

THE HIDDEN WHITENESS OF AUSTRALIAN LAW

A Case Study

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Indigenous people face procedural barriers in bringing actions in the Australian legal system, such as the need to frame their claims within Western cultural constructs of individual actions and economic loss, and to transform their stories into the written evidence privileged by courts. But an even greater barrier is the hidden Whiteness of Australian courts, which places Indigenous people as the 'Other' who must either change their claims to conform with 'our' requirements, or be rejected. The case study explored in this article shows how this Whiteness exhibits itself in procedural requirements; in its racialising of Indigenous people, their claims and evidence; and in its assumptions of essentialist views of Indigenous culture as something fixed in the past. Judges and lawyers need to step outside their personae as Whites faced with Others, to adopt one where 'us' embraces Indigenous people and culture too.

Introduction

Despite the liberal ideal of a neutral and culturally unbiased legal system, concepts of race have shaped the law and its interpretation in Australian courts. The initial invasion displaced Indigenous law courtesy of the *terra nullius* principle, yet excluded Aboriginal and Torres Strait Islander peoples from the protection of transplanted British law. The decision in *Mabo v Queensland*¹ seemed to offer hope that Australian law could recognise cultures other than the dominant one. According to Gray, for example, *Mabo* 'made this nation officially a legally pluralist one',² while Strelein argues that the decision 'affirms the strategy of Indigenous peoples' in utilising the courts to assert their right to self-determination'.³ Yet, as Strelein also argues, there are 'limits to the judicial system in recognising and protecting these rights'.⁴ She refers to both constitutional and procedural barriers as limiting the capacity of the courts, but in fact there is a more fundamental barrier: the Australian legal system's inherent assumptions of Whiteness that affect both the content and procedures of the law. This article surveys the procedural barriers faced by Indigenous people in using the legal system, discusses Whiteness theory as

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

2 Gray (2000), p 1.

3 Strelein (2000), p 1.

4 Strelein (2000), p 1.

developed in the international and Australian literature, and analyses the judgement in *Cubillo and Gunner v Commonwealth*⁵ to argue the application of the theory to Australian law. The significance of this argument is that procedural barriers cannot be overcome without also addressing the hidden Whiteness of Australian law.

Procedural Barriers in the Legal System

The ideal of the Australian legal system is that it applies universal law equally to all citizens through shared institutions such as the courts. Yet, as Yeo points out, 'assertions such as the need for equality before the law and equal protection before the law are highly suspect once we pose the question: "whose law?"',⁶ to which can be added 'whose courts?' *Mabo* was groundbreaking in its recognition of the existence of Indigenous law, but the extent of that recognition was extremely limited: it was confined to land tenure rather than Indigenous law generally; it accepted the ability of Indigenous law to be overborne and displaced by colonial law; and it forced Indigenous claimants into framing their entitlements in only those terms and concepts accepted by the dominant legal system.

Subsequent cases have extended the *Mabo* decision at the fringes — for example, *Wik v Queensland*⁷ established the potential for native title claims to leasehold land, and *Yanner v Eaton*⁸ extended the scope of rights protected by native title to include some traditional hunting rights. But the essential nature of the recognition afforded by the Australian legal system to Indigenous rights has not changed. Indigenous people must find, shape and present their cases in ways recognised and acknowledged by the dominant legal system. Not only must they, as Gray suggests, assume the 'difficult burden of proving the continuing existence and the content of the relevant Indigenous legal system',⁹ and do so in ways that conform with the rules and values of the legal system, but they must also accept the courts as arbiters of what constitutes Indigenous law and culture.

The difficulty starts, as Strelein¹⁰ points out, with the framing of the claim, which requires the compartmentalising of a shared experience based on culture into individual claims and evidence with a focus on economic elements. There are conflicts between what courts expect and Indigenous perceptions, first in relation to the nature of evidence — especially the primacy of written documents as opposed to oral history. A second source of conflict is between courts' demands to hear all evidence and determine its relevance, and Indigenous rules limiting access to knowledge. And there is also conflict between the adversarial process by which information is extracted and tested in

⁵ *Cubillo and Gunner v Commonwealth of Australia* (2000) 174 ALR 99.

