

THE WINTER ROAD: A story of legacy, land and a killing at Croppa Creek

Kate Holden; Black Inc, 2021; 336 pages; \$32.99 (paperback), \$14.99 (e-book)

On July 2014, farmer Ian Turnbull shot and killed Glen Turner on an empty road near Croppa Creek, north of Moree in north-west New South Wales. Turner was an environmental compliance officer who had been investigating unlawful land-clearing on Turnbull's property.

While 'The Winter Road' is superficially a book about the circumstances leading up to that murder and the 2016 trial that followed, instead it is much more ambitious in its scope. Holden sets out to understand the complex relationship between Australians and the land. It is a daunting task, and in large part she succeeds.

I moved to Moree shortly after the Turnbull trial had concluded, at the beginning of a record-breaking heatwave when the air seemed to be rebelling against the treatment of the land. There is truth to Holden's assertion that many thought Turnbull had been pushed too far by overzealous compliance officers. But there were also many in the area who were horrified, not only by the murder itself but also by the destruction of native vegetation by Turnbull and others that served as a prelude to Turner's death. Rural Australia defies typecasting.

Nuanced and empathetic, Holden paints a mesmerising tableau of the highly arable area surrounding Moree. 'This is *l'Australie profonde*, its mythic colours of gold and green, its timeless ways, its small gods' (p 16). Holden has gone to the effort of trying to understand the people of the Moree plains in a way that moves beyond stereotypes.

She also traces the history of legislative attempts in NSW to regulate the clearing of native vegetation on farmland. Environmental regulation remains a patchwork of state and federal laws that frustrates landholders and environmentalists alike. And in trying to please both camps, it pleases neither. She maps the increasing complexity of environmental law and concludes drily 'so much paperwork. So many trees felled to argue about the felling and keeping of trees' (p 259).

Holden narrates the history of rural landholders in western NSW, who have long resented government agencies telling them what they can do with their land. Holden traces this to the colonial view of land that drew its inspiration from John Locke and other Enlightenment thinkers. Land was seen as 'an opportunity for seizure and personal advantage' (p 17). As Holden points out, land clearing goes to the heart of the tension between rural communities and the government. 'It relates', she writes, 'to what we deem shared heritage; to the concept of a common wealth that spreads across private property, despite fences, and down through time; to the dilemma between maintaining land and working it; to the choice between a legacy for your children or the survival of ancient ecologies' (p 35). When Ian Turnbull murdered Glen Turner in defence of his 'right' to clear his land, 'it came from ... the long legacies of libertarianism and conservatism ... that recalled the "robbery by government" that made the squatocracy of the 1860s pay for lands they had sweated salt and blood to seize' (p 48).

The book falters somewhat in its descriptions of the criminal proceedings against Turnbull which, at times, lacks precision or seems to skim over important details. But this is not a book about the minutiae of a criminal trial. It is a book about the land and how we are all linked to the bush, just as we are all hypocrites. As Holden points out, 'Victorian and New South Wales coast-dwellers logged out their forests and cleared grasslands for more than a century. Now they tell Queenslanders and those on the New South Wales border country to pull back, leave good soil unused, because they would like to keep those forests, that scrub' (p 109). Let they who have not benefited from environmental destruction cast the first stone.

While I was living in Moree, I drove with a group of Gomeroi Elders to the site of a colonial massacre. The landscape was bare save for the desiccated remnants of a creek and the stubble of harvested wheat. Looking at the empty horizon, one of the women sighed. 'The poor birds', she said. 'They have nowhere to rest.' The agricultural history of Australia is a complex story that involves tragedy at various scales. This is well-documented at the macro level: colonial dispossession, environmental destruction, and the alienation of rural communities from the city bureaucrats who dictate without trying to understand. Zoom in closer and those tragedies comes to life: the legacy of massacres, the homeless birds, and Glen Turner's death. Holden makes the effort to zoom in closer and in doing so comes close to capturing the essence of the relationship we all have with the land.

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COMPENSATION FOR NATIVE TITLE

William Isdale; Federation Press, 2021; 243 pages; \$125.00 (hardcover)

Compensation for Native Title by William Isdale was the recipient of the Holt Prize in 2022, and for good reason. Isdale's book looks at the current landscape of native title compensation in Australia and envisions how the judicial approach to native title compensation should develop.

