Feathers up to this point. Her attempt to reason with her aunt, and to make sense of this revelation, draws the two systems of law (native title, “blackfella business”) into sharp relief. Where Miranda proposes deeper engagement with the dominant white system – “we’ve filed an appeal… we’re fighting this” – Ethel instead calls on traditional law to achieve an outcome that is, for her at least, satisfactory. She cannot envisage a situation in which the white law will recognise her culture and her truth: “I’ve had to fight my entire life, proving to people who I am. I wasn’t going to let them take my identity away from me…”

At the police interview, Ethel is candid with Detective Matthews, and identifies Red Feathers (who the police determine must be “well over one hundred years old”) as her “co-worker” in the killings: “he got me through each door, he told me about their dirty little secrets.” These revelations are perplexing for the detectives – how could they have prosecuted someone they could not see? – and especially for Detective Matthews, who now realises that, by dismissing an earlier reference by Ethel to Red Feathers, he has ignored an important clue in the investigation. Moreover, he realises that he has also erred by doubting the existence of “blackfella law” and its capacity to exact revenge on those who have acted unjustly or with impropriety.

Miranda is revisited in the final chapter of the narrative – some six months after her father’s death and Ethel’s imprisonment – as construction begins at Meston Park and earthmovers sit uneasily with tents. In the intervening months, she has established a new appreciation for the strength of her

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people, and recognises their fearlessness in the face of the native title defeat:

Before her eyes felt the bitter taste of defeat. Now, she knows they are stronger. Every day they wake is a victory. For so long as they believe they are Corrowa, they will never swallow defeat.798

As she walks into the future, Miranda “looks up and sees a bird stretch out his wings.” She admires its “cloak of emerald and red as [it] soars into the heavens.”799 In this scene, the reader must ask whether this newfound clarity – the ability to see Red Feathers – is born of Miranda’s now being able to imagine a future for the Corrowa people beyond painful litigation, or something else. Perhaps it represents a final exercise of reveal in the detective narrative – that Miranda has been complicit in Red Feathers’ actions all of this time. My impression is that Watson is content to leave these questions unresolved,800 preferring instead for the reader to digest the narrative in their own way and to formulate responses to the questions that it raises – none more pressing than, “We know what the boundary did to us, but do you know how it has scarred you?”801

800 An emphasis on a lack of resolution ties The Boundary to the metaphysical detective fiction genre, which subverts the traditional detective story convention of narrative closure, and forces the reader to confront the “insoluble mysteries of his own interpretation and his own identity.” See: P. Merivale & S. Sweeney (eds), Detecting Texts: the Metaphysical Detective Story from Poe to Postmodernism, University of Pennsylvania Press, Philadelphia, 1999, p. 2.
In this chapter, I examine Melissa Lucashenko’s novel Mullumbimby as a fictional reflection on the politics of Indigenous belonging in post-Mabo Australia. Specifically, I contend that the narrative challenges the prevailing view of native title as an answer to questions of land justice, and that it does this by both critiquing and embracing colonialist strategies for conferring the ownership of land. This complex negotiation is evident in the novel through its linking of the practice of cartography to the violence of dispossession, and additionally, through the characters’ engagement with the legal framework of land tenure – which is used as a means to ensure the preservation of sacred sites and of “Goorie Law”. I argue in the chapter that this pragmatic engagement is presented by Lucashenko as the most effective means through which to ensure continued access to ancestral lands.

Critical Survey:

In the past two decades, Melissa Lucashenko has emerged as one of Indigenous Australia’s foremost novelists and social commentators. She describes her fifth novel, which was published by the University of Queensland Press in 2013, as having a gestation period of 60,000 years; it was, she says, “a book demanding that I write it.” The novel takes its title from, and is set in, the northern New South Wales coastal town of Mullumbimby, which lies in a valley at the foot of a mountain range that forms...
part of a World Heritage Listed National Park. The Bundjalung people, whose traditional lands stretch from northern coastal New South Wales to southern Queensland, have called Mullumbimby home for thousands of years. The return of Jo Breen to this town, her people’s budheram jagan (sacred land), sets the scene for the novel’s engagement with land politics.

Since its release, Mullumbimby has achieved limited critical attention, despite having been favourably received. Most critical engagement has focused on the way that Lucashenko successfully articulates a narrative of belonging within the novel, and her use of a feminist ethic to do so. In Southerly, Anne Brewster posits that Mullumbimby takes the form of the Bildungsroman, having protagonists who undergo “traumatic transformations” in order to “recognise and accommodate difficult and uncomfortable knowledge and become incorporated within their community.” This designation of Mullumbimby as Bildungsroman speaks to the processes of personal and community development that the novel traces: when Jo is introduced she is unsure of her place – she knows that she is hereditarily and spiritually tied to Bundjalung land (and specifically to the Arakwal nation), but is unable to see how this manifests itself in a tangible sense. By the end of the narrative, after having engaged in debates about the ownership of land and having been exposed to Bundjalung songlines, Jo develops a deeper sense of her place in country.

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804 Lucashenko’s use of the town’s name for the title of the book serves to situate the narrative geographically, and also foreshadows the importance of place.


807 A. Brewster, ‘Review: Mullumbimby’, 2013, p. 250. The traditional Bildungsroman is a coming-of-age story in which an individual develops a deeper understanding of their place in the world. This is distinct from the Aboriginal Bildungsroman, as identified by Jeanine Leane, in which the individual’s growth is dependent upon a community or collective’s recuperation of identity. See: J. Leane, ‘Rites/Rights/Writes of Passage’, 2013, pp. 107-123; N. Bims, Contemporary Australian Literature: A World Not Yet Dead, 2015, p. 148.
Other reviews of the novel, such as those by Indigenous critics Tony Birch and Daniel Browning, focus on the incorporation of Bundjalung and Yugambeh language within the narrative. Critically, they argue that it “put[s] the language back into the mouths of the Bundjalung people.”808 This is a compelling interpretation, and it is supported by Anne Brewster, who contends that the novel demonstrates a commitment to “linguistic revival and renewal.”809 This commitment is demonstrated in a practical sense through the novel’s inclusion of a glossary of terms, which provides clarity to readers who are unfamiliar with the Bundjalung and Yugambeh languages. The other effect of this “revival” is to emphasise the embeddedness of language in place, and to point to the way that ‘linguistic clues’ are scattered across the Australian landscape (most often in the form of place names) as tangible evidence of an historical Indigenous presence. The most obvious example of this (in the context of this discussion) is the naming of the town of Mullumbimby, which is a Bundjalung word generally understood to mean ‘small round hill.’810

Brewster has also argued in her analysis (which represents the deepest engagement with the novel to date) that Mullumbimby is characterised by a “pedagogic impulse”, and that this materialises in the narrative’s “worlding and self-fashioning of an Indigenous cosmological juridical imaginary which asserts sovereignty and belonging.”811 This is a sophisticated reflection on Lucashenko’s narrative, and it refers to the way that Mullumbimby (like each of the novels considered in this thesis) describes an Indigenous worldview that is born out of the laws of the cosmos and expressed through the relationships between individuals, and with sacred landscapes.812 Brewster’s

