

The Gweagal shield

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The Gweagal shield
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Abstract

When British naval officer James Cook first landed on the continent now known as Australia in April 1770, he was met by warriors of the Gweagal nation whose land he was entering uninvited. The Gweagal were armed with bark shields and wooden spears. Cook fired a musket at them, hitting one. The shield from that first encounter, complete with musket hole, is today displayed in the British Museum. It is subject to a repatriation request from Gweagal man Rodney Kelly, who wishes the shield to be displayed in Australia where Aboriginal people will be able to care for and view it. In this article, I outline the contested legal status of the shield. Centring Kelly's perspective, I argue that, regardless of whether he is able to prove the precise genealogy of either the shield as object or himself as owner, as an Aboriginal man he has a better claim to the shield than the British Museum. What is at stake in the dispute between Kelly and the British Museum is not just rights over the shield but also the broader issue of basic colonial reparations: in this instance returning an Aboriginal object to Aboriginal control. The issue of ownership/possession of the Gweagal shield cannot be separated from the historical reality of Britain's mass theft of Aboriginal land, decimation of Aboriginal people and destruction of Aboriginal culture.

Keywords: Gweagal shield; property; colonialism; repatriation; Aboriginal Australia.

† www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=490919&partId=1&searchText=bark%20shield&page=1

Even if you are a regular visitor to the British Museum, you probably have not noticed the Gweagal shield. It hangs on a wall of the 'Enlightenment' room, a long regal chamber lined with glass cabinets and dotted with shiny white busts of colonial explorers. It has the feel of an imperial trophy exhibition, displaying a large collection of unrelated objects from taxidermic rare birds, to Chinese porcelain bowls, ancient Egyptian and Greek statues, Roman jugs, Native American totem poles, Maori tikis, fossils, shells and the jaw of an extinct elephant. The Gweagal shield is attached to the wall by nails in a cabinet at the far end of the room, hovering above this brief explanation:

Bark Shield: This shield represents the moment of first contact between the British and Aboriginal Australians at Botany Bay in 1770. When James Cook and his men tried to land, two men of the Gweagal people came forward with spears. Cook fired musket shot and hit a man who then grabbed what was likely this shield in defence. As the wounded man retreated the shield was dropped on the beach. First contacts in the Pacific were often tense and violent.

This brief description hides a history of genocide¹ and remarkable resistance. This 'moment of first contact' was a violent and racist invasion of the oldest surviving civilisation on earth, an invasion that continues to this day. The day that Cook arrived, Aboriginal Australians had been in effectively exclusive occupation of the land for 60,000 years. Today they are 3 per cent of the Australian population,² many living in conditions of abject poverty unthinkable to non-Aboriginal Australians. Aboriginal Australians have an average life expectancy 10 years shorter than non-Aboriginal Australians,³ and they are grossly over-represented in Australian prisons,⁴ where even their children are tortured.⁵ Tucked away in this room in the British Museum, with a generic name and brief explanation, the Gweagal shield is almost as well hidden as the history of violence and resistance it represents.

Rodney Kelly's repatriation request

A recent repatriation request for the shield helps illustrate the rich and complex legal history of this object. The request has been made by Rodney Kelly, a Gweagal man and descendant of the Aboriginal warriors who resisted the earliest stages of British colonisation. According to oral history handed down to him through his community, Rodney is in fact a descendant of a warrior known as Cooman, who stood on the beach at the place today known as Sydney to oppose Cook's landing. Cooman used the Gweagal shield to defend himself against Cook's musket bullets on that fateful day in April 1770.

Kelly travelled to London in October 2016 seeking the repatriation of the Gweagal shield. The long expensive trip to Britain was Kelly's first out of Australia, and his first time on an aeroplane. Kelly travelled together with Mutitjulu elder and veteran activist

1 Many writers argue that the ongoing colonial process of dispossessing Aboriginal Australians from their ancestral lands is genocidal. See Irene Watson, 'Buried Alive' (2002) 13 *Law and Critique* 253–69; Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387–409; Damian Short, 'Burying Genocide: Official Remembrance and Reconciliation in Australia – Remembering the Modern World', in N Eltringham and P Maclean (eds) (Routledge 2014).

