

## **Bridging the Gap or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy**

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### **Introduction**

In December 2002 Australia's High Court dismissed an appeal by the Yorta Yorta Aboriginal people of Northern Victoria and New South Wales relating to their native title claims under the *Native Title Act* 1993. These Aboriginal peoples' struggle for recognition of their enduring connections with their ancestral lands under Australia's 1993 native title laws had, in this hearing, depended solely on the outcome of complex legal deliberations regarding notions of tradition and custom.

The claim was dismissed by the Federal Court on the basis of a presumption that the 'tide of history had washed away' their connection to lands and waters. The argument by the Federal Court, confirmed four years later by the High Court, was that the traditional laws acknowledged and customs observed by Yorta Yorta today were not the same today as they were in the period before Europeans arrived. Therefore, the learned judges concluded, the Yorta Yorta could not successfully demonstrate that they had a continuing connection to the area they claimed under the 1993 *Native Title Act*.<sup>1</sup>

This case highlights one aspect of the problem in translating and interpreting concepts relating to Aboriginal peoples' relationships with their lands and territories into the discourses of law and policy. Laws designed to provide for Indigenous peoples' rights and interests in land or native title, or for their participation in management or protection of environment and biodiversity, incorporate terms and concepts intended to denote aspects of Aboriginal culture relevant to the particular law in question. Examples include 'tradition', 'traditional knowledge', and 'law and custom'. Yet such terms are employed in legal texts in ways that present idealised, or fictive notions of Aboriginal culture and society. They are derived not from Indigenous ways of understanding and articulating the world, but, rather, from Western intellectual worldviews and presuppositions.

In this paper I want to discuss a number of issues that flow from these problems in cultural translation by first exploring, and then challenging the often-held notion of a divide between Indigenous knowledge and 'western' science. By 'western science', I refer to all modes of knowledge and practice that form dominant epistemologies, have claims to truth or authority, and are said to be 'derived from facts'.<sup>2</sup> First, I will review the perceived notion of a divide, or dichotomy between Indigenous knowledge systems and western science. I then revisit one of the main consequences of that divide, that is the view that has emerged suggesting that western science and allied systems of knowledge have formed a dominant discourse that has obliterated, marginalised, or assimilated local, traditional and Indigenous peoples knowledge systems and discourses.<sup>3</sup> Following this I outline some examples of ways in which

this Indigenous knowledge/western science divide might be questioned, or interrogated by recent developments and emerging practices that emphasise complementarity, or integration between indigenous knowledge systems and western scientific approaches. Such examples include the use of Indigenous knowledge in agricultural, pastoral, and other 'conventional' land uses, increasing recognition of the value of Indigenous knowledge in environmental and biodiversity conservation, management and sustainable use, and the growing demands on Indigenous knowledge by industrial, scientific, and commercial interests. My discussion will also highlight the complexity and diversity of Indigenous systems of knowledge, and suggest a role for applied disciplines such as anthropology in enabling a greater understanding of Indigenous epistemologies.

To illustrate my argument I refer to some Australian environmental legislation to suggest a possibility of opening up a space in which an Indigenous epistemology might be incorporated, or at least acknowledged within the dominant knowledge system. I also examine some developments in native title insofar as these demonstrate the use of concepts and terms relating to Indigenous epistemologies.

I want to pose the question: by employing appropriate language in legal and policy texts, can we move towards a position in which the diversity and plurality of Indigenous world-views can be encompassed? This plea for recognising and entrenching in law, policy and administration the 'plurality of cultural systems and the diversity of environmental knowledge within and between cultures'<sup>4</sup> might also allow for recognition of the dynamism, and innovative and adaptive capacities of Indigenous cultures. While advocating plurality in discourses and epistemologies, I would also urge caution to avoid representing Indigenous knowledge in law and policy either (a) as essentialised or homogeneous entities that satisfy some stereotypical western image; or (b) as utterly incommensurable, radically other in an extreme relativistic position that renders cultural comparison untenable, or negates any possibility for finding common ground or integrating different knowledge systems.

### **Creating the Divide**

Indigenous knowledge has historically been regarded in the dominant, western society as inferior, marginalised, and as a devalued form of knowledge. This lowly status of Indigenous knowledge has been created as a result of the growth of dominant forms of knowledge concomitant with Indigenous peoples' historical experiences of colonisation and oppression. This marginalising of Indigenous knowledges is also a result of the particular bureaucratic-administrative machinery of government, founded upon the creation of hierarchies that privilege those forms of knowledge such as science and law which make claims as the purveyors of some truth and authority. As one writer notes:

The negation, devaluation, and denial of indigenous knowledges, particularly those of women, is the result of deliberate practices of establishing hierarchies of knowledge. ... Institutions are not unmarked spaces of thought and action. Knowledge forms are usually privileged to construct dominance, and can be "fetishized" so as to produce and sustain power inequities.<sup>5</sup>

The activist Vandana Shiva has similarly noted that:

...under the colonial influence the biological and intellectual heritage of non-Western societies was devalued. The priorities of scientific development and R&D efforts, guided by a Western bias, transformed the plurality of knowledge systems into an *hierarchy* of knowledge systems.

