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To cite this Article Merlan, Francesca(2006) 'Beyond Tradition', The Asia Pacific Journal of Anthropology, 7: 1, 85 — 104
To link to this Article: DOI: 10.1080/14442210600554507
URL: http://dx.doi.org/10.1080/14442210600554507

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Beyond Tradition
Francesca Merlan

Liberal multiculturalism as practised in Australia makes demands upon Indigenous minorities to demonstrate their traditionality. Taking examples from recent Australian land and native title claims, the paper illustrates notions of ‘tradition’ generated and applied in these processes. It explores the demand for tradition as an aspect of a liberal economy of values, showing that limitations of liberal perspectives in regard to the recognition of indigenous entitlement are inherent to its economistic framework. It suggests kinds of issues that need to be addressed in the envisioning of a post-liberal approach.

Keywords: Liberalism; Tradition; Reflexivity; Australia; Land Claims; Native Title

Introduction

Liberal multiculturalism enjoins tolerance towards those considered ‘other’, but also works towards the reduction of otherness to a depoliticised ‘symbolic’ (Gans 1979). In attempting to recognise and deal with the disadvantaged condition of indigenous minorities, these same liberal multicultural systems do not simply assume their eligibility for certain kinds of measures which recognise historically derived disadvantages, but make considerable demands upon them to demonstrate traditionality, or continuity with practices and forms considered traditional (see Connolly, this volume). Measures of recognition are based upon such demonstration, as is also, to a considerable extent, positive popular appreciation of indigenous cultures.

In this paper, I want to explore the demand for tradition as a dimension of a liberal economy of values. Some have seen a pretence to universalism in liberal multiculturalism, but taken it to be a form of cunning, a false promise of broader acceptance (Povinelli 2002). Though it may be seen as deceptive or insufficient, I maintain that the demand for alterity and its containment within the terms of...
tradition is inherent in liberal multiculturalism, according to the ‘liberal arts of separation’ (Walzer 1984) rendering anodyne that which threatens to be potentially disruptive: revelation of the extent to which indigenous and non-indigenous are mutually constituting, as well as the extent to which tradition is itself a reflexive rather than empirically discoverable category. I illustrate the kinds of meanings of ‘tradition’ that such acts of containment require from participants at the indigenous—non-indigenous interface, and argue that these versions of tradition require understanding of indigenous social actors and their action as non-reflexive, or at least as lacking awareness concerning the production of tradition and its relation to the circumstances of demand for it (Wiley 1994).

Systems introduced by the Australian state for the purposes of recognising Indigenous land rights have required Indigenous people to demonstrate continuity with traditional forms and practices. Sufficient demonstration of traditionality triggers recognition and a positive outcome; inadequate demonstration produces denial of recognition of rights to land. After all these decades of non-recognition and, indeed, state attempts to erase Indigenous relations to land, one might ask: why should recognition depend on the capacity for land courts and tribunals, and Indigenous and other participants, to produce collectively what is essentially an ‘as if’ story: we (in a position to decide these things) accord you (Indigenous people) recognition to the extent you can show you are traditional in your relations to land? To call this an ‘as if’ story is not to dismiss the relevance of places and the land in Indigenous people’s lives, but to recognise the basically anachronistic nature of the demand being made of them. The offer of restoration of land is made to people living under very different conditions from those in which Aborigines were dispossessed of it.

In some ways, the answer to the question posed above is obvious. Demonstration of traditionality distinguishes those worthy of recognition from the unworthy, those who should be entitled from those who should not. Raising the bar of proof high allows appropriate distinctions to be made. Otherwise everybody would seek recognition—anybody with any claim to Indigeneity. The wider public would be dissatisfied were recognition not based on continuity and clear cultural difference—indeed, if it were otherwise, why should not everybody, not only the Indigenous, be entitled? Traditionality is a test of entitlement, and mainstream understanding overwhelmingly posits that land is a great, even supreme, value for Indigenous people.

But to say this confirms that access to land and to social esteem is constituted in this context in a particular way, and poses the question again: what kind of concept is ‘tradition’? Why is demand for demonstration of tradition such a key element in the liberal recognition process? In market society, the principle mode of access to land, as to any property, is by purchase, but for indigenous people entitlement is allowed to follow from long-standing relationship and continuity of practice with respect to land. Relationship must be current, constituting a bridge between past and present. In claims, the vicissitudes of history can be cited as extenuating circumstances that help
to explain why relationship to land is of lesser intensity than it might be; but too little continuity of indigenous practice renders the relationship inadequate. Thus entitlement depends on the demonstration of distinctively indigenous relations to land, and these are required to appear as though free-standing. There is a question here concerning how schemes of recognition and restoration could go beyond these demands for tradition, and what they would look like. In the substantive part of my discussion I want to show how the notion of tradition is shaped in the claims processes. This will set the stage for discussion of an economy of liberal social values and their application to the indigenous.

Relocating Tradition

Shils sees ‘tradition’ as used to ‘describe and explain the recurrence in approximately identical form of structures of conduct and patterns of belief over several generations’ (1971, p. 123). Raymond Williams (1977) offers a more critical definition of tradition as a mode of incorporation in relation to contemporary context. This viewpoint suggests that ‘tradition’ involves forms of awareness and accommodation to circumstances as they seem to present themselves, and is less focused on the factuality of reproduction.