2 Australian Bureau of Statistics, 'Estimates of Aboriginal and Torres Strait Islander Australians, June 2011' <www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.

3 Australian Institute of Health and Welfare, 'Life Expectancy' <<https://www.aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/contents/life-expectancy>>.

4 Australian Bureau of Statistics, 'Prisoners in Australia, 2016' <www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>.

5 Caro Meldrum-Hanna, Mary Fallon and Elise Worthington, 'Australia's Shame' (*Four Corners*, ABC 26 July 2016) <www.abc.net.au/4corners/stories/2016/07/25/4504895.htm>.



Figure 1: Rodney Kelly looking at the Gweagal Shield at the British Museum in November 2016

Credit: Sovereign Embassy @sovereignmbc

Vincent Forrester and Roxley Foley of the Aboriginal Tent Embassy, who came to support Kelly's request for the shield's repatriation. I met with Kelly, Forrester, and Foley in my office at Birkbeck Law School, which is just around the corner from the British Museum. On 25 October 2016, in a meeting with the deputy director of the British Museum and a number of curators, Kelly made a formal request for the return of the shield to the Gweagal people.⁶ I asked him why its repatriation meant so much to him.

RK: Because my family, my people have been dispossessed of their land and their culture. We've lost our language and our ceremony and all of that. I grew up on an Aboriginal reserve where we were just all put, and I didn't know who I was or where I came from. But I grew up hearing stories about being there with Captain Cook, and once I got older I started to think about all that and wanted to find out who I was and where I came from. So I started researching and found that loads of old historians had written about my family members.

Kelly explained to me that it was his ancestor Cooman who, together with another Gweagal warrior, stood on the beach that day in 1770 and opposed Cook's landing. Cook shot at the men a number of times, ultimately hitting Cooman, who dropped the shield on the beach. Cook later came to shore, picked up the shield and brought it back to England. Indeed, if you look closely at the Gweagal shield in its glass casing at the British Museum, you can see a hole that pierces the shield clean through its centre.

As Kelly explained in his letter to the British Museum, since that day on the beach in 1770, Aboriginal Australians have had their land, their language, their health and their culture stolen by British colonial forces and their white Australian descendants. The Gweagal shield is something that a contemporary British institution can actually give back.

RK: The British Museum must realise that this sacred object still has vital and imperative cultural work to do in Australia. The healing power that this shield has for Aboriginal Australia is much greater than any value it can have as part of a collection in the British Museum.

⁶ Murrum of the Gweagal, 'Statement to British Museum Regarding Gweagal Repatriation' (25 October 2016) <www.firstcontact1770.com/single-post/2016/10/25/STATEMENT-TO-BRITISH-MUSEUM-REGARDING-GWEAGAL-REPATRIATION-October-25th-2016>.

The first time Kelly saw the Gweagal shield it was on loan to the National Museum of Australia in Canberra in early 2016. There, he felt for himself the healing power of this enormously significant cultural object. The Gweagal shield not only proves the precolonial Aboriginal connection with land, it also makes clear Aboriginal Australians' long history of resistance to British colonisation, from the very first act of violence they faced on the beach at Botany Bay.

RK: *It was the 28th of March, the last day of the exhibition. It was a good day that day. It was emotional. We got to see it twice. My Mum was there and my aunty. Seeing it in Australia, we felt proud to see it there. It was an awesome display.*

As well as its cultural significance to the Gweagal people, the shield has the power to instil renewed pride into Aboriginal people and to educate non-Aboriginal Australians because it is physical proof of the lie of *terra nullius*. Australia was founded on the white supremacist notion that the land was empty, belonging to no one. Aboriginal people were regarded as too 'backward', 'barbarous' and 'low in the scale of social organisation' to warrant recognition as properly human.⁷ As such, they could be treated as part of the landscape that Britain claimed to have 'discovered'. British sovereignty over and possession of this expansive land was exerted on the basis that it was uninhabited. Although *terra nullius* was overturned by Australian judges in 1992,⁸ its legacy lives on in the national psyche and in the material dispossession still experienced by Aboriginal people. The Australian government's persistent stream of policies removing Aboriginal people from their land⁹ is possible because they continue to be treated as less than human.¹⁰ This racism has severe material consequences, confining many Aboriginal people to lives of abject poverty. Racism is internalised by Aboriginal people, many of whom suffer from serious mental health problems. The suicide rate among young Aboriginal men today is the highest in the world.¹¹

For Kelly, seeing the shield back in its permanent position in the Enlightenment room at the British Museum was a very different experience from seeing it in Australia.