⁶ Yeo (1996), p 229.

⁷ *Wik Peoples v State of Queensland* (1996) 141 ALR 129.

⁸ *Yanner v Eaton* (1999) 166 ALR 258.

⁹ Gray (2000), p 2.

¹⁰ Strelein (2000), pp 9–12.

a courtroom, and Indigenous ways of telling stories and conveying information.

All of these difficulties were illustrated in the Hindmarsh Island Royal Commission. That commission, conducted by a judge and drawing heavily on adversarial legal processes, concerned allegations by one group of Aboriginal people that another group of Aboriginal people had fabricated claims put to a statutory inquiry into the cultural significance of Hindmarsh Island. The claimed cultural significance was the island's centrality to women's spirituality, knowledge of which was limited — or secret women's business. The outcome of the statutory inquiry was that federal legislation could be used to limit development of the island and its impact on these cultural beliefs. The Royal Commission determined that the cultural and spiritual significance of the island had been fabricated.¹¹

The commission shows the conflict between the processes of law and Indigenous culture in several ways. First, the claimant women had to translate their oral culture and history into a written form, contained in 'secret envelopes'. Then that restricted knowledge had to be mediated through credible white spokespersons, both the person conducting the statutory inquiry and expert anthropologists. As Harris suggests, the commission 'emphasised the essential incompatibility of the two systems of law — the emphasis upon disclosure and the law's need to know against the essential secret nature of some of the beliefs of Aboriginal peoples'.¹² He adds that the commission illustrates how 'the "Law" privileged the testimony of experts (from both groups in the dispute) and made representations about the two opposing groups of Ngarrindjeri women'.¹³ More than this, the commission rejected the stories of the claimant women as fabrications, based on findings that the stories lacked logic and were not supported by experts. In fact, the women were required to prove their beliefs within the constructs of white culture and law, and their major failing was a lack of white support for their story, from both early and contemporary anthropologists. Nicholls goes further, suggesting a gender bias as well — noting that the claims of the female adherents and their female white experts were rejected while 'claims of male adherents to a particular, conservative school of anthropological thought were legitimised'.¹⁴ In addition, Nicholls suggests that the principal claimant was constructed by the commission and the media in ways that suggested unreasonableness, which then justified their rejection of her beliefs.¹⁵

There has been some recognition of the difficulties faced by Indigenous people in participating in Australian and overseas court processes,¹⁶

¹¹ For discussion of the Royal Commission, see Harris (1996), pp 115–39; Nicholls (1996), pp 59–72; Hemming (1998), pp 26–33; Fergie (1996), pp 13–24.

¹² Harris (1996), p 1.

¹³ Harris (1996), p 1.

¹⁴ Nicholls (1996), p 59.

¹⁵ Nicholls (1996), p 62.

¹⁶ See eg Strelein (2000); Flynn and Stanton (2000), p 75; Gray (2000); Burke (1996), p 215.

particularly in relation to the admissibility of oral traditions as evidence, the interpretation of testimony of witnesses and differences in language usage. In some cases, there has been an acknowledgment that cultural differences also have an effect on the ability of Indigenous people to effectively present their claims.¹⁷ But these difficulties have often been viewed by judges as being embedded in legal institutions and in legal reasoning, rather than as the result of cultural bias in the legal system itself.¹⁸ Thus the recognition of cultural differences is superficial, and the underlying Whiteness of the legal system remains unchallenged. This 'hidden culture of the legal system'¹⁹ rests on inherent assumptions of Whiteness, in relation to law, culture and the nature of Australian society generally. The result of these assumptions is that cases about Indigenous rights transform into trials of Indigenous people and culture, with White courts sitting in judgment.