To Shils’s assertion that ‘tradition’ has played an extremely important role in Western social thought generally, we can juxtapose Nisbet’s (1969, p. 168) claim that one of its central tenets is that change, or a succession of differences in time within a persisting identity, is continuous. If this orientation to change is fundamental to our lived experience and understanding, we are better able to see that ‘tradition’, understood to connote continuity between past and present, counters or differs from the experience of pervasive change through its containment within limits. The tension between the experiences of linkage with the past, and continuous change, accounts for one common association of ‘tradition’ with pastness, and with historicised social objects outside present practice. ‘Tradition’ links past and present, not as unproblematic continuity, but as the objectification of the past–present relationship viewed and evaluated from the present. It includes by its very nature a dimension of reflexivity: the consciousness of evaluation of the relation between past and present.

Can indigenous continuity between past and present be seamless, unbroken, non-reflexive? This question suggests a basis on which a contrastive indigenous social position can be imagined, and a distinctive indigenous relation to the wider social system positively underpinned.

Thus, tradition is a bridge between past and present that can be deployed to deny or at least background change. If our recognition of indigeneity is based upon demonstration of its traditionality, its terms are bound to be past-oriented, fundamentally reaching into the past for evidence of maximal difference to sustain conceptually the values, practices, and wider societal acceptability of any ‘special measures’ (as they are often called by reluctant politicians and public of liberal
orientation) that may be involved in indigenous recognition. ‘Tradition’ conceived in this way, as a continuation of the past in the present, thus has particular salience in the formulation of practice and policy with respect to indigenous peoples. It is at the basis of their distinctiveness and claims to particularity. But in what terms is tradition evaluated?

Many social science discussions of the word ‘tradition’ try to achieve some clarity by beginning with its etymology and history of reference, and I believe that something is to be gained by rehearsing this. ‘Tradition’ can be traced to the Latin verb *tradere*, which implies transmitting or giving something up or to another. Roman jurisprudence saw this practice as legally constituting the making of a bequest or inheritance (Luke 1996). *Traditio* referred to the process of giving, and *traditum* to the thing transmitted. True to this etymology, the word is still taken to connote connection to an earlier point in time, that is, to allude to a temporal span over which the link of transfer is conceived. While in many contexts the span is considered to stop short of the present, from which vantage one may view tradition as relevant to but different from present practice, or an objectified form of past practice in the present, criteria for indigenous recognition demand the demonstration of ‘tradition’ in the present, and as of continuing relevance.

These etyma point to two possible focuses of the notion of tradition. One is constancy or identity of the *traditum*, that which is transmitted. We might call this (following Williams 1977) the notion of tradition as the surviving past in the present. The other focus, which may involve toleration of some degree of change in what is transmitted, exists at some higher level as putative relative constancy in the framing processes of transmission.

These two emphases, I argue, can be found in the ways in which ‘tradition’ has been used in recent land-related cases. The first emphasis tends to be associated with an object-like, inert, historicised character of what is understood as tradition. Such a viewpoint generally plays a socially conservative role, as it is compatible with a search for the strictest possible requirements of contemporary traditionality. The conservative character of such requirements, however, is generally not overtly acknowledged by those who employ the notion of ‘tradition’ in this way. The second emphasis tends to be associated with (what is in some ways) a more generous view of the conditions for recognition of indigenous specificity, from the vantage point of social theory as well as political perspective. It allows for some change in the nature of particular social objects but attributes constancy to underlying social processes. Thus, it tends to presuppose some kind of argument about the difference between ‘surface’ and ‘deep’ structures of social process, even if the argument is not made overt. This view maps onto a more accepting position concerning the extent to which a ‘succession of differences in time’ can still be taken to meet requirements of continuity.
Land Cases in Context: Notions of Tradition

Land claims and native title claims have arisen in Australia as areas of negotiation and engagement between institutions of the state and Indigenous people and organisations representing their interests. Engagement goes on in constructed institutional spaces and involves specialised forms of dialogue and interaction (see Merlan 1998; Povinelli 1993, 2002; Glaskin 2002). Notions of tradition have played a central role in the statutory instruments that are the source of authority for the claims processes.

Milirrpum v Nabalco (1971), heard in reference to an Indigenous claim to land in north-eastern Arnhem Land in the context of looming bauxite mine development, resulted in a finding of the Northern Territory Supreme Court that the Aboriginal group concerned had not demonstrated a system of communal native title capable of being recognised at common law. Though they evidently lived according to a complex system which ‘provided a stable order of society’, their relations to land did not correspond to ‘the substance of proprietary interests’, which the judge held to include ‘the right to use or enjoy, the right to exclude others, and the right to alienate’. The judge also deemed another element he saw as necessary to have remained unproven: ‘that the plaintiffs’ predecessors had in 1788 [that is, at time of British occupation of the continent] the same links to the same areas of land as those which the plaintiffs now claim’. Thus he did not find the plaintiffs to be proprietors of the disputed mining lease area scheduled for development.

Given positive inclinations within government towards some restorative measures, a process was instituted shortly thereafter to establish under what conditions Aborigines could be granted land rights. A special, beneficial statutory regime was established, not throughout Australia (as had been initially proposed) but in the Northern Territory, which provided for the hearing of claims to Vacant Crown Land only. This statute did not require the establishment of property rights as Blackburn had construed the concept. The Aboriginal Land Rights (Northern Territory) Act 1976 required that Aborigines demonstrate that they constituted a ‘local descent group’ with ‘primary spiritual responsibility for the sites and for the land’, entitled to ‘forage as of right’ over the land claimed. Thus criteria of effective traditionality were required, but couched in terms of the structure and relationships to the claimants’ land. This ‘beneficial’ statute nested a determination procedure within the common law without changing the negative finding concerning the recognisability of Indigenous rights to land at the common law.