RK: *I felt insulted and angry. They don't respect it. The amount of rods that hold it in place are doing damage to the shield. People walk past it everyday and don't look at it, don't know the significance of it. You can't see the back of it, which is important. It's disappointing to see it like that. When it was in the museum in Canberra it had an awesome cabinet, had a video behind it [showing footage of the Sydney beach where the 1770 battle took place], you could walk around it and see the shield properly. At the British Museum people just look at the front and walk past if they even notice it.*

I asked Kelly whether the British Museum's possession and treatment of the shield was in line with Gweagal law.

RK: *Cooman's grandson was destined to hold that shield, and then his grandson, and so on. It's breaking the law taking the shield off the land without the proper protocols.*

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

8 *Ibid.*

9 For a recent example, see the forced closure of remote Aboriginal communities in Western Australia: Richard Howitt and Jessica McLean, 'Towards Closure? Coexistence, Remoteness and Righteousness in Indigenous Policy in Australia' (2015) 46(2) *Australian Geographer* 137–45.

10 A Macoun, 'Aboriginality and the Northern Territory Intervention' (2011) 46(3) *Australian Journal of Political Science* 519–34.

11 'Australian Youth Development: A Jurisdictional Overview of Youth Development' (Report from Institute for Economics and Peace, Melbourne 2016) <www.documentcloud.org/documents/3010514-Australian-Youth-Development-Index-report.html#document> 22.

Who owns the Gweagal shield?

While under Gweagal law it is clear that the British Museum's possession of the shield is unlawful, under British law the situation is not clear. Days after Kelly's meeting at the British Museum, the deputy director Jonathan Williams wrote a generic response which failed to acknowledge Kelly as having any rights to the shield.¹² In the letter, Williams assumes that the rightful ownership of the shield lies with the British Museum, but offers no evidence as to the legal basis of that ownership. Williams' failure to present any documentation evidencing chain of title suggests that the British Museum does not have a bill of sale or similar in its possession.

The museum describes the origin of its possession of the shield through this accompanying online description which leaves open the question as to how the shield was first acquired: 'Findspot: Found/Acquired: Botany Bay'.¹³ Any suggestion that the shield was innocently 'found' by British officers is unlikely to withstand the common law test from *Parker v British Airways Board* [1982] 1 QB 1004, which holds that occupants of the land have the better right to lost objects if those occupants manifested an intention to exercise control over the land and things on it. This test also requires the finder to act honestly and to inform the true owner that the item has been found. The historical fact of early frontier battles in Australia¹⁴ shows that the Aboriginal occupants clearly manifested an intention to exercise control over the land and things on it. To suggest otherwise is to rely on the *terra nullius* lie that the land was empty and/or that the people on it had no civilisation. If it is accepted that the shield was more likely 'acquired' than innocently 'found', the fact that the acquisition took place at the location where Cook landed in 1770 raises ethical issues, but no clear legal ones. The conflict at Botany Bay pre-dates the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 by almost two centuries and the Convention rules do not apply retrospectively.

Whether the shield is understood as having been 'found' or 'acquired' during armed conflict, the British Museum is protected from having to answer questions as to the legitimacy of its proprietary rights over objects in its collection by s 3(4) of the British Museum Act 1963, which expressly prohibits the disposal of objects in 'the collections of the British Museum' except in the limited circumstances prescribed in the Act. This prohibition has been held to apply even where the museum trustees themselves feel a moral obligation to 'give'/return objects in the collection to their moral owners (*Attorney-General v Trustees of the British Museum* [2005] EWHC 1089 (Ch)). Unless the objects are human remains, only legislation or a 'bona fide compromise' entitle the trustees to return objects to their moral owners: they cannot simply give objects back. Despite the seeming finality of s 3(4), it is still possible to make legal arguments as to why the shield should be returned to Kelly. One argument is that, as the museum can show no proof of legitimate acquisition and, as the shield was clearly acquired by British forces during the early colonial era and at the site of a frontier battle, by logical inference the shield must have been stolen from its indigenous owners. As the shield was stolen and has never been properly acquired by the museum, it has never actually been part of 'the collections of the British Museum', so s 3(4) does not apply. This avenue of argument was left open by

12 Jonathan Williams, 'Response from British Museum about Gweagal Repatriation' (4 November 2016) <www.firstcontact1770.com/single-post/2016/11/04/Response-From-British-Museum-about-Gweagal-Repatriation>.