Assumptions of Whiteness

Some scholars explain the disadvantaging of Indigenous culture in the legal system from a position of Whiteness that results in Western culture being perceived as 'proper' and 'superior'.²⁰ Dyer describes the power of Whiteness as:

White people have power and believe that they think, feel and act like and for all people ... White people create the dominant images of the world and don't quite see that they thus construct the world in their own image; White people set standards of humanity by which they are bound to succeed and others bound to fail.²¹

Contrary to the positioning of people as either belonging or not belonging to White culture: 'There is no more powerful position than that of being "just" human.'²² When a particular group of people is viewed as human, all others are then categorised as being something less than human unless they too can behave, think, feel and look the same as the dominant group. This hegemony allows the dominant group to speak for all others. Although White people claim this position of authority, they do not see their privilege because they do not see their race. 'Whiteness, like maleness, becomes the norm for "human".'²³ Raced people, because of their inferior power, cannot speak for anyone but people of their own race. Raced people will never be in a position to impose their own values and beliefs on (White) people who, by their own admission, make up the 'human' race. Unless Whites are able to understand

¹⁷ See Gray (2000), pp 6–7.

¹⁸ Strelein (2000), p 8.

¹⁹ Strelein (2000), p 8.

²⁰ Dyer (1997); Moreton-Robinson (1998), p 11.

²¹ Dyer (1997), p 9.

²² Dyer (1997), p 2.

²³ Maher and Tetreault (1997), p 324.

that they are also part of a race there will never be a disintegration of the hegemony that currently exists. Dyer makes this point by simply saying:

We may be on our way to genuine hybridity, multiplicity without (white) hegemony, and it may be where we want to get to — but we aren't there yet, and we won't get there until we see whiteness, see its power, its particularity and limitedness, put it in its place and end its rule. This is why studying whiteness matters.²⁴

Participating in cultural hegemony may be an unconscious act that is uncontaminated by any malice or hatred for other races. In fact, White people may be motivated by goodwill and think of their actions as honourable. Whites may try to benevolently offer assistance to people of other races so that they too can be like White people, to move on and improve their lot in life, within the Western constructions of a progressively improving society. But White people may find it difficult to accept that they are also raced and that their position of power is a cultural construct rather than a universal truth. Clouded by their benevolent beliefs, Whites become defensive when their position of supremacy is pointed out to them. bell hooks says of White liberals that:

Often their rage erupts because they believe that all ways of looking that highlight difference subvert the liberal belief in a universal subjectivity (we are all just people) that they think will make racism disappear. They have a deep emotional investment in the myth of 'sameness', even as their actions reflect the primacy of whiteness as a sign informing who they are and how they think.²⁵

Theories of Whiteness have been prominent in North American literature. However, recognition of the prevalence of Whiteness in media, politics, law and education has only recently manifested itself in discourses relating to race relations in Australia. Assumptions of Whiteness have been used by legal scholars from the United States to identify the way their legal system racialises non-Whites. Tehranian, for example, shows how the Supreme Court after 1922 relied on performance of Whiteness instead of the common-knowledge test or the scientific-evidence inquiry, in order to make racial determinations.²⁶ Harris traces how Whiteness became viewed as a form of property acknowledged and protected in American law.²⁷ Cho explores the life of Earl Warren, a former Chief Justice of the US Supreme Court, and his quest for racial redemption. Cho's notions of racial redemption offer a theoretical basis from which to understand various court decisions regarding the positioning of non-Whites.²⁸

²⁴ Dyer (1997), p 4.

²⁵ hooks (1992), p 167.

²⁶ Tehranian (2000), p 817.

²⁷ Harris (1993), p 117.

²⁸ Cho (1998), p 73.

Flagg uses the notion of indeterminacy to illustrate how legal reform can ultimately lead to laws that dismantle White privilege.²⁹

In Australia, Moreton-Robinson demonstrates the White hegemony of law in her critique of the High Court decisions in *Mabo* and *Wik*. She shows how White principles of justice applied by the High Court and subsequently enshrined in the *Native Title Act 1993* (Cth) force Indigenous people in claiming native title to satisfy White rules.³⁰

Tragically and ironically, even though we were dispossessed of our lands by White people, the burden of proof for repossession of our lands is now placed on us, and it must be demonstrated in accordance with the White legal structure in courts controlled by predominantly White men. As the written word is generally regarded as more reliable by courts, all claimants must be able to substantiate their oral histories with documents written by White people such as explorers, public servants, historians, lawyers, anthropologists and police ... Whiteness is centred by setting the criteria for proof and the standards for credibility.³¹