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810 For an account of the etymology of the term, see: ‘The Meaning in Mullumbimby’, Brunswick Valley Historical Society, online.
812 Marcia Langton argues, “What our people mean when they talk about their law, is a cosmology, a worldview which is a religious, philosophic, poetic and normative explanation of how the natural,
description also recalls Charles Taylor’s theorisation of the “social imaginary”, which refers to the collective understanding internal to a group’s worldview and which is articulated through the images, stories and legends that shape the practices of a society. By drawing this link, Brewster provides a way for thinking about the Bundjalung people’s sense of embeddedness in place (and in a cosmological system), while also signalling the novel’s use of story to explicate an Indigenous law that lives in the people and the landscape. This view is supported by Lucashenko herself, who has argued that “the stories that give life meaning – the pedagogies of the generations – are contained not in books or language alone, but in language expressed within and by landscape.” Brewster’s description of a “cosmological juridical imaginary” also invokes the idea of the ‘law-story’, which has been described by Larissa Behrendt as a cultural story that explains, “[an Indigenous] worldview, value systems, and rights and responsibilities, and… our connection to land.” In this sense, it can be argued that Lucashenko’s novel attempts to present an Indigenous law-story in the context of the contemporary politics of belonging and native title, and that, when taken together, the ‘law-story’ and “cosmological juridical imaginary” provide a way for describing the Indigenous narrative jurisprudence that has been developed in this thesis. Before exploring this possibility any further, it will be helpful to summarise the novel and its themes.

**Budgeree Jagan – Returning Home:**

Jo Breen returns to Mullumbimby from Sydney following the breakdown of her marriage to Paul, a white man who is the father of her daughter, Ellen. When the narrative opens, mother and daughter live in a rundown shack – all

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813 Taylor describes the ‘social imaginary’ as referring to the way that “people imagine their social existence, how they fit together [and] how things go on between them and their fellows.” It is a common understanding that contributes to a group’s shared sense of legitimacy. See: C. Taylor, Modern Social Imaginaries, Duke University Press, Hertfordshire, 2004, pp. 23-24.


that they can afford – near the Mullum cemetery where Jo is employed as a groundskeeper.816 Despite being a proud Bundjalung woman, Jo struggles initially to establish a sense of belonging at her new home.817 Gravesites at the cemetery, for example, confirm her sense of estrangement from the land, being a constant reminder of the history of white settlement in the town, and bearing the stories of colonists who, “months or years from anything they thought of as home – had tried to slash and log and burn their way into freedom here.”818 In contrast to the highly visible (and celebrated) history of the white occupiers, Jo views the local Bundjalung people as misfits and outcasts: Granny Nurrung is hostile and God-loving, Uncle Humbug is a homeless drifter and Oscar Bullockhead is violent and morally corrupt.

Despite its financially crippling effect, Jo has been able to purchase a plot of land with her brother, and so becomes a “free enterprise, freehold blackfella, beholden to nobody except my own family and my own conscience.”819 The knowledge of the security that this legal contract provides – she holds the title deeds to the property in “her kitchen drawer”820 – has a transformative effect for Jo: it offers both spatial freedom and a deepened spiritual bond. This is articulated upon her arrival at Mullumbimby: “here I am, my budgeree jagan. Here I am. Know me for who I am, a Goorie jalgani… I’m here at last.”821 The significance of the legal contract is explained through the narrator’s emphasis: “This was her farm… Her paddocks. Her trees. Her mountain.”822 The use of the personal pronoun “her” (and its italicisation) denotes the importance of reclaiming (black) ownership over these spaces,

816 In his reading of the narrative, Nicholas Birns argues compellingly that Jo’s role as a caretaker at the cemetery is effectively a proxy for the idea of the “galvanising premise of care” demonstrated in the narrative, and an “Indigenous advocacy that goes beyond a reverence for forebears.” In other words, he suggests that Jo’s reverence extends beyond care for the deceased to include care for the environment and culture. See: N. Birns, Contemporary Australian Literature: A World Not Yet Dead, 2015, p. 150.
817 She is supported, however, by a community of strong women who share tight bonds – these include her sister Kym, as well as long-term friends Chris, a Gadigal woman from Sydney, Therese and her girlfriend Amanda. Men, by contrast, are largely absent from the narrative, or appear only intermittently. Take, for instance, Jo’s brother Stevo, who, despite sharing ownership of the property on Tin Wagon Road, is rarely seen.
818 M. Lucashenko, Mullumbimby, University of Queensland Press, St Lucia, 2013, p. 6.
819 M. Lucashenko, Mullumbimby, 2013, p. 42.
820 M. Lucashenko, Mullumbimby, 2013, p. 42.
821 M. Lucashenko, Mullumbimby, 2013, p. 22. My use of the term ‘legal’ here refers to the framework of property law instituted in Australian jurisdictions through acts of parliament following colonisation.
and can also be tied to an overriding sense of duty or obligation. By buying freehold land, Jo believes that she is “circl[ing] right around the hideous politics of colonial fallout”, which means, in the context of the narrative, avoiding the complications of the native title system.\textsuperscript{823} Her idealism here reflects a romantic aesthetic that is carried throughout the text and which will be reflected upon at different times in this analysis.

\textit{“Talking” Mabo:}

The arrival of the Jackson brothers in Mullumbimby, and the announcement that they will make a claim for native title over “the whole bloody lot” of the town, is the primary source of conflict within the narrative. At their first meeting, Twoboy explains to Jo that he plans to “rebuild a nation” ruined by dispossession:

Our great-grandfather, Tommy Jackson, he knew this valley back to front and inside out, and he knew who he was too, a Bundjalung man robbed of his rights by the land grabbers… And now we’re back to collect what’s ours.\textsuperscript{824}

Jo interprets Twoboy’s claim as a “declaration of war” and is disconcerted by the assertiveness of his claim to be “the one true blackfella for this place.” Ultimately, she is aware that his arrival will cause ripples in the Bundjalung community, and is offended by his claim to represent an ‘authentic’ Aboriginality: “…fuck him if he thought he was blacker than she was. She knew plenty of lingo, more than he did. She knew some Law too.”\textsuperscript{825} In the face of Twoboy’s bravado, Jo feels compelled to defend her decision to ‘buy back’ Bundjalung land, warning him: “… just don’t go claiming my farm.”\textsuperscript{826} Twoboy’s smug reply – “if you’re Bundjalung tidda, yorright by me… we’ll let

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\textsuperscript{823} M. Lucashenko, Mullumbimby, 2013, p. 42.
\textsuperscript{824} M. Lucashenko, Mullumbimby, 2013, p. 41.
\textsuperscript{825} M. Lucashenko, Mullumbimby, 2013, p. 164.
\textsuperscript{826} M. Lucashenko, Mullumbimby, 2013, p. 42. Jo’s fears are unfounded since freehold land cannot be the subject of a native title claim (the High Court determined in \textit{Mabo} that Indigenous claims to land were extinguished by the granting of freehold title).
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ya stay on your farm\footnote{M. Lucashenko, \textit{Mullumbimby}, 2013, p. 44.} – exemplifies the dynamic of their relationship, which is marked by a mix of flirtation and condescension. It also speaks to the differences of approach that the pair take to the question of land justice; where Jo urges restraint (she is not interested in engaging in a campaign of attrition with the Native Title Tribunal), Twoboy advocates a comparatively radical approach, and conceives of his litigation in terms of a war: “It’s no time to be sittin on the fence, here. You’re part of this case. You wanna give that up? Let the dugais win?”\footnote{M. Lucashenko, \textit{Mullumbimby}, 2013, p. 250. In an interview with Anne Brewster, Lucashenko reflects on the link between war and native title: “war is conflict over territory... Aboriginal people call themselves Nations and some of those Nations are at war and the forum for that is native title.” See: A. Brewster, \textit{Giving This Country a Memory}, 2015, p. 125.} Jo’s response to Twoboy’s provocation is outlined in the following exposition:

Well he can \textit{talk Mabo} all he wants, but they took our grandparents and the rest of em away to assimilate our families and fuck up our connections to land. And it very nearly worked. So there’s a bloody great need to compromise in families like ours.\footnote{M. Lucashenko, \textit{Mullumbimby}, 2013, p. 50.}

Her call for compromise, and previous advocacy for a “middle path” between the “table crumbs” offered by the government and the “radicalism of the Taliban”, points to a cautiousness of approach. In this respect, and in contrast to Twoboy, Jo is figured as an anti-radical; she recognises that the burden of proving a continuity of connection to country effectively prevents her from substantive engagement with the native title system, and so compromises by complying with instituted systems of white property law – which she views as presenting the most productive (and viable) means of reclaiming land.\footnote{Jo’s ability to engage in this system (by buying a parcel of freehold land) is predicated upon her having the financial means to do so.} The narrator explains:

Jo couldn’t prove a damn thing about her family, which meant that she… would find no place in any Native Title tribunal in the land. The Breens were, and would likely remain, the
unacknowledged traditional owners of three-quarters of nine-tenths of sweet fuck all.”

Twoboy’s actions are figured in the novel as highly provocative, being read as unnecessarily inflammatory by Jo, and as antagonistic to the Watt and Bullockhead families (who claim to be surviving members of the Bundjalung community). This antagonism leads to a physical altercation when Twoboy is confronted by Oscar Bullockhead and his nephew, Johnny. In this scene, which can be likened to the enactment of a ‘turf-war’, the men appeal to (and therefore legitimate) state borders in order to make their claims for access to Bundjalung country. Oscar yells to Twoboy (who is from Queensland), “you wanna get back to the other side of the border, cunt”, and encourages his nephew to “show this fucken dog whose land he’s on.” As the Bullockheads retreat, Twoboy “turn[s] and brace[s] both his hands on the rail of the bridge that he ha[s] just won… fair and fucking square. My country.”

In this episode, Twoboy aggressively defends his right to access land, and simultaneously challenges Oscar Bullockhead’s claim to belong. He also proposes that future native title disputes should be settled in this way – with a fight, “like the old days… Fuck the tribunal.” Jo reminds her boyfriend of the hypocrisy of this position when she pushes him on his claim to be acting on behalf of his mother, who would be physically incapable of fighting for her land. Twoboy’s emphatic response – that “native title [is] there for the taking” – can be read as evidence of his opportunism; he recognises that he is in a better position (in terms of resources) than his ‘rivals’ to lodge a successful claim.

831 M. Lucashenko, Mullumbimby, 2013, p. 79.
832 M. Lucashenko, Mullumbimby, 2013, pp. 187, 189. Their claims to land are complicated by the institution of state borders, which, it goes without saying, do not respect the contours and boundaries of traditional country.
834 M. Lucashenko, Mullumbimby, 2013, p. 190.
835 M. Lucashenko, Mullumbimby, 2013, p. 191.
836 Uncle Humbug, for instance, is the self-described “one true blackfella” for Mullumbimby, and yet is prevented from lodging a claim on account of his illiteracy and lack of resources. Jo summarises his predicament in the following way: “He must have a Native Title claim to somewhere… Native title (isn’t) going to fill that old brown belly any time soon.” See: M. Lucashenko, Mullumbimby, 2013, p. 171.
This scene is effectively a dramatisation of the way that the native title regime sets up a conflict, or a series of conflicts, between claimant groups (many of whom have longstanding ties), who are forced to ‘fight’ in order to convince a court or tribunal of the strength of their claim. The upheaval that is caused as a result of these processes has been summarised by Larissa Behrendt and Loretta Kelly, who argue that: “native title has created formalised disputes between traditional owners and non-claimant parties, where previously latent conflict may have existed. [It] has also, in some places, unintentionally added another layer of conflict to Aboriginal communities.”

This tension is especially evident in cases where there are overlapping claims to territory (such as the kind depicted in Lucashenko’s novel) and is exacerbated as a result of the role of cartography within the native title process. The friction that it introduces is described by Alexander Reilly in the following terms: “The advent of native title did not lead to a reconsideration of existing maps, but to the less dramatic exercise of plotting native title rights on these maps of the land.”

In the following section, I will consider the way that Lucashenko’s novel engages with, and complicates, the practice of cartography, before turning my attention to a discussion of the role of the fence (which has been recognised as a symbol of white occupation) in Australian cultural studies, and more specifically, in *Mullumbimby*.

**Mapping in *Mullumbimby* – Documenting Dispossession:**

In *Mullumbimby*, Lucashenko reflects on the way that colonists have used, (and continue to use) maps to confer and confirm ownership and control over Bundjalung land. In this section, I will reflect on mapping as a colonial strategy and outline the ways in which the novel critiques this tradition, but also engages with it, in order to reclaim land. I use Homi Bhabha’s

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837 L. Behrendt & L. Kelly, *Resolving Indigenous Disputes*, 2008, p. 27. For detail on the ‘intra-cultural’ and ‘inter-cultural’ conflicts that often arise as a result of native title claims, see pp. 28-32.

theorisation of mimicry to argue that Lucashenko reimagines the coloniser’s map, and in so doing challenges its claims to truthfulness of representation.

The imperative to map has been theorised as a colonial strategy aimed at confirming possession and ‘overwriting’ the past possession of country. The ‘success’ of this campaign can be measured by the effective erasure of Aboriginal peoples and their stories from the national consciousness. Alexander Reilly suggests that cartography is complicit in this project, given that, “maps can tell or hide a variety of stories... [they] can be used to perpetuate the invisibility of Indigenous people on the legal landscape.” Similarly, though in different terms, Nicholas Dunlop argues that maps can also be decoded as a “visual and conceptual analogue for colonial authority.” Lucashenko’s novel draws particular attention to this ‘erasure’ in scenes where Mullumbimby’s colonial history is brought into full view – such as when Jo tends the graves of white settlers – but also in statements by Granny Nurrung which reference an attempt to overwrite Aboriginal possession:

‘See, it looks to all the dugai like only one thing happened here, on our budheram jagan,’ she told Jo. ‘But no. Something else happened too. Cos lotta Goori e mob dead now, or taken far away, but our little family still here.’

Here Granny Nurrung alludes to the blindness of the occupiers, who recognise neither Bundjalung possession nor the “something else” – which is the violent dispossession of Indigenous peoples from their lands, described

839 Nicholas Blomley argues compellingly that, “Property boundaries, we have seen, rely upon a logic of severability. Subjects and objects must be detached from their contexts... the remaking of property relations in colonial contexts clearly entails powerful (and ongoing) processes of displacement, whereby Indigenous peoples are wrenched from their local life-worlds... Colonial displacement, for example, entails not only individual acts of expulsion, but also sustained and continuing acts of forgetting.” See: N. Blomley, ‘Cuts, Flows, and the Geographies of Property’, 2010, p. 213.


by Irene Watson as a “raping... into existence... an erasure [of] peoples, their memories and ideas of laws.”