13 'Shield', British Museum Collection Online <www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=490919&partId=1&searchText=bark+shield&page=1>.

14 Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (UNSW Press 2006).

the High Court in *Attorney-General v Trustees of the British Museum*, a case which concerned the return of artwork stolen by the Gestapo during the Nazi occupation of Czechoslovakia. However, to argue that s 3(4) does not apply, the claimant must prove the validity of his or her own claim to the object, a task which is invariably difficult in the context of items stolen during violent conflict decades and centuries ago. Kelly's proof of title to the shield lies principally in oral history that has been handed down within his community over many decades and which is unlikely to be accepted by British courts.

Indeed, the scarcity of paper evidence showing the genealogy of the shield may also cause historians to question whether it is in fact the original shield held by the Aboriginal warrior at Botany Bay on the day Cook landed. The shield broadly fits the descriptions of a shield from first contact set out in the *Endeavour* journals of both James Cook and Joseph Banks,¹⁵ but the Gweagal people made many shields and there is evidence that they traded throughout the Pacific region during the early nineteenth century.¹⁶ It is thus possible that the shield at the British Museum is not the shield held up in defence on the day Cook landed, but another shield made by the Gweagal people, penetrated by a musket in battle and later traded. This possibility seems unlikely in light of the British Museum having long displayed the shield as the one Cook fired at during the landing battle of 1770. But, even if this possibility is true, it is irrelevant to the broader political issue at stake in the repatriation request, which is that of colonial reparations.

Beyond ownership

Although the battle for possession of this object is framed in terms of ownership, understanding it as a simple property dispute misses the point of the broader colonial history and present of which the shield is a tangible part. Whether the shield at the British Museum can be genealogically traced back to Cooman and thus to Rodney Kelly or not, what cannot be questioned is, firstly, that it is an Aboriginal shield and, secondly, that it is now held in an institution in the heart of the colonising power, where the overwhelming majority of Aboriginal people are unlikely ever to see it.¹⁷ The same goes for arguments that Kelly is not recognised as a representative of the Gweagal people and that his claim therefore has no legitimacy. If property is understood not just in the positivist terms of individual ownership, but rather as a relation of belonging that is recognised, accepted and supported by the space in which that relation of belonging is located,¹⁸ then the question changes from 'Who owns the Gweagal shield?' to 'Where does the Gweagal shield belong?' In light of contemporary recognition of the colossal, genocidal destruction of Aboriginal culture by British (and subsequently, white Australian) military, economic and social structures, surely it is time for the British Museum to give the shield back? To do so would mean that the museum has become a space that recognises, accepts and supports relations of belonging between indigenous people and the items violently robbed from their ancestors.

Despite the British legal position being in the British Museum's favour, Williams attempts to make an ethical rather than legal argument in response to Kelly's repatriation

15 James Cook, *The Journals of Captain James Cook on His Voyages of Discovery: The Voyage of The Endeavour 1768–1771* (published for the Hakluyt Society at Cambridge University Press 1968) 305; Sir Joseph Banks, *The Endeavour Journal of Joseph Banks: 1768–1771*, Vol II, J C Beaglehole (ed) (Trustees of the Public Library of New South Wales in association with Angus & Robertson 1963) 54–5.

16 Tracey Banivanua Mar, 'Shadowing Imperial Networks: Indigenous Mobility and Australia's Pacific Past' (2015) 46(3) *Australian Historical Studies* 340–55.

17 Boyd Hunter, 'Three Nations, Not One: Indigenous and Other Australian Poverty' (Working Paper No 1, Canberra Centre for Aboriginal Economic and Policy Research 1999).