She further asserts that:

Western systems of knowledge in agriculture and medicine were defined as the *only* scientific systems. Indigenous systems of knowledge were defined as inferior, and in fact as unscientific.<sup>6</sup>

Shiva takes this further to claim that 'Indigenous knowledges have been systematically usurped and then destroyed in their own cultures by the colonizing West'.<sup>7</sup>

The idea that local and Indigenous knowledge systems are rendered invisible or devalued by the dominant culture also finds expression in the development arena. In conventional development approaches, Indigenous and local peoples are the ones who are 'developed' by those doing the developing. As a result, relations of dependency are established and maintained, wherein Indigenous systems of knowledge are usurped by the dominant developed discourses.<sup>8</sup>

Knowledge systems and epistemologies are more often seen to be jostling in situations of adversity and competition, rather than striving for integration and mutual interdependence. There are many examples of competing systems, which are typically played out in contexts of claims for recognition. One prominent example in recent years was that known as the Hindmarsh Island case in which Aboriginal women's knowledge relating to a certain place in South Australia was subordinated and denigrated by those advocating and supporting the proposed development of a bridge from the mainland across to Hindmarsh Island.<sup>9</sup>

### **The Tyranny of Dualism and Categories**

Indigenous knowledges are subordinated not only through the formation of hierarchies, but also by the perpetuation of binary oppositions Us/Them, Self/Other, or We/They. The perceived dichotomies between 'traditional' and 'modern', 'Indigenous' and 'non-Indigenous' are further consequences of this pervasive dualism.

These dualities extend most significantly into discussions on modes of thought. In the history of anthropology and philosophy a strand of debate has centred on a notion that there are differences between modes of thought of non-Western, so-called 'primitive' others, and Western 'rational' modes of thought.<sup>10</sup> Allied to this is the Enlightenment idea of progress, and the historically rooted shift from superstition to magic to religion to science. Indigenous peoples in this schema have been regarded as exemplars of so-called 'primitive' or irrational modes of thought. One of the problems in this debate over rationality and modes of thought is the specific categories that have been used to define and describe the binary oppositions flowing from Us/Them. As Jack Goody

has noted ‘the trouble with the categories is that they are rooted in a we/they division which is both binary and ethnocentric, each of these features being limiting in their own way’. Goody goes on to suggest that ‘we speak in terms of primitive and advanced, almost as if human minds themselves differed in their structure like machines of an earlier and later design’.<sup>11</sup> Goody suggests that the ‘dichotomous’ approach to human development runs deep throughout our language, and has been reinforced through the discourses of anthropology and sociology. He advocates changes in the modes of communication and literacy as one important way of breaking these binary approaches to understanding human societies and cultures.

Contrasting or opposing views between Indigenous systems of knowledge and practice, and Europeans’ knowledge and practices have been reported in the case of, for example, attitudes towards use of fire in Australia’s Northern Territory. Aboriginal people had traditionally used fire as a management tool for maintaining or increasing natural resources, and also for what has been termed ‘cleaning’ the country. Fire is also used by cattlemen for pastoral purposes, and by national park rangers in park management. Although Aborigines have in recent years become more involved in park management and ranger activities, there are still some significant differences in worldview between Aborigines, cattlemen and park rangers regarding burning practices. Underpinning these differences is the persistence of a divide between what is termed a ‘folk’ system of ecological knowledge, thought to be held by Aborigines, that is intuitive and founded in culture; and scientific knowledge, generally practised by cattlemen, park rangers, and town dwellers, with its technological rational and purposive basis.<sup>12</sup>

### **Beyond Categories**

While some have identified different ways of knowing and interacting with landscapes and environments that serve to reinforce the Indigenous knowledge/Western science divide, I want to suggest that in practice, this divide is more subtle and complex, or even non-existent. The category ‘Indigenous knowledge’ is more likely to be formed from a complex intertwining of knowledge traditions and practices fashioned through the engagement of Indigenous, and non-Indigenous peoples. Indigenous knowledge, far from being constituted as a unitary, homogenous entity founded in some perceived idea of Indigeneity, must instead be understood as contingent, historically situated and particular to the specifics of locality, group dynamics, place and time. Thus, like the term ‘culture’, Indigenous knowledge needs to be interrogated in order to shift from positing it as a reified, essentialised construct suspended in a space and devoid of context. In this way, we also need to problematise the sharp distinction between ‘Indigenous knowledge’, and other knowledge systems. What is usually termed ‘Indigenous knowledge’ is a product of complex interactions between peoples – Indigenous and non-Indigenous, situations, experiences, observations, and practices. Following on from this, in what way might we define a point at which ‘traditional’ knowledge differs from, say, ‘new’, ‘adapted’, or ‘modernised’ knowledge? There may be a continuum, or spectrum of systems of knowledge across time, space and locality, thus rendering difficult or irrelevant any attempts to create artificial distinctions or dichotomies between ‘Indigenous’ knowledge, ‘traditional’ knowledge, or ‘science’.<sup>13</sup>