Watson describes native title as an illusory recognition of Indigenous law and rights, saying:

While the illusion of recognition runs, we still live without the freedom of our culture, and economic and civil rights, taken for granted by most citizens of Australia, are yet to become the Aboriginal experience.³²

Similarly, Nicholls, writing of the Hindmarsh Bridge Royal Commission, refers to its privileging of documentary evidence and explains that privileging:

Literate transmission modes have acquired their elevated status by a kind of simple deception, because literacy is what 'we' do, while 'they' do otherwise.³³

Thus the courts, legislators, lawyers and media are 'we' and Indigenous people are the 'Other', who must either transform their claims to conform with 'our' requirements or be rejected. Harris puts it differently, saying that the Hindmarsh Bridge Royal Commission illustrates the 'manner in which a narrative of community and society seeks either to incorporate Aboriginal people within the framework of Australian society or to deny their existence completely'.³⁴ He adds:

²⁹ Flagg (1996), p 250.

³⁰ Moreton-Robinson (1998), pp 12–14.

³¹ Moreton-Robinson (1998), p 12.

³² Watson (2000), p 5.

³³ Nicholls (1996), p 65.

³⁴ Harris (1996), p 118.

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 ... Cultural heritage legislation remains a white construct, which defines Aboriginal culture, requires that Aboriginal applicants should 'prove' their Aboriginality and still insists that ultimate control should remain with the Minister.³⁵

Watson describes two impacts from these assumptions of Whiteness of the Australian legal system: first, that 'many Aboriginal people are still resisting the violation of Aboriginal laws and the imposition of an alien legal system';³⁶ and second, that 'we practise our culture in a straitjacket of accountability, and the lighting of ceremonial peace fires is met with the same mindset, which extinguishes "native title"'.³⁷ That is, continued interpretation of Indigenous law and Indigenous rights through the construct of White assumptions is just a continuation of *terra nullius*, in another, more insidious form.

Whiteness in Action

The decision in *Cubillo and Gunner*³⁸ illustrates the inherent assumptions of Whiteness in the Australian legal system. The case involved Lorna Cubillo and Peter Gunner, both members of the Stolen Generation of Aboriginal people removed from their families as children, in 1947 and 1956 respectively, in the Northern Territory. They sued the Commonwealth government for damages for wrongful imprisonment and deprivation of liberty, breach of fiduciary duty, breach of statutory duty, and breach of duty of care. Justice O'Loughlin of the Federal Court found that the applicants had each suffered damage in the form of psychiatric illnesses and through loss of contact with their traditional culture. However, they had not discharged their burden of proof in relation to any of the causes of action.

The court found that, while the evidence suggested Mrs Cubillo was removed without her mother's consent, she had failed to prove that the officials involved in her removal had acted contrary to their statutory duty to intervene only to promote her welfare. This failure occurred because of the complete lack of documentary or oral evidence to show why she was removed. In Mr Gunner's case, the court found that a thumbprint on a request form was evidence of his mother's consent to his removal, and hence no breach of duty had occurred. The judge concluded that government policy at the time was directed to the assimilation of 'part-Aboriginal'³⁹ children through their removal from their families and receipt of a Western education, and that the actions taken in respect of the applicants were in pursuit of these policies and

³⁵ Harris (1996), pp 119–20.

³⁶ Watson (2000), p 4.

³⁷ Watson (2000), p 5.

³⁸ *Cubillo and Gunner v Commonwealth of Australia* (2000) 174 ALR 99 (*Cubillo*).

³⁹ This term, acknowledged by the judge as offensive and racist, was nevertheless used in the judgment because of its prevalence at the time of relevant events.

therefore authorised by law. While he found that both applicants had been victims of maltreatment at different children's homes, he found that the Commonwealth was not vicariously liable for the injuries they had suffered because the homes were operated by churches, independently of the government.⁴⁰