18 Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge 2015).

request. Williams takes the British Museum's legal rights over the shield as given, offering no evidence as to their legitimacy. Instead, he writes:

The British Museum is a unique resource for the world: the breadth and depth of the collection allow a global public to explore the complex histories of interconnected human cultures and to re-examine cultural identities. The shield is an integral and important element in this world collection, and serves to inform our visitors of the enduring cultural significance of Indigenous Australian communities . . .¹⁹

The suggestion being made here is that the shield belongs to 'the world', the inhabitants of which can access it at the British Museum with an ease that would not be possible if the shield was returned to Kelly. Further, the suggestion is that this access of 'the world' to the shield is important for the cultural survival of indigenous Australian communities, including, of course, Kelly and his community. This suggestion reproduces the colonial logic of white British cultural experts making decisions for the benefit of indigenous communities, who are constructed as being at risk of irrelevance and incapable of making wise decisions for their own survival. It also relies on the false notion that the British Museum is easy for 'the world' to access, when in reality most of the world – and certainly most indigenous Australians – will never have the necessary resources to make the journey to London. Kelly himself relied on crowdfunding to pay for the journey.²⁰

Kelly explains that his desire is not to keep the shield as his personal property in the way white people keep private art collections in their homes, but rather to have the shield displayed in an Aboriginal Living Cultural Heritage museum in Sydney. As this museum is not yet operational, Foley tells me that Sydney Museum has indicated that it is willing to be responsible for the proper care and storage of the shield, in consultation with Gweagal people, until an Aboriginal-run museum is operational in Sydney.

RF: *Sydney is the shield's rightful resting place. The Sydney Museum are happy to be the institution to keep it until we can have an Aboriginal cultural centre. We want our culture to be presented properly and not just as a dead culture.*

What is really at stake in the dispute over ownership and possession of the shield is not just the rights over the object, but rather the issues of colonial reparations of the most basic kind: in this instance, returning an Aboriginal cultural object to Aboriginal control. The shield is appearing in this special issue and in the Pop-up Museum of Legal Objects with Kelly's permission. I hope that by highlighting his voice and placing the shield in an online collection alongside other objects whose current museum locations silence their legal and political significance (see, in particular, Ruth Buchanan and Jeff Hewitt on the drum and treaty from Manitoulin Island),²¹ this commentary and the Pop-Up Museum go some small way toward returning the shield to Aboriginal control.

The issue of ownership/possession of the Gweagal shield cannot be separated from the historical reality of Britain's mass theft of Aboriginal land, decimation of Aboriginal people and destruction of Aboriginal culture. By refusing to recognise the shield as the property of the Gweagal people, and by placing it in a room with dead specimens from 'the natural world' and the spoils of British 'discovery', the British Museum is

19 See Williams 2016 (n 12).

20 Return the Gweagal Shield Fund <www.gofundme.com/gweagalshield?utm_source=internal&utm_medium=email&utm_content=CTA_view_campaign&utm_campaign=donation_receiptv5>.

21 'Encountering Settler Colonialism through Legal Objects: A Painted Drum and Handwritten Treaty from Manitoulin Island (2017) 68(3) *Northern Ireland Legal Quarterly* 291–303 (this issue).

reproducing the lie of *terra nullius* and reproducing itself as a space of British colonial theft and delusion.

VF: *The biggest symbol that Australia has is that shield. It affects questions of sovereignty and treaty. Look through the bullet-hole in that shield, and fast forward in time . . . you can see how this state-sponsored abuse is connected.*

As Forrester suggests, the shield is relevant to questions of Aboriginal sovereignty because it offers material evidence of a pre-colonial Aboriginal sovereign power, a power with which colonial Australia continues to refuse to enter a treaty. Property disputes expressed as contests over particular objects are always indicative of deeper struggles over space and belonging,²² and this is particularly so for disputes between coloniser and colonised. The dispute over the Gweagal shield goes well beyond questions of individual ownership and genealogy and to the heart of British white supremacy established at the genocidal expense of Aboriginal Australia. Modern Australia began with a British bullet fired through the Gweagal shield. After 246 years, it is time Britain and Australia acknowledged their histories and allowed Aboriginal Australians to rebuild theirs. A good starting point would be for the British Museum to give back the Gweagal shield. As Rodney Kelly says:

RK: *Our shield deserves to be at home where it can help repair our history and start telling the true story of Botany Bay, where modern Australia started and started to go wrong.*

²² Keenan (n 18).