Another critic of essentialised categories is Roy Ellen, who has argued against a sharp distinction between 'Indigenous' and 'non-Indigenous', claiming that such a distinction 'has many highly specific regional and historical connotations which are not always appropriate to other ethnographic contexts.' In this view, creating these distinctions renders comparative work difficult.<sup>14</sup>

### **Difference or Complementarity?**

One study illustrates some contrasts between knowledge systems, or epistemologies of Aborigines and pastoralists in the context of land management in the Kowanyama River catchment in Far North Queensland. Here, Strang has noted fundamentally different discourses on land and environment that appear to reflect contrasting world-views. Discussing Aborigines' perceptions of, and approaches to land management, she comments that 'the most important point about Aboriginal land use is that economic interactions with country are never wholly divorced from social and spiritual interactions'. She goes on to argue that:

Land provides a central medium through which all aspects of life are mediated, and economic considerations are merely part of an intimate, immediate, fundamentally holistic relationship.<sup>15</sup>

Strang describes some stark differences between pastoralists' world views, and those of Aboriginal peoples in this region, writing:

Aboriginal cosmology is typically presented as the foundation for a primarily mystical, spiritual interaction with the physical world, while in the European or white Australian cosmos, scientific rationalism and crass materialism are largely believed to have marginalised spiritual life.<sup>16</sup>

The Aboriginal groups and the pastoralists experience quite different kinds of physical and emotional interaction with the environment. The traditional Aboriginal economy demands intimate and highly detailed knowledge of the local ecology and geography, with an intense focus of attention on the indigenous flora and fauna. Being integrated with the spiritual and emotional aspects of Aboriginal life, it is part of a deep engagement with a particular landscape, encouraging a continual investment of value in the land. The interaction based on traditional activities – walking, fishing, collecting resources and so on – is a very immediate, tactile engagement, lending itself to qualitative and affective responses to the land.

The pastoralists are focused on the foreign elements they have imposed on the landscape: the Western technology, the infrastructure and the stock. Their attention is firmly engaged by, and therefore invested in, their economic activities. On a daily basis, their adversarial efforts to control the cattle and the land are largely mediated by technology, separating them from a more gentle, intimate interaction with the landscape.<sup>17</sup>

While studies such as Strang's have emphasised difference and incommensurability; others have stressed more optimistically the potential for integration between Indigenous knowledge systems and western scientific systems. Rather than beginning

with an assumption of an inherent and entrenched lack of translatability between these systems, these latter views are more open to the possibilities for integration between different systems. An example of this more optimistic view is a comparative study of landscape classification and ecological knowledge by Anangu Aboriginal people in Central Australia, with scientific ecological approaches to land management.<sup>18</sup> This study shows that two, quite distinct systems of taxonomy and classification of the natural world can be worked together towards the common goal of sustainable land and environmental management.

### **Beware the Noble Savage**

In recent years there has been a growing recognition of the intrinsic value of Indigenous systems of knowledge.<sup>19</sup> While this growing recognition of the value of Indigenous knowledge provides a useful and much needed counterpoint to earlier discourses that denigrated such knowledge systems, it also brings with it a risk of constructing Indigenous peoples as environmentalists *par excellence*. These Noble Savage ecological warriors become, in these discourses, the saviours of the planet, standing as powerful symbols for those who opposed globalisation and unfettered development.<sup>20</sup> As one commentator has stated ‘most of us will also accept that the claims made for the environmental wisdom of native peoples have sometimes been misjudged and naïve, replacing denial with effusive blanket endorsement and presenting an “ecological Eden” to counter some European or other exemplary “world we have lost”’.<sup>21</sup> To prevent this kind of reification of Indigenous knowledge we need to strive to develop plurality wherein a space is created for the juxtaposition of different systems of knowledge and actions in structures of complementarity, rather than competition and adversity.