The findings of the Arnhem Land case of 1971 were substantially altered only in the more recent Mabo case, a long-running issue heard in the High Court of Australia (Mabo v Queensland, nos 1 and 2 (1988), (1992)). It concerned land on Mer, an island in the Torres Strait between Australia and Papua New Guinea. The Indigenous people of Mer are horticulturalists, culturally more Melanesian than continental Australian. Ultimately, in this case, some of the plaintiffs were found to hold ‘native title’. The novelty of this case, compared to the earlier Arnhem Land one, consisted in the finding that native title existed as an Indigenous form of property right.
recognisable at the common law, its origins antedating colonisation, continuing into the present under certain conditions. It was a catalyst to the federal *Native Title Act 1993* (Cth), which established the terms for demonstrating the existence of native title elsewhere in Australia.  

In the native title process, the rights and interests which are the expression or product of native title must be shown to be held under ‘traditional laws acknowledged’ and ‘traditional customs observed’ in connection with land or waters (s. 223, *Native Title Act 1993*). As a matter of legal practice the social content of native title, that is of the traditional laws and customs, had been held to be a question of fact presented in each case. This understanding arises from the comments, for example, of Brennan in *Mabo No. 2* (at para. 64):  

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

Incidents of some category (‘laws and customs’) are to be empirically demonstrated, and evidence concerning them constitutes the ‘facts’ of the matter. These laws and customs must be found to be traditional.

In both land claims in the Northern Territory, as well as in some native title claims, requirements of continuity have been interpreted at the first level described above, as requiring the demonstration of social objects—groups, relations—exhibiting little or limited change from past to present, the surviving past in the present. This position can be illustrated from the Arnhem Land case that was a precursor to the Northern Territory land rights legislation, as well as from a recent native title case.  

Williams (1986) has pointed out that in *Milirrpum v Nabalco* (often referred to as the ‘Gove case’ after the mining location in north-east Arnhem Land), the presiding judge insisted upon demonstration of identity of a particular set of social objects over time (see Williams 1986, pp. 174–91). These were social groupings referred to (in English) as ‘clans’, as well as their relations to particular areas. Was the Rirratjingu clan of the time of colonisation demonstrably continuous in its relationship to a particular area? Could this and other claimant clans demonstrate that they had been associated from the time of colonisation with the same area of country to which they claim belonging today? Could strict genealogical continuity be demonstrated between contemporary members of these groups and members of groups of the same names at time of colonisation? In his view, none of this could be adequately demonstrated; criteria of strict continuity were not satisfied.

Justice Olney, in the much later Victorian native title decision, *Yorta Yorta v The State of Victoria* (1998), also relied upon an argument that there must be substantial continuity over time, both in the specific identities of persons definable in genealogical terms linking them with the past, and in the identities of social groupings. Commenting that the arguments about continuity and clarity of the latter had proved ‘sterile’, he observed regarding the former:
What ultimately must concern the Court is whether members of the claimant group can trace descent from those inhabitants who at or before the earliest contact with Europeans occupied the claim area, or part of it, and in relation to that area or part possessed what is now known as ‘native title’ in the sense described by Brennan J in Mabo No. 2 at p. 57. If that connection is made it will be necessary to identify the nature and extent of the native title rights of those ancestors.¹⁰

We might designate this emphasis upon the identity and continuity of specific social objects a ‘first level’ of objectivation. Explaining aspects of the Yolngu land tenure system by which yapa or sister clan groups to ‘owning’ groups are vested with subsidiary rights through shared myth, Williams (1986, pp. 184, 189) comments that it would not have occurred to the Aboriginal people involved not to arrange for succession on these and other such bases, despite changes over time in the primary associations of clans with land areas.

Emphasis upon specific social objects can be contrasted with processual emphases on Aboriginal land tenure in terms of which those identities and their relations are reproduced and altered through time. The system is negotiated and reconstituted by people, who themselves recognise and debate the ways in which ‘succession’ to land may occur and has occurred. Justice Blackburn focused upon particular kinds of social objects as having fixed relations to land, rather than on questions of social process and its patterns. Had an effort been made to chart some of these patterns, much greater latitude might have had to be allowed in the ways in which groups might be deemed to relate to land ‘traditionally’ over time. At some point, the criteria for traditional relationship might have become sufficiently complex that no rule-defined set of relationships would have adequately modelled the socio-historical relations involved: the substantive content of social relations would have played a role. Clearly, the judge was unprepared to move in such a direction. He preferred the clarity of the position that any given clan’s entitlement over time is to a specific territory, and that ‘tradition’ is inherent in the maintenance of this relation.

Williams’s (1977) comments on process bring us to consider the second sense of tradition, involving the notion that some change from past to present is to be expected, and continuity is thus to be posited at more abstract levels. Here there is some preparedness to locate continuity in the ‘structuring structures’, the terms, categories, or processes within which social objects are formed and reconstituted.