This case illustrates assumptions of Whiteness in the Australian legal system in several ways. First, the applicants had to frame their objection to their removal as children from their families not in terms of Indigenous law or culture, or even basic human rights, but in terms of causes of action recognised by the legal system. The judge clearly rejected the notion of broader considerations informing his judgment, adopting the view that 'the business of the courts is legality', with legality assumed to mean conformity with Western concepts of that notion.⁴¹ This involved the translation of the claimants' action from one of rights, morality and principle to one of economic loss and damages. This very transformation was then used to try to discredit the applicants, with suggestions from the Commonwealth's counsel that the whole motivation of their claim was to obtain monetary compensation. This transformation was also evident in the insistence that what was at issue was not what had happened to Aboriginal people as a whole, or government policy, or what had been documented by the Human Rights and Equal Opportunity Commission in the *Bringing Them Home* report,⁴² but the circumstances of the two individual claimants.⁴³

Second, the judgment shows a strong preference for documentary evidence over the oral histories provided by Aboriginal witnesses. The best example of this is the acceptance of a document with a thumbprint, allegedly that of Mr Gunner's mother, as evidence of her consent to his removal, over the testimony of witnesses that, as a child, Mr Gunner was frequently hidden from patrol officers, had his skin blackened with ash and did not voluntarily leave his community.

Third, the judge assessed the testimony of Indigenous and non-Indigenous witnesses in very different ways. In relation to the former patrol officers and other officials who gave evidence, he said:

The calibre of the former officers of the Native Affairs Branch and the Welfare Branch who gave evidence in this trial was exceptionally high ... My reason for mentioning this factor is to identify them as people of intelligence and experience who might be expected to have knowledge and awareness of the policies that existed in relation to Aboriginal and part Aboriginal people and the manner in which those policies were implemented.⁴⁴

⁴⁰ See *Cubillo*, Summary of Reasons for Judgment.

⁴¹ *Cubillo* (2000) 174 ALR 99 at 133.

⁴² Human Rights and Equal Opportunity Commission (1997).

⁴³ *Cubillo* (2000) 174 ALR 99 at 136.

⁴⁴ *Cubillo* (2000) 174 ALR 99 at 121.

The missionary in charge of St Mary's was also assessed in glowing terms:

the evidence of Sister Eileen was very important because it made clear how she — and no doubt, others like her — worked with dedication and commitment for the welfare and betterment of the Aboriginal and part Aboriginal people.⁴⁵

However, the evidence of the two applicants was not so well received:

There are sections in the evidence of Mrs Cubillo, of Mr Gunner and of some of their witnesses that I cannot rely on ... Both Mrs Cubillo and Mr Gunner showed objective signs of intense distress at times. At one stage during the trial, Mr Gunner had to seek medication ... there is the risk that, in some areas, they may have given distorted, but not deliberately false, accounts of matters to which they deposed in their evidence. In exercising this caution, I have chosen not to engage in a personal or subjective assessment of their demeanour. I would be entitled to have regard to their presentation in Court, but I prefer not to rely on that. I find more comfort in making an *objective assessment* of the evidence so that I can test whether it appears to be inherently improbable, or whether it matches other evidence, or whether it is logically probative.⁴⁶

The judge found that Mrs Cubillo had 'in some instances, engaged in a process of reconstruction' of events. One basis for this finding was his rejection of her direct and uncontroverted evidence of being called 'a half-caste' as a child, saying 'it was not possible that a part-Aboriginal girl, who was then no more than three or four years of age, would recognise and retain a memory of an English word that had no significance to her'.⁴⁷ He does not consider that, even while not understanding a word's literal meaning, a child may be well able to recognise its significance as one repeatedly used to describe not only her, but her whole position in life as a 'part-Aboriginal' child in the 1940s.

Aboriginal witnesses appearing for the applicants generally were described adversely as churlish,⁴⁸ defensive and truculent,⁴⁹ and 'the quality of GK's evidence was marred by his bitterness and anger'.⁵⁰ Mr Gunner was also assessed adversely:

I do however describe him as slow thinking and easily confused. I also find it of interest that the school report referred to him as 'sullen and

⁴⁵ *Cubillo* (2000) 174 ALR 99 at 331.

⁴⁶ *Cubillo* (2000) 174 ALR 99 at 149 (emphasis added).

⁴⁷ *Cubillo* (2000) 174 ALR 99 at 248.