### **Defining Indigenous Knowledge**

To create a plurality requires a deeper understanding and appreciation of different knowledge traditions across, and within cultures. The Indigenous writer Winona LaDuke has written that ‘traditional ecological knowledge is the culturally and spiritually based way in which indigenous peoples relate to their ecosystems’. She states that ‘this knowledge is founded on spiritual-cultural instructions from “time immemorial” and on generations of careful observation within an ecosystem of continuous residence’.<sup>22</sup> In another writer’s view, what is termed ‘Indigenous traditional knowledge’ is acknowledged as being difficult to define. This writer provides a working definition as follows:

[Indigenous knowledge] is a living system of information management which has its roots in ancient traditions. It relates to culture and artistic expression and to physical survival and environmental management. It controls individual behaviour, as it does community conduct. In short, it is a concept that essentially defies description in Western terms, but which lies at the heart of Indigenous society.<sup>23</sup>

In this view, the problem in understanding Indigenous knowledge within Western discourses lies in the kind of categorisation that these discourses use to separate categories such as ‘law’, ‘culture’, ‘heritage’ and ‘religion’. This problem was discussed above, in terms of the Western preoccupation with hierarchies of

knowledge. Howden writes 'Indigenous knowledge systems are better understood as practical, personal and contextual units which cannot be detached from an individual, their community, or the environment (both physical and spiritual)'.<sup>24</sup>

Working definitions of Indigenous, or 'traditional' knowledge have been proposed by various writers such as Davis, based on certain identifiable characteristics said to be common to all types of Indigenous knowledge. These include

- The holding of communal rights and interests in knowledge;
- A close interdependence between knowledge, land and spirituality;
- The passing down of knowledge through generations
- Oral exchange of knowledge, innovation and practices according to customary rules and principles; and
- The existence of rules regarding secrecy and sacredness which govern the management of knowledge.<sup>25</sup>

Although in principle, there is some analytical use in formulating a working definition of Indigenous knowledge, such definitional concerns raise important questions. By establishing definitions, we return to the very problem that I am arguing against in this paper: the reification and essentialising of Indigenous categories and concepts. Formulaic definitions, once established in the literature, become subject to appropriation by dominant discourses, thus perpetuating the very problem I am seeking to critique. Another concern with definitions revolves around who is doing the defining. In current contexts in which Indigenous peoples seek to control their own heritage and culture, it is possibly inappropriate for non-Indigenous people outside the communities to impose definitions. Finally, the formation of definitions places at risk the possibility of recognition of the diversity and plurality of Indigenous knowledge. As another critic explained this plurality, 'All knowledges exist in relation to specific times and places. Consequently, indigenous knowledges speak to questions about location, politics, identity, and culture, and about the history of peoples and their lands'.<sup>26</sup> Is it possible then to represent such fluidity within a single definition? And an even more important question is: What purpose would such definitions have, and for whom?

### **Valuing Indigenous Knowledge**

In formulating definitions of Indigenous knowledge, the question of giving greater value to this knowledge arises. Many writers have pointed out, Indigenous knowledge has often been undervalued, or perceived to be of less worth than other forms of knowledge. An example of this is in the case of development:

in the past, indigenous knowledge was widely regarded among development professionals as an academic, if not dilettantish, concern limited largely to social anthropologists. Much of it was seen as superstition. In the dominant model of development, useful knowledge was only generated in central places – in universities, on research stations, in laboratories, then to be transferred to ignorant peasants and other poor people.<sup>27</sup>

However, an increasing body of literature is also emerging that recognises the intrinsic value of Indigenous knowledge systems, and of the benefits of harnessing these systems towards sustainable development goals.<sup>28</sup>

### **Plurality, Complexity and Understanding**

Recognising the value of Indigenous systems of knowledge is a critical step towards enabling a greater plurality between and among different traditions. The search for plurality among different knowledge systems rests on developing a sound comparative understanding across, and within different cultural systems. Activist and writer Vandana Shiva advocates a plural approach to knowledge systems, arguing that:

It is now generally recognized that the chemical route to strengthening agriculture and health care has failed, and must be abandoned. This provides us with an opportunity to re-evaluate indigenous knowledge systems and to move away from the false hierarchy of knowledge systems back toward a plurality. The pluralistic approach to knowledge systems requires us to respect different such systems – to embrace their own logic and their own epistemological foundations.<sup>29</sup>

She elaborates on this:

It also requires us to accept that *one* system (ie., the Western system) need not and must not serve as the scientific benchmark for all systems, and that diverse systems need not be reduced to the language and logic of Western knowledge systems.<sup>30</sup>

And further:

The integrity of our biological [and?] intellectual heritage can be protected only after we embrace the pluralistic perspective. A hierarchical perspective will continue to project the Western paradigm as scientifically superior in spite of its now proven failure to keep people healthy and to safeguard their food supplies.<sup>31</sup>

In advocating a better understanding of, and cross-cultural translation and comparison of different knowledge systems, I am proposing a space wherein this kind of plurality might find expression.