Some judges have been prepared to argue, on the basis of evidence before them, for an interpretation of ‘tradition’ as able to change but still meet their requirements. Among them are Beaumont and von Doussa in the native title case Commonwealth v Yarmirr (1999):

*Mabo* 2 (at 70, 100, and 192) recognizes that laws and customs of indigenous people may undergo change subsequent to the acquisition of sovereignty, and the means of enjoyment of native title rights and interests can change with the times (e.g. to permit the hunting of estuarine crocodiles with the use of an outboard motor).¹¹
The allowance for change exemplified here restricts itself to the ‘means’, a kind of technical modification. It represents a position defined by a notion that the aims, purposes, values, and social entailments of activity may not change, while the outward means of accomplishing action may do so (gun instead of spear, outboard motor instead of canoe, and so on). We may say there is, in Nisbet’s (1969) terms, a succession of differences within a category of ‘means’. This kind of finding skirts the difficult questions concerning the social significance of this activity as between past and present, and how that is to be understood in view of radically altered and no longer independent Indigenous production and ways of life. In Yarmirr, Beaumont and von Doussa assert that the key issue is not whether the rights and interests which the common law protects were ‘acknowledged and observed at any particular date’, but that they demonstrably follow from the ‘acknowledgement of traditional laws and the observance of traditional customs’.12

With greater generality, Brennan in Mabo had observed: ‘in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too’.13 In Ben Ward & Ors (1998), Justice Lee amplified the notion of expected change in a way that nevertheless made explicit an underlying demand for continuity:

Change or variation in the practise of traditional laws or customs will not declaim loss of native title. The question to be asked and answered is whether the community claiming native title retains a form of practice of traditional laws and customs that shows that, as far as is practicable, it has a connection with the land that may be attributed to an ancestral community.15

Not all requirements of continuity have been lifted; it is, rather, that greater freedom is to be allowed in what these might entail or how a connection with the past is to be understood. Here, continuity of connection is traced within the category of ‘community’ and ‘laws’ that may in some way be seen as continuous between a community of the past and one of today. Presumably, such findings seem plausible where Indigenous social practice and categorisation appear appreciably different from ‘mainstream’ social practices. Thus, the courts are not absolved of the necessity of locating something that remains identifiably continuous and distinctive about Aboriginal traditions, underpinning the entitlement to landedness. Consequently, judges have varied in allowing categories deemed to be sufficient evidence of continuity to be identified at lower and higher levels, and in terms of the variability in the explicitness (or otherwise) of Indigenous rule-like formulation they have required. In favourable circumstances, where Indigenous difference seems assured, the issue of difference may not, however, for practical purposes, need to be the subject of close scrutiny. In the case of native title, one must be able to relate findings to the operative phrase of the Act concerning ‘traditional laws and customs’. Again with respect to Australia, Merkel J wrote to the effect that:
Generally, it is the occupancy of a particular community of its land, or the presence upon or use by the community of land, in accordance with traditional law and customs at the date of sovereignty that affords the requisite connection between the land and the community entitled to hold native title to it. As native title follows from establishing the requisite traditional connection between the community and its land it does not depend on proof of particular laws or customs that governed the relation of community members with that land at the date of sovereignty.\textsuperscript{16}

Arguably, the positive findings of native title in \textit{Ben Ward \& Ors etc.} (1998) were stated in a robust form because of the evident satisfaction of Justice Lee that there was a recognisable community of Aboriginal people linked to the claimed land and exercising relationships to it in terms of traditional laws and customs. Lee made reference to the Canadian case \textit{Delgamuukw v British Columbia} (1997),\textsuperscript{17} which established that prior occupation flows from and is ordered by the ‘laws and practices, customs and traditions’, of indigenous people. The findings cannot simply be seen to relate to precedent cases, but rather as dependent upon the nature of the evidence given by Aboriginal witnesses. Note also that, although in \textit{Commonwealth of Australia v Yaminirr} (1999) there was a finding that native title does not depend on proof of ‘particular laws or customs that governed the relationship of community members with that land at the date of sovereignty’, a ‘determination must be made... to... determine the present content of the native title possessed by the relevant community and which has survived and is therefore entitled to recognition by the common law’ (at para. 320).

Such cases realise underlying beneficial intent by allowing some general notion of continuity, within a presumed persisting identity, to activate recognition. They do not explicitly resolve questions about the form that evidence might take in those cases where there may be a greater problem (than there evidently was in, for example, \textit{Ben Ward \& Ors}) with linking more specific notions of title to the concepts of continuity and presence. Most such questions might have to do with the way in which aspects of contemporary practice and consciousness presuppose the regional recognition of higher-level groupings, their membership, and the continuity of relationship to land mediated in the name of such social units. Where conditions of life have made direct contact with land and sea more intermittent, and have resulted in greater differentiation of the activity in regional populations, there will inevitably be greater difficulty in allowing presumptions of continuity in presence to do the work of recognition. Public and academic forms of understanding see the possibility that relevant laws and customs may wane, fade away, or (under changing circumstances) no longer be socially reproduced.