On a different but related point, Bill Ashcroft proposes that, “the map is in some ways the ultimate simulation because it creates the reality of place, creates knowledge of place, and imputes ownership by mapmakers.” This is a particularly compelling argument as it gestures to the map as a metonym for representation (where spaces are controlled by being ‘domesticated’ through language) and reflects on cartography as a device for the assumption of authority over land – where naming is an act of power. *Mullumbimby* also conceives of cartography in this way – as an ideological tool to assert control over territory:

Jo obsessed over the inclination of the dugai to take things – normal, natural things like earth and creeks and trees – and tie them up in their endless clever ways. She spent hours looking at detailed topo maps of the shire... She rediscovered... that every small part of the ridge... each field and paddock and roadside had not simply been named and claimed by the whitefellas. The taking of the land had been more absolute and thorough than she’d realised. Jo found that pieces of land, dismembered from the other, the orphaned parts of a now-dissolved whole, were found on the maps all numbered in the way that the graves at the Mullum cemetery were numbered in her groundskeeper’s register.

In thinking about the map as an agent of dispossession, Jo links cartography with the law and suggests that both combine to “bind” land to white Australians. Her reference to the numbering of parcels of land, for example,

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844 B. Ashcroft, ‘Reading Post-Colonial Australia’ in N. O’Reilly (ed), *Postcolonial Issues in Australian Literature*, 2010, p. 27. For further discussion of the relationship between cartography and colonialism, see Dunlop in O’Reilly, who argues that “the figure of the map – an artificial model of surveillance and imposed order, constituting as it does a totalising and monolithic ideological system of classificatory grids and boundaries, may be profitably decoded as a visual and conceptual analogue for colonial authority.”
implies an economising of territory (where it is sold for profit), while her invocation of the idea of “dismemberment” suggests that mapping leads to a violent division – land is surveyed, subdivided and defamiliarised. In other words, she suggests that it produces a split which dissociates Indigenous peoples from their lands; they are “orphaned” because they are disconnected from the laws that reside in country.

**Incommensurability, Cartography and Native Title:**

Alexander Reilly’s observations about the apparent incommensurability of Indigenous and non-Indigenous epistemologies can be taken up and applied to *Mullumbimby* – particularly with respect to its account of the native title litigation. Having suggested that “Indigenous laws and customs… are based on relationships between country and people that defy international context [and] precede circumnavigation, the drawing of state boundaries, and standard topographical map series”, Reilly goes on to ask whether “it [is] possible to represent in the written signs and terms of one epistemology, a relationship that has its origin in another epistemology?”. The disjunct that Reilly identifies is also observed by Lucashenko in her critical writings, where she posits that:

> Western culture lives in people, influenced by their environment, which they conceive as more or less separate to themselves. Indigenous culture lives in the more porous space, the relationship between humans, landscape and animal life.

These arguments are important because they gesture to the questions that Lucashenko grapples with in her narrative’s rendering of the native title process. We see it, for example, as Twoboy gathers evidence (of connection to country) to present to the National Native Title Tribunal for adjudication by

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847 A. Reilly, ‘Cartography and Native Title’, 2003, p. 4.
the Federal Court. Reilly describes the tribunal as the ‘custodians’ of “geo-spatial information relevant to native title claims” and suggests that, like the Indigenous traditional owner who cares for and manages access to country and its stories, “the tribunal cares for and manages geo-spatial knowledge relevant to the ascertainment of native title rights.”

In short, one is the custodian of the land, and the other the custodian of information about the land. This disjuncture materialises where, in order to be ‘received’ by the court, Indigenous stories (which are often highly specific and localised, providing evidence of connection) must be shaped so as to be legible to the signs and codes of Australian law. This shaping results in an epistemic ‘distortion’, whereby Indigenous claims must conform to the spatial and conceptual boundaries and distinctions established in Australia since colonisation. Reilly expands on this by explaining that:

As well as translating Indigenous relationships to land into a legal form, native title is productive of new Indigenous relationships to land. These new relationships are defined by fences, state boundaries, non-Indigenous land tenures and lines written on maps. Typically, claim boundaries follow the edge of existing land tenures that have extinguished native title.

The suspicion and contempt with which Twoboy approaches the tribunal – he resents “having to submit to the bullshit and humiliation” – reflects broadly the dissatisfaction felt by Indigenous claimants, who are concerned that, because of the institutional dominance of the white legal system (which cannot fully comprehend Indigenous epistemologies) their stories and voices remain marginalised. In Mullumbimby, Twoboy is caught in an unfortunate position, lacking both a deeply intimate knowledge of country – this is the judgment of the Bundjalung community and Australian law – and a legal entitlement to the land (according to both the traditional custodians and

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Australian property law).\textsuperscript{852} As a consequence, he is trapped in a matrix where competing epistemologies attempt to negate each other’s influence. That is, the ‘holders’ of ‘traditional law’ refuse to recognise native title (they challenge its legal authority\textsuperscript{853}), while the white legal system, in turn, refuses to recognise the entitlements to land enshrined through Bundjalung law. Jo’s sister Kym reflects on the damaging consequences of such an arrangement by describing native title as “colonisation 4.0” – where the “dugai don’t have to lift a finger anymore – they’ve outsourced it to us.”\textsuperscript{854} This is a damning appraisal since it identifies native title, which has been promoted as a tool of empowerment and social justice, as just another instrument of white power. Moreover, it suggests that native title continues the processes of white hegemony by disempowering communities and stripping them of the ability to make decisions about access and entitlement to country.

\textbf{Map as Metonym, Mapping Mimicry:}

Before considering the role of the fence in \textit{Mullumbimby}, and the way that assumptions about it as a marker of white proprietorship are complicated in the novel, I will briefly introduce the ideas of mimesis and mimicry in relation to the practice of mapping. On this point, Graham Huggan has argued compellingly that maps are instruments of mimesis because they are intended to project representations of the real. They are also, of course, political and ideological documents, which have been used in settler states to provide “a means of promoting and reinforcing the stability of Western culture.”\textsuperscript{855} According to Huggan, the inscription of borders, boundaries and place names on cartographic maps “promotes a falsely essentialist view of the world which suppresses alternative views which might endanger the

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\item \textsuperscript{852} Granny Nurrung confirms Twoboy’s estrangement when she explains, “we don’t know him. He our blood, yeah, but he don’t know this place. Not like we do.” See: M. Lucashenko, \textit{Mullumbimby}, 2013, p. 275.
\item \textsuperscript{853} Granny Nurrung dismisses native title as “just a bitta paper.” See: M. Lucashenko, \textit{Mullumbimby}, 2013, p. 275.
\item \textsuperscript{854} M. Lucashenko, \textit{Mullumbimby}, 2013, p. 233.
\item \textsuperscript{855} G. Huggan, ‘Decolonising the Map: Post-Colonialism, Post-Structuralism and the Cartographic Connection’, \textit{ARIEL: A Review of International English Literature}, Vol. 20, No. 4, 1989, p. 117.
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privileged position of the Western perceiver."\(^{856}\) Rather than representing a truthful imitation, cartographic discourse is characterised by:

The discrepancy between its authoritative status and its approximate function, a discrepancy which marks out the ‘recognisable totality’ of the map as a manifestation of the desire for control, rather than as an authenticating seal of coherence.\(^{857}\)

In this way, “the ‘uniformity’ of the map... becomes the subject of a proposition rather than a statement of fact”,\(^{858}\) and its claim to represent the landscape truthfully is cast into doubt. This discordance is manifested in *Mullumbimby* as Jo and Rob Starr debate the location of a boundary fence. Jo alleges that it has been constructed unlawfully on her property, since its physical location is, she suggests, inconsistent with its representation on the topographic map. In response, Rob invites Jo to test her claim against the surveyor’s map at his house. He contends, “I haven’t lived here for forty-five years for nothing. I know where the boundaries are along these roads.”\(^{859}\) In this instance, the map is positioned as an arbiter of disputes about relationality with land, and Rob’s claim is upheld.