### **Crossing the Divide**

Perhaps one of the most telling ways in which the divide between so called Western rational, instrumental scientific discourses and actions, and Indigenous epistemologies can be crossed is in what is referred to as ‘caring for country’. The divide has been based on a perceived dichotomy between the scientific approach with its emphasis on pragmatic, rational and logical actions, founded in measurement, accuracy and technology, and Indigenous approaches, thought to be more integrative, and which juxtaposes both the physical and the pragmatic with the spiritual and religious. However, if we use as our starting point, instead of imposed presuppositions about an



Indigenous knowledge/western science divide, a focus on caring, nurturing and maintaining land and ecosystems, then we may develop a possibility for integrating or harmonising different traditions and epistemologies. This notion has been suggested by one anthropologist, Deborah Bird Rose, who has worked extensively with Indigenous peoples. Rose found that when it comes to what she has termed ‘practices of care’ in nurturing and looking after land, ‘the Western science/ Indigenous dichotomy falls apart’.<sup>32</sup>

An important way in which the divide between Indigenous knowledge and western scientific epistemologies can be crossed is by encouraging a more informed understanding of other cultural systems within Western discourses. More informed, systematic understandings of Indigenous knowledge, taxonomies, categories and concepts may be gained through rigorous, applied disciplines such as anthropology, geography and history. An example of such an endeavour is geographer Richard Baker’s study of the Yanyuwa Aboriginal people around Borroloola in Australia’s Northern Territory. Baker writes that ‘it is important to try and see Yanyuwa country through Yanyuwa eyes’. He explains that ‘what can seem to European imagination to be an unproductive, strange and at times frightening landscape, is the known and bountiful home of the Yanyuwa’.<sup>33</sup> Baker’s study shows these Aboriginal peoples’ environmental knowledge to be dynamic and responsive, changing and adapting over thousands of years through constant observation, experimentation, and transmission across the generations. This type of innovative knowledge also aids in refuting the notion that what is often called ‘traditional’ knowledge is fixed and immutable.<sup>34</sup> A better cross-cultural understanding of systems of thought and practice can also provide a powerful challenge to the authority and hegemony of the dominant modes of thought, as Joanna Overing argues. She states that ‘an excellent antidote to the power of our Western hierarchical oppositions and the theory of knowledge upon which they ride is an acquaintance with other theories of knowledge and ontologies’.<sup>35</sup> While agreeing with this view of the need for greater understanding of other systems of knowledge and translation across categories and boundaries, I would also urge a note of caution. Not all Indigenous knowledge can, or should be revealed to those outside the culture, or even to certain persons within the culture. There is much that must remain secret, and respect for this secrecy and other internal rules governing the management of knowledge in Indigenous communities is an essential part of cross-cultural translation.

### **Translating Concepts: Tradition and Custom**

The problem of homogenising concepts and categories purporting to represent Indigenous epistemologies brings me back to the native title case I cited at the beginning of this paper.

In the Yorta Yorta case the judges deliberated extensively over the notions of ‘tradition’, ‘traditional laws’, and ‘traditions and customs’. Their judgements were written entirely within a jurisprudential discourse, bounded by the requirements of the relevant Act. Here, I quote from the High Court appeal decision as it outlines what the claimants sought to demonstrate:

That there was a connection between the native title rights and interests which they claimed to possess with the traditions and customs of Aboriginal society

*as those traditions and customs existed before European settlement.* This connection was said to be established by demonstrating either continuous physical presence from the time the British Crown asserted sovereignty to the date of the proceeding or the existence of a *continuing* system of custom and tradition. Of this latter connection it was said that it could be demonstrated even though it had changed and adapted since European settlement.<sup>36</sup>

In both the Federal Court finding, upheld by the High Court Decision, the judges held that Aboriginal ‘tradition’ could not be said to have continued to the present day, because of the more ‘settled’ life now led by the Aboriginal people. Historical factors, they concluded, had resulted in what to them was the fact that Yorta Yorta did not practice the same laws and customs of their ancestors. Therefore, they determined that these Aboriginal people ‘did not continuously occupy the land’ in the manner required by the *Native Title Act*.

This case demonstrates the problems when trying to translate concepts and categories from one type of discourse (such as indigenous), into another discourse, such as that of law. As anthropologist Peter Sutton has stated ‘the focus of native title in Australia is on the translation of customary and traditional rights in country into legal “rights and interests”’.<sup>37</sup> The presumed notion of tradition espoused in the legal arguments is based on a homogenised concept rooted in Enlightenment ideas of progress, and a traditional/modern dichotomy. As Roy Ellen observes in regard to this concept of tradition, among all such terms (eg ‘culture’):

despite its implications of anachronism and long-term cultural stasis, “traditional” seems to have more credibility and is among the most common ways of describing a particular kind of anthropological other. Like the other terms, it derives its meanings from variations on the modernity-traditional dualism, which we have quite rightly learned to treat with suspicion.<sup>38</sup>

The historically situated concept of tradition within discourses of modernity has also been outlined by other writers:

Along with the concept of culture which was put forward in idealist thought, there also emerged a notion of “tradition”. Although tradition was understood as the antithesis of modernity, the very use of terms like tradition indicated the influence of a modernity which problematised certain hitherto accepted ideas and practices and made them objects of analysis. The dichotomy between modernity and tradition was a characteristic of Enlightenment thinking and it was complemented by a dichotomy between past and present, and a notion of the contemporary which was reflective of a new attitude to time and history.<sup>39</sup>

Indigenous peoples in this schema became the exemplars of ‘tradition’ in eternal opposition to modernity.