⁴⁸ *Cubillo* (2000) 174 ALR 99 at 280.

⁴⁹ *Cubillo* (2000) 174 ALR 99 at 284, 285.

⁵⁰ *Cubillo* (2000) 174 ALR 99 at 409.

moody'; I observed that those traits have remained with him in his adult life.⁵¹

Not all Aboriginal witnesses were regarded negatively. Those considered to have adopted desirable features, including learning English, engaging in Western education and working with White experts, were treated as inherently more believable:

Bunny Napurrula was an impressive witness. Although she was quietly spoken, and very difficult to understand at times, her evidence was helpful and I find myself able to accept it. She learnt English in school and has completed an interpreter's course. She has worked with linguists and anthropologists over the last twenty years but she still has difficulties with the English language and it was necessary at times to rely on an interpreter.⁵²

The most telling aspect of the judgment, however, is its division of Australian society into an 'us' and an 'Other', with Indigenous people being the Other. Thus:

To adapt a phrase that has been used by Professor Helen Haste, *we* have seen in the last fifty years or so, a huge change in the mapping of *our* moral and social values towards the Australian Aborigine.⁵³

Even more, the judge clearly showed acceptance of a progressive attitude to Indigenous culture, one that sees that culture as evolving towards a more civilised, or better state:

[Mr Lovegrove] had dedicated the greater part of his working life to the *betterment* of the Aboriginal people.⁵⁴

Whilst they [Aboriginal people] *clung* to their cultures and traditions, I find, based on Mrs Kunoth-Monk's evidence, that they nevertheless appreciated the value of a western education for their children.⁵⁵

The conduct of Mrs Ward and her attitudes [such as teaching Aboriginal children to use knives and forks] ... were powerful reminders that there were European people in the Northern Territory in the 1940s who were dedicated in their concerns for the health and education of Aboriginal and part Aboriginal people.⁵⁶

⁵¹ *Cubillo* (2000) 174 ALR 99 at 370.

⁵² *Cubillo* (2000) 174 ALR 99 at 258.

⁵³ *Cubillo* (2000) 174 ALR 99 at 140 (emphasis added).

⁵⁴ *Cubillo* (2000) 174 ALR 99 at 125 (emphasis added).

⁵⁵ *Cubillo* (2000) 174 ALR 99 at 414 (emphasis added).

⁵⁶ *Cubillo* (2000) 174 ALR 99 at 254.

In fact, everything about Mrs Cubillo points to her having a strong urban background. She dresses well, she speaks clearly and firmly, but above all, her work history and her determination to educate herself and to *improve* her station in life are all familiar characteristics of persons wishing to succeed *in a western culture*.⁵⁷

Justice O'Loughlin also demonstrated an essentialist view that Indigenous culture was unchangeable, existing somewhere fixed in time and place, rather than attaching to Aboriginal people themselves. That is, while change and evolution are accepted and even welcome aspects of Western culture, Indigenous culture is somehow invalidated or obliterated by changing circumstances. At its extreme, this view holds the only valid form of Aboriginal culture to be one which existed prior to White occupation, and which remains unchanged. Thus Mrs Cubillo can only 'regain' her Aboriginal culture by leaving her home and the urban environment and returning to 'tribal life':

I find it difficult to accept Mrs Cubillo's proposition that she would like to find out more about her Aboriginality. In my opinion, Mrs Cubillo has had the opportunity since she was about seventeen, if she had wished to take it, to investigate *whether she wanted to return to the tribal life* to which she originally belonged or, as would more likely be the case, to an Aboriginal life within an Aboriginal community that enjoyed fundamental aspects of western civilisation. But she elected to stay wholly in an urban environment ...⁵⁸

I also accept that her time at Retta Dixon would have so conditioned her to a western lifestyle that it would have been difficult, and almost impossible, to *return to tribal life in its purest form*.⁵⁹

A further complicating factor is the need to determine what it is that the applicants have lost. For example, the sisters Napanangka and the sisters Napurrula were presented as Aboriginal women who still follow an Aboriginal lifestyle and participate in Aboriginal culture. I accept that presentation as a substantially accurate presentation of the personal circumstances of those four witnesses. But it is not totally accurate because, as part of an evolutionary process, those women, and no doubt, countless others like them, have taken up and embraced some aspects of western culture. Some of them live in conventional houses in Tennant Creek, Eileen Napanangka teaches Aboriginal culture in a western style school; Lena Pula has travelled the world as a result of her batik artistry. The evidence in this trial did not disclose *whether tribal life, in its pure and original form, continues to exist*.⁶⁰

⁵⁷ *Cubillo* (2000) 174 ALR 99 at 252 (emphasis added).