This is indeed the third position which has become evident concerning the form and nature of continuity. In addition to the first concept that there be demonstration of specific, continuous social objects, and to the second one that some more general, higher-level notion of continuity (of either categories, or kinds of social process), a third position recently became a reality in several native title cases, following upon a
now-famous pronouncement from the *Mabo* case which made explicit the notion of ‘disappearance’ of tradition. Brennan J put matters this way:

> when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.\(^{18}\)

Ritter (2004) deconstructs the Brennan metaphor ‘tide of history’, showing that it is far from neutral and far from innocent. It implies that there has been an irresistible and impersonal ‘washing away’ by a seemingly natural ‘tide’, rather than by the force of unequal human interaction. If, he concludes, certain kinds of groups of Aboriginal people are not to be permitted to obtain native title, then that decision should be made openly, and not cloaked under a figure of speech.\(^{19}\)

The possibility of disappearance is waved aside by some advocates of Aboriginal rights who hold any inquiry into the specifics of relationship to land to be against a ‘genuine’ concept of native title. For instance, Pearson (2002) sees title as inherent in continuous occupation without need for demonstration of its (changing) socio-cultural bases, which are held to be a matter *inter se*. One may ask what ‘continuous occupation’ could imply, if not also specific practices of inter-generational transmission. But, for Pearson, the fact that Indigenous people are present should allow continuity to be inferred, and alleviate the need for specific inquiry into it. He explains what he believes native title should have meant for recognition of Indigenous people:

> At the moment of sovereignty, as subjects of the British Crown in occupation of their traditional homelands and entitled to the protection of the new land law brought on the shoulders of the settlers from England, the indigenous people became in British law no less than the comprehensive owners of the entire continent. (Pearson 2003)

The implications of native title have been vastly different. Pearson summarises pointedly, in contrast with this promise, the actuality of native title as he sees it: ‘the whitefellas keep all that is now theirs, the blackfellas get whatever is left over and there are some categories of land where there is co-existence and in the co-existence the Crown Title always prevails over the native title’ (2003).

His is an understandable advocacy and social justice position. Pearson (2003) all too clearly recognises, but leaves tacit, the extent to which the very existence of such schemes as land claims regimes and native title is a product of wider societal compromise about how to address unequal relations produced in history, that is, it is itself the result of power-laden relations, rather than a scheme which aims only to address inequalities of historical outcome.

Between the demonstration of ‘traditional laws and customs’ according to either stricter or looser criteria and their disappearance is a large gap which has only very incompletely and tentatively been conceptualised by anthropologists and others. One
of the issues that arise within this space is the need to understand ‘tradition’ as reflexive and interactive product, and the variety of mediated positions in terms of which people express their senses of relationship to land. Can experientially mediated and corporeally distanced terms of relationship to land meet the requirements of tradition? In claims cases, the tendency has been to address such difficult questions historically, rather than in critical terms of the issues they raise concerning notions of continuity, change, and their constitution and necessity within these processes. Schemes of recognition and restoration that go beyond demands for tradition will need to address these issues conceptually.

**Tradition and Reflexivity**

The three positions—first-level or second-level recognition of tradition or its loss—are compatible with an ‘objectivist’ view of findings. All presume that laws and customs have status and can be identified either in the recognition of particular social objects or in the ways that social processes are presumed to work to produce them.

These perspectives may be expected from state institutions assigned the task of discovering ‘traditional laws and customs’, posited from the outset in, for example, native title law as a discernible set of objects. But let us consider what such objectivist approaches exclude.

Raymond Williams’s (1977) definition of ‘tradition’ as a mode of incorporation in relation to contemporary social context raises some of the relevant questions. His approach brings with it greater awareness of the selectivity of what can be meant by tradition (something that the other views examined tend to leave underspecified). Awareness of selectivity involves the critical understanding that, from a whole possible spectrum of pastness, only certain meanings and practices will be found to be emphasised, given special weighting or valuation in contemporary contexts. Williams’s version of tradition as mode of incorporation thus further suggests the need to consider changing social possibilities and actors’ awareness of them, as well as their part in them. The whole dimension of reflexivity—response on the part of people to their social environment, with its distributions of social processes and power relations—needs to be given consideration.

Some might take the notion of tradition as mode of incorporation to be an open invitation to a strictly instrumental interpretation of social process on the part of calculating social actors. While notions of instrumentality and strategy are never completely irrelevant to what goes on in practice, this kind of instrumental view is far too crude, and presumes far too limited a conceptualisation of actors’ positions and motivations, to be a sufficient account of them.

Let us examine a case in which argumentation in a land claim nearly required close examination of Indigenous awareness as an aspect of claimed relationships to land, but shied away from doing so, I would suggest, because of the difficulties such an approach makes visible.
In the Finniss River land claim (1981), heard under the Northern Territory *Aboriginal Land Rights Act*, anthropologist Sutton argued, the practice of a system of relations to land by Marranunggu people for whom the Finniss was not their traditional country should be recognised as traditional ownership (see Finniss River, paras 141–51). Under claim was country into which they could be shown (by researchers such as himself, through selective interview and historical inquiry) to have shifted in fairly recent times. But, he argued, the system of relations in terms of which they related to the country remained such that the judge could convincingly award title to that land to them as owners: their practice of relationship to land was ‘traditional’ in character, involving acts of transmission recognisable as traditional, though the land to which they were linked through these practices could be shown to have changed. In making a positive finding, the judge had to give priority to the Marranunggu over other regional groupings who understood that land to have been their own historically, but who no longer practised ‘traditional-seeming’ Indigenous relations to it. The identity of the object (an area of land, and the character of historically known ties to it) was not as significant in this outcome as the acceptance that there was a system of a recognisable type in terms of which relations to land were sustained. Thus, as we saw previously, judges’ acceptance of the proposition that there is change does not prevent findings compatible with ‘tradition’. This change may, as in this case, involve what can be understood as reattachment by Indigenous people to new areas of land, as long as the ‘system’ of relations, and by inference, acts undertaken within that system, can be understood as continuous in some demonstrated ways with past system.