Not only are categories and concepts such as ‘tradition’ as used in native title decisions problematic, so too is the circular reasoning that has been employed in some decisions with regard to the category ‘cultural knowledge’. To illustrate this, I turn to another recent native title decision in which the High Court of Australia was asked to examine the native title right to ‘maintain, protect and prevent the misuse of cultural

knowledge' of the native title holders. Here, control over 'cultural knowledge' was defined to mean that claimants could restrict 'access to certain sites or ceremonies', and also restrict the 'reproduction of artwork or other images'. One of the factors in the court's decision to decline recognition of cultural knowledge as a native title right was that such cultural knowledge was insufficiently defined in the claimants' submissions. On the basis of what was received, the court held that a connection could not be demonstrated between cultural knowledge and native title, and therefore the judges did not support the contention that cultural knowledge is a part of native title for the purposes of the NTA. Instead, they suggested turning to existing intellectual property laws, including the moral rights aspect of copyright, to seek protection for cultural knowledge.

Two aspects of this decision warrant some comment. First, by seeking recourse to intellectual property rights law for remedies to protect Indigenous cultural knowledge, the judges are caught in a hermeneutical circle that only serves to perpetuate the incapacity of the legal system to adequately engage with Indigenous epistemologies. By referring to other areas of law for matters dealing with Indigenous knowledge, the court assumes Indigenous knowledge to be equivalent to the western legal concept of intellectual property. This tactic fails to advance the judicial system's understanding of, or capacity to incorporate categories and concepts from Indigenous systems of knowledge and practice. It defers the problem of cross-cultural interpretation and translation by maintaining the discourse within the ultimately restricted domain of legal considerations.

The Ward Decision also highlights what is perhaps a more fundamental problem, that has to do with the particular ways in which formal legal processes and legislative regimes purport to capture, or represent notions such as Aboriginal 'tradition', 'culture', and 'traditional knowledge'. The use of such terms and categories in legal, policy and administrative discourses and practices has little to do with the historically, socially and culturally situated actualities of Indigenous communities. Such uses are generally divorced from the adaptive, dynamic processes of cultural systems in Indigenous societies, and reflect more the ideologies and presuppositions of the dominant legal and political machinery. The role of disciplines such as anthropology, grounded in field observation and close engagement with Indigenous communities is important to consider here, as such disciplines might provide a more nuanced and complex understanding of Indigenous cultural systems.<sup>40</sup>

### **Other Laws, Other Concepts**

Other laws in Australia grapple in similar ways with representing Indigenous terms and concepts. Examples of these are environment and heritage laws. The *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* provides for the 'preservation and protection from injury or desecration' of certain significant indigenous areas and objects. (section 4a) This Bill defines 'indigenous tradition' as

the body of traditions, observances, customs and beliefs of indigenous persons generally or of a particular community or group of indigenous persons, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships. (s5)

In 1999 the Australian Government introduced the *Environment Protection and Biodiversity Conservation Act 1999*. This Act replaced a number of other pieces of environmental legislation. It provides for Indigenous peoples' interests in its Objects, which state that this Act is to:

promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.<sup>41</sup>

And

promote a partnership approach to environmental protection and biodiversity conservation through ...recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity.<sup>42</sup>

It is certainly an advance on earlier legislative regimes to entrench in the objects of Commonwealth laws some provisions that encourage recognition of Indigenous peoples' traditions, environmental knowledge, and the role of that knowledge in conservation and sustainable use of biodiversity. However, as I have argued in this paper, there is also an inherent risk in entrenching received versions of categories that purport to represent some notion of Indigenous cultural systems.

By reifying such knowledge in the legislative machinery of the nation state, Indigenous concepts and categories are thus 'captured' within the dominant system and implicitly rendered into some indefinable homogenous category. This leaves little or no space for a differentiated understanding of Indigenous epistemologies that is at once pluralistic, contextualised and situated in the specifics of place and time.

Terms and concepts (such as 'tradition') assume in legal and policy discourse, the status of authority; that is, they come to represent an essentialised, homogeneous or unitary notion of Indigeneity, or Aboriginality. These constructed categories provide the grounds for the dominant discourse to diminish, or render invalid the existence of a continuing, adaptive and dynamic Indigenous tradition (eg as in the Yorta Yorta case). As some writers argue 'we must bear in mind that knowledges cannot be examined as fixed categories, experiences and social practices'. Further, they state 'we must remember how complex such knowledge forms are, and the implications of this complexity for rethinking "indigenous knowledges" as a whole'.<sup>43</sup>

Is indigenous environmental or cultural knowledge then, an entity whose existence ultimately can only be contingent on it being constructed as a space within the dominant western socio-political and legal discourses? If this is the case, why do dominant legal discourses persist in formulating indigenous knowledges in terms of essentialised, timeless concepts such as 'tradition' and 'custom'? I would argue here that these constructed notions of indigenous knowledge serve the interests of the nation-state through its legislative-bureaucratic-administrative machinery.