⁵⁸ *Cubillo* (2000) 174 ALR 99 at 305 (emphasis added).

⁵⁹ *Cubillo* (2000) 174 ALR 99 at 305 (emphasis added).

⁶⁰ *Cubillo* (2000) 174 ALR 99 at 577 (emphasis added).

The judge rejected any notion of removal decisions being based on race:

Furthermore, integration of part Aboriginal children was *not based on race*; it was based on a sense of responsibility — perhaps misguided and paternalistic — for those children who had been deserted by their white fathers and who were living in tribal conditions with their Aboriginal mothers.⁶¹

There was absolutely no causative link connecting ‘race’ to a failure to have regard for the welfare of children.⁶²

The fourth and last purpose for the removal policy, as identified by the applicants, was said to be to ‘breed out half-caste Aboriginal people and protect the primacy of the Anglo-Saxon community’. That must be rejected. Although there were pre-war writings that promoted miscegenation, no material in the trial would suggest that any such purpose existed in 1947.⁶³

And finally, any deprivation or loss of culture the applicants had suffered was largely their own fault:

I am also satisfied that Mrs Cubillo was unhappy at the Retta Dixon Home; she pined for her family — she felt unloved and unwanted. However I cannot say that this was the fault of Miss Shankleton and the other missionaries. It was, more likely, the result of Lorna’s personality and character.⁶⁴

In my opinion, both Mrs Cubillo and Mr Gunner have suffered compensable losses through not being regarded by other members of the Aboriginal community as traditional owners of the lands to which reference has been made in these reasons. However, those losses are not total; they are reversible. That has already begun to appear in the case of Mr Gunner ... Any award would, however, be very modest, particularly in the case of Mrs Cubillo. She has made no attempt to change her lifestyle. In Mr Gunner’s case he has returned to Utopia and is making serious attempts to return to his former community. Unlike Mrs Cubillo, he has attempted to mitigate his damages.⁶⁵

Conclusion

The *Cubillo and Gunner* case illustrates the procedural difficulties faced by Indigenous people in translating protection of their rights into causes of action

⁶¹ *Cubillo* (2000) 174 ALR 99 at 160 (emphasis added).

⁶² *Cubillo* (2000) 174 ALR 99 at 344.

⁶³ *Cubillo* (2000) 174 ALR 99 at 454.

⁶⁴ *Cubillo* (2000) 174 ALR 99 at 327.

⁶⁵ *Cubillo* (2000) 174 ALR 99 at 568.

recognisable and supportable by the Australian legal system. But more is needed to overcome this problem than simply tinkering with evidentiary and procedural requirements. Judges and lawyers need to step outside their personae as Whites faced with Others, to adopting one where 'us' embraces Indigenous people and culture too. The United States experience suggests that this is a long and difficult process, and that to a large extent the legal system is simply reflective of the Whiteness of society more generally. But that does not mean the courts have no role or capacity to achieve change. The High Court's most effective role as a result of the *Mabo* decision was as *agent provocateur* — lobbing a grenade that forced unwilling governments to finally address native title, even though in a very imperfect way. The stolen generations may not achieve justice through the courts, but litigation can be a way of forcing the issue on to political agendas. Even though the case was lost, and this loss has now been confirmed on appeal,⁶⁶ the facts that so far the Commonwealth has spent \$8.4 million on litigating the case, and that there are another approximately 2100 similar claims for compensation, may prompt policy changes.⁶⁷ These circumstances provide cogent reasons for Australian courts to take the initiative in addressing and overcoming their hidden Whiteness.

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⁶⁷ Emma McDonald, *The Canberra Times*, 27 February 2001.

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