Significantly, however, Sutton argued that Marranunggu young people did not know that their relations to this land were recent (see paragraph 142, where it is suggested this may have partly been the result of deliberate withholding of information by seniors in relation to younger people). In the Finniss case, Indigenous people were presented either as completely confident in their assertion of ‘traditional-type’ relations to this land (with associated ritual practice, and so on), as some older people were, and where questions of their awareness of the shift were left obscure, or as nescient, unaware or unconscious of the change (as younger people were said to be). In short, the transfer of allegiance was said to have occurred within the structures of traditional relationship to land, and thus potentially messy issues about people’s awareness and evaluation of the difference between previous and present relationships to territory were avoided.

We might wish to know whether, today, younger Marranunggu people embody the same ‘system’ of relations to land as their elders or whether their understandings of those kinds of relationship are rather different. Perhaps it is true that they have no sense of prior attachment to another area. In order really to understand the ‘shift of allegiances’ argument, we need to have some informed understanding of what the actors involved thought about their links to land, as well as about what they were attempting to prove to the court. In the case of the Marranunggu and the competing claimants, this would involve the question as to whether they understood themselves
to be in competition or whether the Marranunggu claim was unselfconscious in this respect, and perhaps only later came to be understood as competitive. If and when it did, what did those involved understand to be the alternative bases of their claims, and the differences of one case in relation to the other? It would appear, at least as this claim and subsequent investigations and legal actions developed from it, that early on there was an understanding of the claims being in competition with each other. Each side seems to have developed a characterisation of its claims: on the Marranunggu side, as ‘traditional’ with an emphasis on their knowledge of ‘dreaming’ and ritual; on the other side, as based in links of persons to the countryside (in terms of personal origins and associations, birthplaces and so on) in the knowledge that the area had been that of their forebears. The claims of the Marranunggu side were represented as more collectivist, ritual-linked, and presentist; those of the opposite side as more grounded in personal biographical connections deriving from ancestral connection to the area. Each side, in short, developed an account of continuity, but on different bases, which were made to diverge even further in the struggle before the court. The account presented as most firmly based in traditional religiosity was the one with respect to which claimants were said to have least awareness of change in their circumstances. From this we gather that such connections are problematised and disrupted, not by historical shift per se as observers may see it, but by admission of actors’ awareness of this. In the struggle to articulate a coherent case, competition developed between a religiously based notion of ‘traditional connection’ and one of ‘historical connection’, and the former was represented as connecting seamlessly with the indeterminate past and not passing via the understandings of (especially) the younger claimants.

The case of the Marranunggu, then, rested on the successful assertion of Indigenous difference, premised on the a-historical, ‘Indigenous’, mythically and religiously underwritten terms of their case.

This case shows with clarity how forms of relation and action are scrutinised for their value in reproducing difference as Indigenous or non-Indigenous. Forms of practice are evaluated as having authentic value in one system or the other. Acknowledgement of multiple or divided engagement is not helpful in demonstrating traditionality, since what is continuous between past and present must be assessable as Indigenous.

The need to maintain the separateness of Indigenous and non-Indigenous practices for purposes of recognition sheds light on the significance, in the Finniss River case discussed above, of the assertion that young people did not know that their ‘original’ lands were elsewhere. It was important to argue that, had the claim situation not untimely deprived young people of their innocence, they would have lived on to feel complete allegiance to the claimed land as their own, unaware of any historical shift. To put things this way allowed the inference that these young people had been socialised into a single, coherent set of relations to land that could be described as ‘traditional’. Had they been portrayed as realising the extent of the shift, the issue would have arisen of their being aware of conflicting alternative positions, or at least
alternative possibilities. The kind of reflexivity they would have been seen to have would have involved questions of the recent, historically contingent nature of their associations with the land. This question has since proven difficult in another Northern Territory case, the claim over the Cox Peninsula (Povinelli 1993, 2002), in which long-term and still-asserted clan-based relations to one area problematise the claims of the same people to another, where they have nevertheless lived for years, and to which they have strong attachments on somewhat different bases.

Relatedly, in other claim cases, one of the issues has been the use of historical sources, written materials, or even Indigenous witnesses having been informed by advisers’ perspectives. Much has been said about whether or not any or all of these things should be admissible and whether, more generally, revitalisation of an information base should be so (Weiner 2002). All of these things are widely felt to be problematic, because they show the porosity, the partiality rather than free-standing character, of the subaltern position, its lack of complete distinctness from the system of social relations which is interrogating it.

 Judges have been able to recognise ‘modest’ culture change, without having to develop an explicit conceptual framework concerning what this may amount to, and without having to confront directly the implications of reflexivity and mutuality between Aborigines and others. The happiest, least problematic findings of change have been in those instances in which evidently ‘traditional’ social reproduction can be understood as an unintended effect of settlement, with especial respect to the matters lands cases are to investigate. For example, Indigenous participation in the pastoral industry is seen as having allowed people to keep up their relation to country: a happy unintended effect which allows continuity. So it did, in some ways, but in others it profoundly altered the relation and its terms, as shown by accounts of pastoral stations that set out to explore the effects of Indigenous—non-Indigenous interaction (Merlan 1978; Rowse 1987; May 1983).