### **Some Concluding Remarks**

What I have sought to argue is that although there may be innate, fundamental *a priori* principles underlying all systems of knowledge and epistemology, the

application and practices stemming from these systems differ across cultures. In other words, common principles or core elements are perceived and sensed differently by different cultures, which then construct their own classifications and taxonomies to describe the environment in ways that accord with their cultural systems. Dominant legal and socio-political systems delimit and bound indigenous cultural and epistemological systems in artificially constructed categories and concepts that have more to do with bureaucratisation and program management than they refer to specific, localised and particularised cultural knowledge and epistemological systems.

This paper also appeals for a deeper, more engaged understanding of the complexities, malleability and adaptability of Indigenous knowledge systems, and a plural approach to facilitate the working together of different traditions and epistemologies.

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<sup>1</sup> Yorta Yorta Aboriginal Community v State of Victoria [1998]; also Members of the Yorta Yorta Aboriginal Community v Victoria [Federal Court Appeal], [2001] FCA45 (8 February 2001), and Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA58 (12 December 2002)

<sup>2</sup> A. F. Chalmers, *What Is This Thing Called Science?*, Third Edition, St. Lucia, University of Queensland Press, 1999.

<sup>3</sup> I am using the term 'knowledge system' as one element of a discourse, adopting the notion of discourse developed by Foucault and his followers as a set of statements, practices, speech, language and relationships between these.

<sup>4</sup> Grim, p. liii.

<sup>5</sup> Sefa Dei et al, 'Introduction', p. 4

<sup>6</sup> Vandana Shiva, 'Foreword: Cultural Diversity and the Politics of Knowledge', in Sefa Dei et al, *Indigenous Knowledges in Global Contexts* p. vi

<sup>7</sup> *Ibid.*, p. vii

<sup>8</sup> See for example Arun Agrawal, 'Dismantling the divide between Indigenous and scientific knowledge', *Development and Change*, vol. 26 (1995), pp. 413-39; Essays in Mark Hobart, ed, *An Anthropological Critique of Development: The Growth of Ignorance*, London, Routledge, 1993; and Cristoph Antweiler, 'Local knowledge and local knowing: An anthropological analysis of contested "cultural products" in the context of development', *Anthropos* 93, 1993, pp. 4-6.

<sup>9</sup> For a useful analysis and critique of this see Margaret Simons, *The Meeting of the Waters: The Hindmarsh Island Affair*, Sydney, Hodder, 2003.

<sup>10</sup> eg Jack Goody, *The Domestification of the Savage Mind*, Cambridge University Press, 1977.

<sup>11</sup> Goody, op. cit., p. 1. See also Claude Levi-Strauss, *The Savage Mind*

<sup>12</sup> See for example Henry T. Lewis, 'Ecological and technological knowledge of fire: Aborigines versus park rangers in Northern Australia', *American Anthropologist* vol. 91, No. 4, December 1989, pp. 940-961.

<sup>13</sup> This view is suggested by Arun Agrawal, 'Dismantling the divide between Indigenous and scientific knowledge', *Development and Change*, vol. 26, 1995, pp. 413-439.

<sup>14</sup> Ellen, 'Introduction. P. 2

<sup>15</sup> Strang, Veronica, *Uncommon Ground: Cultural Landscapes and Environmental Values*, Oxford, Berg, 1997, p. 84.

<sup>16</sup> Veronica Strang, p. 237.

<sup>17</sup> Strang, p. 280?

<sup>18</sup> L. M. Baker and Mutitjulu Community, 'Comparing two views of the landscape: Aboriginal traditional ecological knowledge and modern scientific knowledge', *Rangeland Journal*, Vol. 14, No. 2, 1992, pp. 174-89; Julian Reid, Lynn Baker, Stephen R. Morton and Mutitjulu Community, 'Traditional knowledge + ecological survey = better land management', *Search*, Vol. 23, No. 8, Sept 1992, pp. 249-51.

<sup>19</sup> See the collection edited by Stephen B. Brush and Doreen Stabinsky, *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights*, Washington D.C., Island Press, 1996.

<sup>20</sup> See for example Lee Sackett, 'Promoting primitivism: conservationist depictions of Aboriginal Australians', *The Australian Journal of Anthropology*, 1991, Vol. 2, No. 2, pp. 233-247.