Huggan also uses the concept of mimicry to draw attention to the disjunct between the map and the physical landscape. He argues that mimicry is an imitative gesture and a destabilising process because it “produces a set of deceptive, even derisive, ‘resemblances’ that implicitly question the homogenising practices of colonial discourse.”\(^{860}\) Homi Bhabha suggests similarly that mimicry has the effect of undermining the power structures typically reproduced through colonial mimesis; it is, he suggests, a “complex

strategy of reform, regulation and discipline, which ‘appropriates’ the Other as it visualises power.” In other words, and according to Bhabha, mimicry is a subversive performance whereby the colonial subject appropriates the power and symbolic gestures of the coloniser in order to reposition the latter as an ‘other.’ As such, subjugated populations use mimicry to speak back to power. In _Mullumbimby_, the partitioning of Jo’s property from others through the installation of a post-and-picket fence can be read as an act of colonial mimicry – especially since it is Jo who is responsible for its installation. By performing mimetically, she challenges the authority of the coloniser to fix and confirm his own position, which is one that enables, according to Bhabha, a fetishizing of the Other.

**The fence in Australian literature:**

In the following section, the focus of analysis will shift to a study of the role of the fence in _Mullumbimby_, and the way that it has been read more broadly as an emblem of frontier conflict in Australian cultural studies. Specifically, I will consider its intersection with Indigenous ideas of belonging and property law, and argue that, through its portrayal of spatial conflict, the novel recodes the fence as a symbol of public good – offering “genuine protection” – rather than as an instrument of (continuing) dispossession.

The fence, and the effect of its inscription upon the landscape, has been studied by a small number of literary and cultural studies scholars in Australia. Much of this criticism has centred, unsurprisingly, around Doris Pilkington-Garimara’s life-story, _Follow the Rabbit Proof Fence_, and its subsequent film adaptation, _The Rabbit Proof Fence_. The release of that

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861 H. Bhabha, _The Location of Culture_, 1994, p. 122.
novel in the shadow of the Mabo judgment has encouraged critical reflection on the relationship between the fence (as a marker of white proprietorship) and race politics in Australia. In ‘Fencing in the Frontier’, West-Pavlov’s literary analysis focuses on the role of the fence in representations of the Australian frontier. He considers Henry Reynolds’ *The Other Side of the Frontier* (one of a number of texts central to the ideological contest known as the ‘history wars’) in relation to Kate Grenville’s novel *The Secret River*, and outlines the way that the fence has shaped relationships between the white coloniser and the Indigenous occupier.  

With reference to frontier violence, West-Pavlov argues that, “the fence does not inaugurate conflict… rather, it indicates the end of a transitional and conflict-ridden process of encroachment. The fence mark[s] the completion of possession.” In other words, he highlights that, while there has been a tendency to link the presence of the fence to violence (Jo begins by reading it this way, “the universe she inhabited was very clearly being bound and strangled with white people’s ruler straight lines and fences”), it should instead be conceived of as reflecting an incursion or invasion. In this light, it is possible to read representations of the fence in Australian literature as gesturing to the cementing of white possession, and to the injustice associated with this act.

In the same way that West-Pavlov regards the fence as a device for asserting identity and marking space, Dolin proposes that it is “an adaptable symbol of social and personal boundaries, a site of defensive gestures and possible transformations.” This argument about the fence’s adaptability – and its implied permeability – complicates assumptions about inside/outside

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865 R. West-Pavlov, ‘Fencing in the Frontier’, 2010, p. 84. While this is true in a practical sense, it is disputed by Mick Dodson, a Yawuru man, who insists that, “We know our land is ours. A fence is not so good a structure that it can automatically destroy our relationship with land.” See: M. Dodson, ‘Human Rights and the Extinguishment of Native Title’, *Australian Aboriginal Studies*, No. 2, 1996, p. 18.


867 K. Dolin, ‘The fence in Australian short fiction: a ‘constant crossing of boundaries’?’, 2010, p. 142. Dolin has also argued that the fence is a ‘sign’ of the “language system of white Australian property law.” In other words, it is part of the vocabulary of the politics of land ownership. See: K. Dolin, ‘Law and Identity at the Fence’, 2009, p. 142.
binaries and is broadly supported by Homi Bhabha (who Dolin cites), who has argued that “borders act as a site of transition in contemporary society. They are ‘in-between spaces’ and provide the terrain for elaborating strategies of selfhood – singular or communal – that initiate new signs of identity.” This becomes clear in *Mullumbimby* as Jo sets about tearing down the “decrepit” barbed wire that once ran the perimeter of her property and installing in its place a picket-and-post fence. In doing so, she mimics the colonialist impulse to establish physical ‘signs’ of ownership – it is a case of the ‘colonised’ *recolonising* colonised space – and asserts her presence on country through a literal taking back of the land. Read in conjunction with Dolin’s claim that “the will to fence can be regarded as a performative ‘reaffirmation of the original basis of sovereignty’”, Jo’s actions in the novel suggest that she is, in fact, making a claim for Bundjalung belonging.

“A fence that doesn’t belong here” – the fence in *Mullumbimby*:

Jo’s understanding of the role of the fence and the practice of cartography shifts across the narrative in a transition that is broadly reflective of the *Bildungsroman* as a narrative of personal development. Initially, she recognises the fence and the map as agents of dispossession (believing that the colonisers “had taken it upon themselves to lace the country tight, using bitumen and wire and timber to bind their gift of a continent to themselves”), but comes to understand that their presence is reflective of a more complex process – especially after being made aware of the way that the Bundjalung people in Mullumbimby are already using fences and private property to protect sacred sites.