‘Tradition’ as a character of indigenous land-related practice would be disrupted in the light of any forms of theorisation that take thorough conceptual account of reflexivity (rather than reducing its content to the terms of a synoptic historical narrative). The extent to which ‘tradition’ itself is a reflexive category, as Williams (1977) suggests, rather than a simple empirically discoverable category, would need to be considered. Indigenous people are often admired for the extent to which they are able to function in what is often called another ‘world’, the non-indigenous world. This bounding is in keeping with the liberal state’s project of recognition, which involves preserving continuity in and difference between existing identities. To keep worlds apart is to allow space for the liberal project of recognition: that the ‘other’ be recognisable in determinate ways, not unboundedly. To develop an analytic understanding of ‘tradition’ as an inherently reflexive category is to question the validity and practicability of such a project. There is a need to address more openly and intelligibly questions of the qualitative diversity in historically shaped indigenous—non-indigenous relations, and to consider—sympathetically rather than punitively—social justice measures that might respond more adequately to such
diversity. This brings us back to the question of tradition as consistent with liberal values.

**Tradition as a Liberal Currency**

Tolerance has long been recognised as an exercise of dominion realised by drawing boundaries, often actual geographical ones. Tolerance was found to be a way of defusing the great religious wars of central Europe, as was making territorial dominion a determinant of religious adherence: *cuius regio eius religio*, as decreed by the Peace of Augsburg (1555) and, later, the Treaty of Westphalia (1648). This involved drawing boundaries between areas which were Catholic and others which were Protestant (Lutheran), and agreeing that such difference, on a territorial basis, should be the object of mutual tolerance. This is essentially a relatively benign version of the formula for ethnic cleansing. It affords perhaps one of the clearest examples of what political theorist Michael Walzer (1984) means when he terms liberalism the ‘art of making separations’—containing and defusing tensions by drawing boundaries that define and delimit.

Tolerance, despite its apparently virtuous character, is revealed by such examples to imply the possibility of intolerance, and therefore an unexpended reserve of power of both positive and negative sorts—to tolerate, to let someone be under specific conditions, and perhaps, also, to withdraw one’s toleration. Hage (1998) invokes this understanding to reveal the mode of operation of tolerance involved in Australian multiculturalism to be one of boundary-drawing, delimitation of the acceptable, rather than unqualified acceptance of alterity.

Povinelli (2002) arrives at a similar finding concerning what she calls ‘late liberalism’. Multiculturalism, though apparently involving acceptance of difference and, in the case of Indigenous Australia, the valuation of its ‘ancient culture’, is actually regulatory and disempowering. Its terms cause Aborigines to experience a disparity between their own condition and the expectations held of them, and to acquiesce in forceful judgement of their inauthenticity. Multiculturalism thus works as a kind of domination, not by direct repression, but by ‘inspiring subaltern and minority subjects to identify with the impossible object of an authentic self-identity’ (ibid., p. 6).

Both Hage (1998) and Povinelli find liberalism guilty of bad faith: a pretence to universalism but a practice of the art of making power-laden distinctions. Hage suggests that forms of grassroots coexistence can operate in other, more humane terms than the governmental ones he attributes to liberal multiculturalism; and Povinelli that proliferation of social movements of identity by oppressed groups, mobilising under banners of ethnicity, race, indigeneity, gender, and sexuality, fracture whatever we use to describe as liberalism.

In this paper I began by suggesting that such mobilisations as those for indigenous recognition and land rights, far from fracturing liberalism, tend to be consistent with a liberal economy of values and its particular capacity to generate workable consent.
Some older political theory had the important insight that liberalism fundamentally involves the intrusion of a kind of economistic quality into all dimensions of social interaction. This inherently involves fractures and tensions that tend to be resolved by a politics of alliance and association that constantly admits new dimensions of difference into the discursive and interactional field unbalanced by new relations of unequal access to sources of wealth and power. Laski (1958) sees liberalism as the mode of thought and practice of a particular socioeconomic transition, a set of ideas, doctrines, and economic relations which emerged with the collapse of feudalism, the breakdown of religious authority, and the emergence of modern property relations. Older religious and social norms, in which rank and status encompassed aspiration, acted as constraints upon socioeconomic relations. The new order involves for him a redefinition of social good in a way compatible with unequal relations of property that is nevertheless ‘freely’ held, that is, to the extent that all may aspire to it. A vision of unlimited possibility opens up to view, but maintenance of it involves a naturalisation of a specific logic of social differentiation and human subjectivity, so that access to opportunity is much more narrowly defined than would appear.

The emergence of doctrinal tolerance referred to above removed ‘religion’ from the sphere of those goods to be overtly contested, privatising it and eventually turning churches into voluntary organisations. Such moralities as had been couched in religious doctrine and practice became subject to revision, narrowed to the sphere of private practice and, to varying degrees, matters of irrelevance in ‘economic’ relations. The individual became a centre of moral decision, economic reason, and political judgement. The casting of interest as ‘self-interest’ provided a definitional basis for both a universalising notion of interest and its limitation in practice. Such shrinkages in moral and other spheres accompany the privatisation of property, the loosening of relations which had bound people to others through sociomaterial ties, the dislike of regulation of the right of property, and the shaping of modern liberal statehood by and in the interests of property-holding.