<sup>21</sup> Roy Ellen, 'Introduction' in Roy Ellen and Peter Parkes, eds, *Indigenous Environmental Knowledge and its Transformations: Critical Anthropological Perspectives*, Amsterdam, Harwood Academic, 2000, p. 1.

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- <sup>22</sup> Winona LaDuke, 'Traditional ecological knowledge and environmental futures', *Colorado Journal of International Environmental Law and Policy*, vol. 5, no. 1, Winter 1994, p. 127.
- <sup>23</sup> Kristin Howden, 'Indigenous Traditional Knowledge and native Title', *UNSW Law Journal*, 24 (1), 60-84, p. 60.
- <sup>24</sup> Howden, p. ??
- <sup>25</sup> Michael Davis, 'Indigenous rights in traditional knowledge and biodiversity: approaches to protection', *Indigenous Law Reporter*, vol. 4, no. 4, 1999, p. 1.
- <sup>26</sup> Sefa Dei, p. 4.
- <sup>27</sup> Robert Chambers and Paul Richards, 'Preface', in D. Michael Warren, L. Jan Slikkerveer and David Brokensha, eds, *The Cultural Dimension of Development: Indigenous Knowledge Systems*, London, Intermediate Technology Publications, 1995, xii; see also Mark Hobart, 'Introduction: the growth of ignorance' in Hobart, ed, *An Anthropological Critique of Development: The Growth of Ignorance*, London, Routledge, 1993, pp. 1-30.
- <sup>28</sup> Arun Agrawal, 'Dismantling the divide between Indigenous and scientific knowledge', *Development and Change*, vol. 26 (1995), pp. 413-429.
- <sup>29</sup> Vandana Shiva, 'Foreword: Cultural Diversity and the Politics of Knowledge', in Sefa Dei et al, *Indigenous Knowledges in Global Contexts* p. viii.
- <sup>30</sup> Vandana Shiva, 'Foreword: Cultural Diversity and the Politics of Knowledge', in Sefa Dei et al, *Indigenous Knowledges in Global Contexts* pp. viii-ix.
- <sup>31</sup> Ibid.
- <sup>32</sup> Deborah Bird Rose, 'Sacred sites, ancestral clearing, and environmental ethics', in Alan Rumsey and James Weiner, eds, *Emplaced Myth: Space, Narrative, and Knowledge in Aboriginal Australia and Papua New Guinea*, Honolulu, University of Hawai'i Press, 2001, p. 109.
- <sup>33</sup> Richard Baker, *Land Is Life: From Bush to Town, The Story of the Yanyuwa People*, St. Leonards, Allen & Unwin, 1999, p. 45.
- <sup>34</sup> Baker, *op cit*, pp. 45-50.
- <sup>35</sup> Joanna Overing, 'Introduction', in Overing, ed, *Reason and Morality*, London and New York, Tavistock Publications, 1985, p. 17.
- <sup>36</sup> *Yorta Yorta v Victoria*, HCA 58, 12 Dec 2002, para 20, original emphasis.
- <sup>37</sup> Peter Sutton, Native Title, 2003: xviii
- <sup>38</sup> Roy Ellen, 'Introduction', in Roy Ellen, Peter Parkes and Alan Bicker, eds, p. 3.
- <sup>39</sup> George J. Sefa Dei, Budd L. Hall, and Dorothy Goldin Rosenberg, 'Introduction' in Sefa Dei, Hall, and Rosenberg, eds, *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World*, Toronto, Canada, University of Toronto Press Incorporated, p. 30.
- <sup>40</sup> For general discussions of the role of anthropology see for example Michael Davis, 'Law, Anthropology, and the Recognition of Indigenous Cultural Systems', *Law and Anthropology: International Yearbook for Legal Anthropology*, Vol. 11 (2001), eds Rene Kuppe and Richard Potz, pp. 298-320; Stephen B. Brush, 'Indigenous knowledge of biological resources and intellectual property rights: The role of anthropology', *American Anthropologist*, vol 95, no. 3, 1993, pp. 653-71. For a specific case involving a Queensland Aboriginal Land claim see Benjamin Richard Smith, "All been washed away now': Tradition, change and indigenous knowledge in a Queensland Aboriginal land claim", in Johan Pottier, Alan Bicker, and Paul Sillitoe, eds, *Negotiating Local Knowledge: Power and Identity in Development*, London, Pluto Press, 2003, pp. 121-54.
- <sup>41</sup> *Environment Protection and Biodiversity Conservation Act 1999*, s3(2)(g)
- <sup>42</sup> *Environment Protection and Biodiversity Conservation Act 1999*, s3(2)(g)(iii)
- <sup>43</sup> George J. Sefa Dei, Budd L. Hall, and Dorothy Goldin Rosenberg, 'Introduction' in Sefa Dei, Hall, and Rosenberg, eds, *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World*, Toronto, Canada, University of Toronto Press Incorporated, p. 4.