Jo’s initial view of the fence as a tool for the consolidation of property by white people is crystallised after her neighbour accuses her daughter, Ellen,

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of “trespassing” on his land.\textsuperscript{871} She is both offended and embarrassed by his allegation, not least because she resents his claim to occupy and control Bundjalung land: “the word trespassing out of a dugai mouth didn’t sit happily with her.”\textsuperscript{872} In a later scene, Jo’s beloved horse Comet is killed after becoming trapped in a tangle of barbed wire that she believes has been discarded by another neighbour, Rob Starr, following the installation of a perimeter fence on a patch of disputed territory. Jo describes the fence as “hideous” and “unwanted”,\textsuperscript{873} and in the process of disentangling her horse, reflects angrily: “Get the wire off… it’s the wire that is standing in the way of things being the way they should be.”\textsuperscript{874} Lucashenko’s italicisation of this text serves to emphasise Jo’s perception of its foreignness – it is, she suggests, an alien presence. Emboldened by sadness and fury she confronts Rob Starr, who rejects the accusation that he has encroached on her land: “Well, I’m real sorry if you’ve lost your colt, but I still say that fence isn’t on your land. I’ve got a survey map of the valley in the house… that fence is definitely not on your land.”\textsuperscript{875} Having been “marooned in [a] sea of Rob Starr’s equanimity” (and embarrassed by her mis-reading of the map), Jo is forced to retreat and to reconsider the way that she has imagined the fence as an instrument of destruction. The narrator reflects:

She was occasionally aware that all was perhaps not quite right in her head. The fences had been along Tin Wagon Road long before she had arrived... She had seen a lot number on her contract when she’d bought the farm.\textsuperscript{876}

By the end of the novel, Jo’s thinking about the fence has been transformed; she recognises that it stands for more than the confirmation of land

\textsuperscript{871} On this point, Nicholas Blomley has argued convincingly that early settlers brought with them a deeply ingrained sense of property, and that this contributed to an estrangement in which people interacted through their property, rather than as social beings. In this episode, Jo’s neighbour feels a sense of personal violation because of the alleged offence. See: N. Blomley, ‘Cuts, Flows and the Geographies of Property’, 2010, pp. 208, 206.
\textsuperscript{873} M. Lucashenko, \textit{Mullumbimby}, 2013, p. 175.
\textsuperscript{874} M. Lucashenko, \textit{Mullumbimby}, 2013, pp. 119, 120. This characterisation of the fence as something “standing in the way of things being the way they should be” can be read as a reflection of Jo’s feelings about a white, colonial presence more broadly.
\textsuperscript{875} M. Lucashenko, \textit{Mullumbimby}, 2013, pp. 126, 127.
\textsuperscript{876} M. Lucashenko, \textit{Mullumbimby}, 2013, p. 134.
ownership. This view is catalysed in large part by her stumbling upon a bird’s nest fashioned out of barbed wire. Tony Birch has reflected on this scene – and the appearance of the bird’s nest on the cover of the novel – by suggesting that the fence serves a ‘dual role’ in the narrative: it reflects colonial possession but also conveys “a sense of sanctuary and genuine protection.” Jo is struck by the homeliness of the nest’s structure (which speaks of resilience and a mother’s care for her offspring) and is forced to reimagine the fence so that it can be at once a source of violence – her horse’s death makes this clear – but also, upon adaptation, a source of “genuine protection.”

_Mullumbimby and Magical Realism:_

Having discussed the representation of land politics, cartography and Indigenous belonging in _Mullumbimby_, I now seek to draw these ideas together in relation to the novel’s conclusion, and the way that it imagines possibilities for engaging with land beyond the prism of native title. I begin by discussing the narrative’s invocation of a magical realist aesthetic (which has been discussed in this thesis in relation to Nicole Watson’s novel _The Boundary_), which is used in _Mullumbimby_ to introduce sacred aspects of Bundjalung cosmology.

Jo is first ‘exposed’ to the sounds of the valley as she moves beyond the perimeter of her property in search of an escaped horse. Having made her way to the ridge, she is “frozen by terror” as the sound of a distinct humming becomes “much louder and much clearer [and she begins to recognise] some words. _Jagan_ – _land_ and _mibum_ – _eagle_ – among them.” At this point, as if to resolve uncertainty for both Jo and the reader, the narrator clarifies (matter-of-factly) the nature of this experience: “What she was hearing was voices. Ancient human voices. Chanting. The hills were singing

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878 M. Lucashenko, _Mullumbimby_, 2013, pp. 97-98.
to her. Despite her trepidation, Jo remains and recalls the advice of her Aunt Barb to, “listen to country, girl, it’s been here a damn sight longer than you have.” As she listens, she attempts to make a recording of the chant on her mobile phone. Believing that she has ‘captured’ the talga (music), and that “centuries could talk to one another after all”, Jo retreats and returns to the familiar surroundings of her property.

This episode is the first in a sequence of what could be described as ‘uncanny’ or inexplicable events in the narrative. On a separate occasion, when Jo once again “clambers through the barbed wire gate at the back of the Big Paddock”, she climbs to the peak of Mount Chincogan, dragged by a sensation “too strong to disobey.” At this time, she is greeted by a “squadron” of more than one hundred fairy-wrens, whose synchronised movements draw her attention to Rob Starr and Sam Nurrung (the grandson of Granny Nurrung), who stand at the base of the valley near a waterhole. The birds fly to Sam and perch themselves on his outstretched arms, while the sound of the talga is carried in the wind from deep in the valley to high on the ridge. As she retreats, Jo is followed by the birds:

They danced in the air around her, circling her, pirouetting from branch to air and back again to the trees. They followed her escape downhill, chittering in annoyance all the way, until… she reached the fenceline.

These episodes (the singing hills, the “squadron” of birds) can be interpreted within the text as expressions of a sacred, spiritual order, and so support a reading of Mullumbimby as a magical realist narrative, which is a mode that provides, according to Suzanne Baker, a “dual spatiality” allowing for the interweaving of axiomatic fantasy with canonical realism. Baker expands
this point to argue that magical realism creates a “space where alternative realities and different perceptions of the world can be conceived” and that it also “allows us to see dimensions of reality of which we are not normally aware.” Based on this characterisation, it is possible to reflect upon Lucashenko’s appeal to the mode of magical realism in terms of the way that it facilitates the integration of Indigenous spiritual beliefs within a political narrative about land claims, homecoming and belonging. Further, its invocation is also tied to the novel’s use of the form of the Bildungsroman (which is allied with realism), and to its engagement with the romance mode, which emphasises the marvellous and magical.

In the scenes that I have described, clarity of vision is reduced (paradoxically, because of the overwhelming vastness of the environment) and the reader is subject to a spatial and psychical disorientation as the narrative pace quickens and the events described become more challenging to comprehend. Jo’s apprehension infects the narrative, and her sudden stream of questions – “Where am I? What lives here, who lived here? What’s gone, and what remains? ... Why me, why now? What for?” – can be understood in relation to the complexities posed by what Brewster has called the novel’s “worlding” of an “Indigenous cosmological juridical imaginary.” In other words, they reflect her (initial) anxiety at being presented with a non-secular, alternative reality.

This anxiety is heightened later in the narrative as Jo travels with Twoboy, Ellen and her sister’s family to Billinudgel, where the group become disorientated and seek the assistance of a topographic map to navigate their way back to Tin Wagon Road. While scanning the map for clues to their location, Jo is alarmed when she discovers that the palms of her daughter’s hands – which have been artfully applied to the side of their travelling van – carry the topographic markings of Bundjalung country. That is, they resemble exactly the lines of the topographic map – “the bitumen roads... that were

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built on the paths that the Bundjalung had made with their bare jinung [feet] before Rome was thought of, before Christ walked or Mohammed breathed.”

Jo’s conclusion that “I gave birth to the valley” is profound because it signals her understanding for the first time of an embeddedness in place. By tracing the lines on her daughter’s palms, she is able to trace her own connection to the land, which is imprinted in her body. Through this literalisation (like the topographic map, Ellen’s hands perform mimesis), Ellen inherits the history of the land and is positioned as its custodian.

When he is alerted to the significance of the patterns on Ellen’s palms, Twoboy attempts to have his girlfriend’s daughter appear as a witness (and to obtain her palms as evidence) in his native title claim. Having exhausted the resources at the State Library, and overwhelmed by the series of crises that has engulfed his family (from whom he has been largely absent), Twoboy implores Jo: “we can show them her hands and then there’s no arguing with it, because it’s right there staring them in the face! They can’t deny it!”