Proof of worth is the attainment of status dependent upon property, which is in fact unequally distributed and denied to most who seek it (Laski 1958), but in theory is the openly available reward of effort. A vast range of differences can be subordinated to the economic process and perceived as the deficit of persons. The resulting political forms emphasise the notion of the free-standing person as an apparently universal type, but the concentration is covertly upon the powers of the free entrepreneur. Lesser condition always evokes the spectre of personal deficiency. Persons of property were commonly, and despite all revolutionary fervours of the eighteenth century, recognised as the natural rulers of society (ibid., p. 159), the labouring sort as only made to be ruled (ibid., p. 198), and the multitude as ‘swinish’ (ibid., p. 199). Conceptions of the state emerged of which the major premise was that its operations ‘must correspond to the will of those who owned economic power’ (ibid., p. 16), and laws regulating property rights were essentially formulated by them. An important sense of ‘liberty’ became the obligation of government to refrain
from interference. There is a drift towards *laissez-faire*, even while one of the greatest goods of society becomes that form of security that guarantees against violence to property as well as to person.

According to Laski, liberal society ‘has no defined objective save the making of wealth’ (ibid., p. 261). There are, however, kinds of disadvantage which are evidently so great that they seem to call for measures which do not simply attempt to try to encourage exit from such society but more aggressively challenge it. The strongest of such alternative measures is the subordination of economic considerations to other social principles, in the name of the deficit to which disadvantage can be attributed.

Disadvantage, however, is a cumulative and interactive effect of a whole variety of factors, only some of which are readily articulated. For Laski, the universalism of liberalism ‘is a particular woven from a special logic unaware of its inherent limitations. Admission to the common good it organizes is always an essay in the conditional mood’ (1958, p. 157). The entire formation is characterised by actors’ degrees of unawareness of its inherent limitations.

Disadvantage and thus particular ways of conceptualising its repair are subject to the inherent limitations of liberal perspectives. Aboriginal disadvantage is approached through governmental technologies (such as land claims) not so much as the result of expropiation and Aborigines’ enmeshment in political and economic systems which rendered them powerless and unequal to others, as through the understanding that they have been deprived of what was indigenously theirs, and that this should be restored to them in what are construed as their own mytho-religious (that is, non-market) terms. In order to qualify for consideration or restorative measures under the terms of indigenous disadvantage, one must be able to imagine a domain of the indigenous. Around this is formulated and contested a currency of indigeneity, and ‘tradition’ is its coin.

Much might be gained by approaching restorative measures in ways not so thoroughly invested in the distinctness of Aborigines’ culture and social situation, and more explicitly informed by understandings of accommodation and relationship, historically and presently, with people and institutions of settler and post-settler Australia. The notion of ‘mutual constitution’ that reflexivity implies has long been one of the strongest potential alternatives to the concept of temporally deep continuity as the source of difference. Admission of practices and relationships constituted reflexively and interactively, that is, in light of relevant self–other relations, does not rule out or completely dismiss forms of continuity but makes their character more complex. In Australian society, a temporally deep and putatively continuous relation to land is perceived by many to be the strongest argument in favour of Aboriginal entitlement, and that which allows Aboriginal interests to be most forcefully contrasted with the relative recency of others’ relations to the continent. But this way of delimiting access to recognition rules out many whose way of being Aboriginal seems too impure and mixed to meet these terms. To open the issue of the interactive constitution of Indigenous–non-Indigenous identities and a
diversity of relations to land would require the conjuring up of a new post-liberal conceptual framework.

Notes

[1] By ‘liberalism’ I mean political theory which takes as central the liberty of individuals. Recognised classical versions of liberalism were articulated in the works of J. S. Mill, Adam Smith, and others. Liberal positions take varying views of the state but see a central role of government as guaranteeing personal security and non-interference in ‘private’ pursuits or things held to be publicly indifferent. Towards the end of this paper I make particular use of the evaluations of liberalism of Harold Laski. Much has been written on certain Anglo-Australian versions of liberal theory and socially reformist versions of it which gave rise to the welfare state; see Green (1964), Rowse (1978). ‘Multiculturalism’ is a much more recent term (in Australia, Lopez (2000, p. 3) dates its currency to about 1975). It essentially designates the according of recognition to the existence of ‘cultural’ difference, its ‘cultural’ value but also political indifference, within a given liberal political system. Just as there are different views of the minimally desirable extent of social liberalism (that is, the extent of efforts that ought to be made to establish equity and equality of opportunity, abolish privilege, and so on), so there are different views of the extent to which multicultural policy should involve explicit measures of access and equity for bearers of ‘multicultural’ difference on the basis of it. I refer to Hage’s (1998) work on multiculturalism in the Australian context. See Lopez (2000) for a history of policy developments in Australia and discussion of several variant policy formations: cultural pluralism, welfare multiculturalism, ethnic structural pluralism, and ethnic rights multiculturalism. Multicultural policy has focused on ‘migrants’ and ‘ethnics’, and, though there have been some contacts with Indigenous policy and issues (see, for example, Lopez 2000, p. 292) these have been limited. The diversification of immigration and the Australian population post-war has been a significant influence on both multicultural and Indigenous policy communities nevertheless. See also Gutmann (1994), Gordon and Newfield (1996).


[8] A National Native Title Tribunal was brought into existence, and native title cases have been embarked upon in many parts of Australia. Many remain in the early stages of a multi-step process, and, in general, native title has been recognised in only a small number of the ongoing cases. See www.nntt.gov.au for details. As of 31 December 2002, there were 502 claimant applications across Australia, and there had been forty-five determinations, thirty-one to the effect that native title existed in the entire determination area or some part thereof, fourteen that it did not. Predictably, most successful determinations have been in upper and central Western Australia, the Northern Territory, and Queensland, that is, in more remote Australia, where apparent continuities in land tenure seem easier to demonstrate. Most of the unsuccessful determinations have been in south and south-eastern Australia, near major population centres.

References