This consideration is much needed in the context of modern Australia, in which 'native title has gone from being described as the product of a "judicial revolution" to being "now just part of the furniture"' (p 218). One crucial part of that furniture is the *Timber Creek* jurisprudence, which is the subject of much of the book, being the most significant native title jurisprudence since *Mabo* and *Wik*. *Timber Creek* was a 2019 High Court decision that provided the 'first detailed judicial consideration of how the NTA's [*Native Title Act 1993* (Cth)] compensation regime operates in practice' (p 38).

Timber Creek was expected to open the floodgates for compensation claims, however such a result has not materialised. Isdale provides a critical analysis of *Timber Creek* and identifies why the decision did not ultimately result in a barrage of claims, proposing an alternative approach which

would better enable native title claimants to access the compensation to which they are entitled.

Chapter 1 outlines the background of native title compensation, including by proffering the book's ultimate thesis, which focusses on the distinction between *sui generis* and similitude approaches to assessing native title compensation, ultimately advocating for a similitude approach. A *sui generis* approach is described by Isdale as 'an approach that provides a new response – a unique set of principles for rights and interests that are themselves unique' (p 10). Similitude refers to an 'approach that seeks to analogise native title to other rights and interests, and thereby fold it into an existing framework of principles concerning compensation ... to treat them similarly' (p 10).

The difficulty of reconciling Australia's Anglo-Western approach to property and legal remedies with the unique characteristics of Indigenous Australians' cultural values and connection to land has historically appeared as an obstacle to recognition of, and compensation for, native title. Isdale's promotion of a similitude approach seeks to reconcile just that, arguing that 'recourse to the principles that govern compensation for the loss of other interests in land ... are *prima facie* the appropriate course' (p 13). Isdale proposes a framework of native title compensation that provides clear principles and parameters within which compensation for native title can be assessed – such principles being those that already exist within Australia's legal system.

This approach has significant support as a general legal principle, in particular from Justice Brennan's dictum, which asserts that courts are bound to follow precedent unless it is plainly absurd or unjust. A similitude approach also finds support within a normative perspective, for example by rebuffing allegations of 'special treatment' for native title claimants (p 219).

In Chapter 2, Isdale explains the *Timber Creek* jurisprudence, from first instance to the appeal to the Full Court of the Federal Court, and then finally the decision of the High Court.

Chapters 3 and 4 then critique the Court's approach in *Timber Creek* to the assessment of economic loss and non-economic loss respectively. Isdale argues that the High Court in *Timber Creek* adopted a *sui generis* approach to assessing native title compensation (despite the Court's own assessment that its approach was one of similitude), and that such an approach is both incorrect and inappropriate.

In particular Isdale argues, contrary to *Timber Creek*, that economic loss should be assessed by utilising the established remedial approach of reinstatement, which would

seek to put native title claimants in the position they were prior to the extinguishment of their native title.

In relation to the valuation of non-economic loss, Isdale criticises the Court's over-reliance on 'intuition', particularly in relation to cultural loss (p 115). Instead, he proposes a multifactorial assessment for non-economic loss which would require the Court to consider the following factors in making an assessment: (1) the temporal dimension, referring to consideration of the intergenerational and on-going effects that extinguishment will have or has had, and how this should be assessed; (2) the proportion of the native title that has been lost as to what is left – the bigger the proportion that has been extinguished, the larger an award should be; (3) the number of members of a claimant group; (4) what the community regards as fair; and (5) consideration as to what the date of assessment should be, noting that the usual approach would be at the time of the compensable act(s).

Chapter 4 discusses the construction of s 51A of the *Native Title Act*, which acts as a cap on compensation awards by reference to the freehold market value of the land. Section 51A works in tandem with s 53, which seeks to 'top-up' compensation awards above the s 51A cap in circumstances where the cap might result in an acquisition of native title contrary to the constitutional guarantee of the compulsory acquisition of property being on 'just terms'.

Chapter 5 then examines that constitutional guarantee and its implications in the native title context, ultimately concluding that native title is subject to the requirement of acquisition on just terms.

Finally, chapter 6 addresses the availability of compensation and other remedies at general law.

Hopefully, in the years to come, the questions raised by *Timber Creek* in relation to native title compensation will be resolved judicially as further compensation claims are made and determined. This book provides a framework for those resolutions. The importance cannot be overstated of there being not only a statutory mechanism for native title compensation, but for that mechanism to be practically accessible and successful at achieving its purpose of providing fair compensation for the harms suffered by native title claimants as a result of infringement of their native title. While the *Native Title Act* provides the former, Isdale's book provides the latter.

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