He assumes, in other words, that her palms will qualify as a kind of tangible evidence where genealogy and knowledge of culture has not. Unable to comprehend the meaning or purpose of the line markings on her palms, Ellen responds by setting fire to her hands. This drastic action is effectively the result of her sudden objectification (where her hands are viewed as the property of others) and reflects, perhaps, a deep anxiety about the burden of the freakish coincidence between her hands and the landforms in which she lives.

“Looking after country the proper way” – Cross-Cultural Partnerships:

With her daughter recovering in hospital, Jo turns to Granny Nurrung in search of an explanation for what she has come to see and know. With some

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885 Ellen has already been identified in the narrative as having the ability to see things beyond the scope of her own reality: “Ellen simply knew: periodically she got messages that she didn’t ask for about disasters that nobody wanted to know about.” See: M. Lucashenko, Mullumbimby, 2013, pp. 246, 107.

hesitation, Granny Nurrung advises Jo that, “we bin waiting for her, see… that’s just the Lord’s way of bringing your girl home to country.” In this way, Ellen is effectively marked as an heir to Bundjalung culture because she holds an embodied knowledge of the land in her hands. Granny Nurrung expands on the significance of this heredity by revealing that she has engaged Rob Starr – the white landholder – to construct a barbed-wire fence at the boundary of Jo’s property, which is where it intersects with his own. The fence is intended to prevent the desecration of a culturally significant waterhole. Granny Nurrung explains, “we don’t want strangers traipsing all over the place. Going where they don’t belong. Seeing things they shouldn’t see.” In this instance, Jo recognises that she has been cast as a “stranger” by Granny Nurrung, who also offers an angry critique of Twoboy and his desperate bid for native title: “…he’s a proppa cheeky bugger, too, stirring up all that trouble with Aunt Sally. For Native title!… what’s the good of Native Title? A bitta paper from the government if you’re lucky.”

When pressed further, Granny Nurrung continues by reluctantly explaining to Jo the depth of Rob Starr’s involvement in the “proper” care of country. He has “signed over” ownership of his property to Sam Nurrung so that the sacred site can be cared for into the future: “Sammy boy, he gonna be manager for that country both ways. Dugai way and Goorie way.” As a consequence of Rob Starr’s altruism (he feels an ethical obligation to ensure the preservation of Bundjalung culture), he is effectively entrusted as a quasi-custodian, and Jo is forced to reassess her biases:

She had attributed greed to Rob Starr, and stupidity, and malice… But the real explanation was one she couldn’t possibly have arrived at on her own. The blunt dugai farmer… was doing Granny Nurrung’s bidding all along, protecting the Goorie Law.

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888 At the same time as she identifies him as a “stranger”, Granny Nurrung also concedes that Twoboy is her cousin: “We don’t know him. He our blood, yeah, but he don’t know this place. Not like us.” See: M. Lucashenko, *Mullumbimby*, 2013, pp. 274, 275.
890 Rob Starr confirms to Jo that the change of ownership deeds are held “in the bank in Mullum.” See: M. Lucashenko, *Mullumbimby*, 2013, pp. 277, 276.
Looking after the place that Granny now spoke of in a hushed and reluctant voice.  

Through its ending, the novel imagines a future characterised by a co-existence of legal cultures, where the Bundjalung people are able to continue to observe traditional laws as a result of the security and autonomy that is implied by privately held land. This outcome reflects, of course, a particularly romantic possibility in the context of land politics in Australia. It suggests, moreover, that Granny Nurrung is able to avoid the conflicts and difficulties associated with native title while simultaneously honouring her ancestors (the reclamation of land is a romantic notion in itself) by ensuring that the next generation of Bundjalung people have a strong sense of culture. Her adaptability – where a form of ‘land rights’ is achieved through private ownership – stands in contrast to Twoboy’s dogmatism. Where he has burned bridges with the local community, she has been able to facilitate a strengthening of cross-cultural ties. The novel can be understood, therefore, as a call for Aboriginal people to think beyond the parameters of native title – toward private ownership and the kind of ‘creative custodianship’ orchestrated by Granny Nurrung – in order to reclaim ancestral lands. More than this, however, it is also possible that the novel provides instructive insights for lawyers, who may be inspired, as Nicole Watson has argued, “to build meaningful vehicles for change; vehicles that are rooted not in what lawyers think Indigenous people need, but in what Indigenous peoples believe they need.”

“That talga been sung there forever and always”:

Having revealed details of the waterhole, Granny Nurrung continues by explaining to Jo that: “the talga you bin hearing, that’s liarbird singing out to

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891 M. Lucashenko, *Mullumbimby*, 2013, p. 274. Rob’s actions contribute to a recasting of the role of the fence, so that rather than being a marker of colonial self-interest, the fence becomes a means to protect ancient, sacred sites. It is essentially an enactment of private property in the service of a public good.

you, calling you. He telling you that you found the right jagan [land] there, you and your girl. Telling you you’re home.” Still seeking clarity (though recognising that “some things would always remain unknowable unless she figured them out for herself”), Jo presses for information about the sounds that she has heard at the ridge of the valley. Granny Nurrung relents and explains:

That talga been sung there forever and always… Protection for the water, see. Then, Captain Cook time. Our old people seen the dugai come in, seen the way they were. Greedy. Breaking their own law… Went too wild, shooting us mob. Our old people saw the dugai couldn’t be stopped, and they knew what they had to do. Our mob mighta started wearing trousers, and working for the white man, yeah, but first they made sure they left their talga in a safe place where no dugai could ever take it away.

In what is a rather cryptic response, Granny Nurrung alludes to the way that the Bundjalung elders “taught” the lyrebird to sing the language of law so that it would always resonate on Bundjalung land. Her description of the ancestors’ pragmatism (they were forced to adapt to circumstance) resembles in a number of ways the flexibility that she has shown by negotiating a future for the next generation of Bundjalung. It also reflects the pragmatism that Jo has shown by buying her own plot of land. According to this reading, then, the survival of the lyrebird, whose call is to be understood as both a mimetic performance and a welcome home, is symbolic of the survival of the Bundjalung people. This knowledge has a transformative effect for Jo – not least because it confirms a deep sense of connection with the land and the cosmos. She concludes:

893 M. Lucashenko, Mullumbimby, 2013, p. 276. Mullumbimby uses two spellings of the word lyrebird: ‘liarbird’ when quoting direct speech and ‘lyrebird’ when used by the omniscient narrator.
To destroy the talga of the rockhole, the dugai would have to kill every last Goorie who knew it. They would have to clear the World Heritage forest, and then they would need to destroy every lyrebird in the valley as well, probably every lyrebird for hundreds of miles around. But unless they did that, unless they went so far in their savagery and their madness, then the talga would always be sung in the nooks and crannies of the bush where it seemed like nobody at all was listening… They would all live, now, with the knowledge of their sacred story place, *budharum kalwunybah* [sacred place of lyrebirds]. Just as the old people had wanted.  

**Conclusion:**

A deep sense of hope and optimism for the future pervades in *Mullumbimby*’s conclusion. This comes as a result of Jo’s homecoming to Bundjalung country and the assurances that it brings; as well as the certainty of legal title to land, she now has a deep and abiding knowledge of the extent of her embeddedness in place. Importantly, the novel’s conclusion also imagines a future for Jo and Twoboy where they are unencumbered by the stresses of native title – he becomes a co-claimant with Aunty Sally Watt and will be recognised as the “blackfella owner for the valley between Middle Pocket and Crabbes Creek.” Together, they now wait with “patience” for the “ancestors… to reveal themselves.” This means, in other words, that they have come to terms with the incompleteness of their understanding of the universe and of Bundjalung culture, which resides *in* country, and in the lyrebird, who knows it “more than any of us ever will… deep, deep knowledge is written into its muscles and bones.”

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This thesis has used a methodology drawn from ‘law and literature’ studies to reveal intersections between law, narrative and race in relation to post-*Mabo* legal events and fictional narratives. By emphasising the connections between law and story, it has argued that narrative can function in the post-*Mabo* context to trace injustice and to demand inclusivity for Indigenous peoples within the law. Through its narrative jurisprudence analysis, the thesis has shown that legal doctrine is problematised when it encounters the stories of people whose knowledge and experience have been marginalised at law. I have argued, as a result, that the circulation of narratives about and by Indigenous peoples in Australia has the potential to reshape the law (and ideas of justice) so that it is responsive to the concerns of people whose voices have been historically suppressed.

In order to support these arguments, and to develop a deeper understanding of the operation of narrative in legal discourse, I have applied methods of literary criticism to the reports of two quasi-judicial inquiries – the *Bringing Them Home* report and the *Report of the Hindmarsh Island Bridge Royal Commission*. By calling on the insights of ‘law and literature’ scholars such as Peter Goodrich and Penelope Pether, Chapters One and Two have demonstrated the way that language is used in the law to compel, persuade and advocate, and also to hide indeterminacies and monopolize political and legal power. By framing the quasi-judicial reports as dialogical, and by initiating a discussion about their constructedness (which allows, in turn, a deconstructive reading), the thesis has argued that the law should be understood as intertextual and relational, rather than as abstract and monologic.

In this light, Chapter One argued that story is the organising mode of the *Bringing Them Home* report. By drawing from critical race theory, it likened first-person testimony to counter-storytelling, and suggested that the quasi-judicial report was powerful precisely because it spoke to the moral senses of
the nation. In a similar way, the chapter argued that, by fostering a culture of respectful listening (which translated in the report to a call for readers to think and to feel), the National Inquiry provided an example of the reconciliatory potential of legal processes. In contrast to this narrative intervention in the law, the Hindmarsh Island Bridge Royal Commission framed its inquiry in adversarial terms; it did not provide the same scope for counter-storytelling, and was resisted by the ‘proponent’ group who rejected its legal authority. The analysis in Chapter Two pointed, therefore, to a confrontation between epistemologies and jurisprudential systems – that is, to a Ngarrindjeri law incommensurate with Australian law. It argued that the effect of the law’s privileging of literate modes of communication and knowledge transmission is the disenfranchisement and disempowerment of Indigenous communities.

In Part Two, the thesis responded to Penelope Pether’s suggestion that literature might play a role in restoring justice to the law by examining four post-Mabo narratives, and by reflecting on the way that storytelling functions as a potent political force in social and legal debates. Specifically, it emphasised (through textual analysis) that literature provides a means to critique existing frameworks of law – such as native title – and that it also provides a vehicle for articulating aspirations for legal change. In this light, I have argued that the Mabo judgment created a fertile ground for the proliferation of stories relating to Indigenous connection to country, and moreover, that these stories underscore the role of narrative in the explication of Indigenous legal philosophy.

In Chapter Three, the thesis argued that Larissa Behrendt’s novel Home re-envisions Australia’s legal history by challenging the fiction of terra nullius, and by reintegrating its Indigenous protagonist (whose ancestors were dispossessed of their lands and children) within a tradition of Aboriginal legal storytelling. Chapter Four analysed Terri Janke’s novel Butterfly Song and suggested that, by telling the story of the misappropriation and return of a pearl brooch, the narrative explores questions of property and ownership similar to those raised in the Mabo case. Chapter Five considered Nicole Watson’s crime-fiction novel, The Boundary, and engaged with its critique of
native title law by contending that, through its invocation of “blackfella business”, the novel demonstrates a subversive approach to questions of Indigenous self-determination. Finally, Chapter Six reflected on the way that Melissa Lucashenko’s novel, Mullumbimby, resists native title and instead contemplates a ‘creative custodianship’ which is based in the private ownership of land, and importantly, which provides for the protection of sacred sites.

Collectively, the novels draw attention to the way that Indigenous fiction speaks back to Australian law. They do this, primarily, by tracing significant shifts in thinking about native title. While both Home and Butterfly Song reflect a sense of hopefulness and optimism about the potentialities of native title (in Butterfly Song, Tarena’s family cite the Mabo case when they appeal for her to represent them in the claim for the return of the pearl brooch), The Boundary and Mullumbimby, by contrast, express deep frustration and dissatisfaction – they demand that new approaches to land justice be considered. This disenchantment is born out of an experience of native title as an obstacle to Indigenous land rights: between 1994 and 2011, the National Native Title Tribunal made only 195 determinations from a total of 2000 applications, out of which 44 were unsuccessful. The narratives suggest that, rather than being a tool for social and legal advancement, native title has, on the whole, failed to deliver substantive benefit or reform. Granny Nurrung summarises this critique in Mullumbimby when she asks, “What’s the good of native title? A bitta paper from the government if you’re lucky.”

As well as speaking back to native title law, the novels also respond to the legal concerns raised by both of the quasi-judicial inquiries. This engagement is particularly evident in the relationship between Larissa Behrendt’s novel Home and the Bringing Them Home report; Behrendt effectively reworks its major narrative themes by highlighting the practical effects of dispossession.

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900 ‘What’s New in Native Title’, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), June 2012, pp. 1-2, online. As of March 2017, the National Native Title Tribunal has made 378 determinations, 63 of which have been unsuccessful. See: ‘Statistics’, National Native Title Tribunal (NNTT), March 2017, online.
and forcible removal, and by presenting a fictionalised account of the processes of family reunion. In this sense, the novel participates in the outpouring of emotion that was prompted by the National Inquiry. In a similar way, *The Boundary* speaks back to the Hindmarsh Island Bridge Royal Commission by offering a strident critique of the structural and systemic biases of the Australian legal system. Its characterisation of cross-examination for Indigenous peoples as being “like a swimming carnival where, in order to win, [you can’t] get wet” resonates with the experience of the Ngarrindjeri ‘proponent’ women, whose traditional legal knowledge was dismissed in the course of the Royal Commission – largely because of its epistemological incommensurability with the dominant social and legal frameworks of white Australia.

In the nearly twenty-five years since the High Court delivered its judgment in the *Mabo* case, momentum for treaty and the recognition of Indigenous sovereignties has intensified. This growth in support can be traced, in many respects, to the success of Indigenous (and non-Indigenous) activists at drawing the nation’s attention – by way of literature and other means – to the failings of the native title regime. They have highlighted its limitations, identified areas for reform and, significantly, articulated alternative social and legal goals. In the next twenty-five years, as calls for the formalisation of treaties and the recognition of Indigenous sovereignties grow louder, it is likely that narrative will play an important role in leading public debate and, critically, in changing hearts and minds.
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