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INDIGENOUS AUSTRALIANS: LANGUAGE, AND THE LAW

ABSTRACT. Indigenous peoples face a number of hurdles in taking cases to Australian law courts. In the case that the social and economic problems can be overcome, they face problems related to the intellectual structures of the court and the language and philosophical beliefs that the court systems are based on. Derrida shows that Western metaphysics privileges speech over writing, and this counts against indigenous cultures in which narrative knowledge is a form of writing. Due to this privileging, there is a differend involving the courts and indigenous peoples which makes the achievement of justice difficult in the legal arena in Australia. This article questions whether the courts are the correct bodies to deal with indigenous issues. The achievement of justice is made more difficult again by the truth-producing effects of legal decisions, which render native title as a weaker form of property right. Finally, indigenous Australians are caught in a catch-22 situation, in which in order to receive justice, they must Westernise their thought to adapt to the court system, and yet not allow any Westernisation of their culture. Such a Westernisation can be forced upon indigenous peoples by the truth-producing effects of language.

INTRODUCTION

Until recently, land rights for indigenous Australians were not even an issue on the political agenda. With the changed political climate however, this situation has changed, culminating in the case of *Mabo (No. 2)* and the Native Title Act 1993.[1] Despite the presence of statutory law in the

[1] *Mabo & Ors v. State of Queensland* (1992) 175 CLR 1 (*Mabo No. 2*). Traditionally, Australian property law held that Australia was *terra nullius* (that is, land with no 'owner') prior to European settlement. Specifically, in the Privy Council, *Cooper v. Stuart* (1889) 14 App Cas 286 declared New South Wales to have been virtually unoccupied before British settlement. The applicability of native title to Australian law was refuted as recently as 1971, in *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141. In *Mabo No. 2*, both cases were overthrown, and it was acknowledged that Australia was, indeed, occupied prior to European colonialism. The effect of this change was that native title rights became recognised under Australian law. It was held that the Crown had acquired 'radical title' at the time sovereignty was acquired. The effect of such radical title, according to Brennan J's judgement (at 69–70), was not to extinguish native title fully. It survived the acquisition of sovereignty and radical title, but was exposed to the possibility of extinguishment by acquisition by the Crown. The case showed that native title was recognised under Australian law but had its basis in traditional law. Due to this, the High Court could not prescribe the content of native title; the indigenous law must decide it. In this way, native

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area, native title has for the most part been a common law matter[2] and as such an investigation of the use of the courts to decide such matters is needed. There are two competing versions of native title – the view of native title as a bundle of rights and the view of native title as an interest in land. The former involves severable rights, which can be taken altogether or individually. Native title as an interest in land leads to rights flowing from that interest. Either way, as it was characterised in *Mabo (No. 2)*, native title is a "device to allow recognition within the common law of Indigenous peoples' rights over lands under their law."[3] For the bundle of rights view, native title is a device that allows the recognition of a range of disjunctive rights whereas for the interest in land view native title is a device that allows the courts to recognise that interest. The majority in the *Miriuwung Gajerrong appeal* favoured the bundle of rights approach.[4] This followed the weakening of native title caused by the government enacting the 1998 *Native Title Amendment Act*, which treats "native title as a competing, though less secure, interest with other property interests under Australian law."[5]

We will be investigating two main questions – first, whether the courts are the correct bodies to deal with questions of native title (following their tacit support of the government's conservative stance), and second, what the effects of those court decisions are on the people who bring cases. The first question will be investigated in the light of Jacques Derrida's deconstruction of the primacy of presence in Western thought, which he holds encourages a view of the written word as subordinate to the spoken word. It will be argued that this not only has special relevance to the encounter between indigenous Australians and the Australian legal system, but that such an encounter can serve as a valuable clarifying example of the trend of which Derrida writes. It will then be shown that this schism

title is described as *sui generis* title. Such an acknowledgement of the uniqueness of a concept being rendered by indigenous, rather than colonial law, shows that there has been some willingness on the part of the courts to examine the difficulties for indigenous peoples bringing cases. However, often the *sui generis* nature of native title has been seen as a weakness – see Brennan J in *Wik Peoples v. State of Queensland* (1996) 187 CLR 1 at 84. A variety of necessities for the establishment of native title were also laid out in the case. In 1993, the *Native Title Act* 1993 (Cth) was passed by the federal government. This act was weakened by the *Native Title Amendment Act* 1998 (Cth) which abrogated some of the rights of indigenous peoples granted in the original, and granted rights of extinguishment that went beyond those in the 1993 *Act*. For a full discussion, see the Strelein article quoted below, or McRae, Nettheim and Beacroft's *Indigenous Legal Issues* (1997, Law Book Co.).

2 L. Strelein, "Conceptualising Native Title", *Sydney Law Review* 23 (2001), 95.

3 *Ibid*., p. 98.

4 *The State of Western Australia v. Ward & Ors* (2000) 170 ALR 159.

5 L. Strelein (2001), 103.

between the indigenous plaintiffs and the state is an example of Jean-François Lyotard's concept of the differend, that is, a situation in which two competing language games are totally incommensurate with each other. Every situation has a different language game, and they are often in competition with each other. When one game gains dominance, other language games become marginalised, and this is the position in which indigenous Australians find themselves, particularly with respect to the law courts. They speak with marginalised voices, voices that cannot be understood within the legal system. This is due in large part to the deeply narrative nature of knowledge within Aboriginal communities, a form of knowledge which is marginalised due to the emphasis on presence within the Western metaphysical system. The consequence of this is that litigation in courts of law may not be the correct venues for native title disputes.

The second question deals with the effects of language on the native title claims and claimants. This question will be dealt with *qua* the idea that language and its use are forms of power which can be exercised by those in dominant speaking positions; in this case, colonisers and non-indigenous Australians. Language is used to create legal fictions in the courts. These fictions end up constructing truth, whether historical or political, and often such truths hide the realities of the present day. I will further argue that in attempting to overcome the practice of the primacy of presence in Western metaphysics, indigenous peoples meet another block to the attainment of justice: language, and specifically legal language, constructs Aboriginality in certain ways that make it difficult for any but a small proportion of native title claimants to overcome the differend mentioned above and regain rights over land.

1. Language in the Court

1.1. *Derrida's primacy of speech above writing*

In his exegesis of Rousseau's essay 'On the Origin of Language,' Derrida discovers what he sees as the fundamental fact of our conceptions of language; the primacy that is given to speech above writing, a conception of the written as secondary signification, that is, the "signifier of the signified." As against this, he proposes that what "we call language could have been in its origin and in its end . . . a species of writing."[6] It is important to show that

[6] J. Derrida, *Of Grammatology*, trans. G.C. Spivak (Baltimore: Johns Hopkins University Press, 1976), p. 8.

from the moment that one considers the totality of determined signs, spoken, and *a fortiori* written, as unmotivated institutions, one must exclude any relationship of natural subordination, any natural hierarchy among signifiers or orders of signifiers."[7]

All signs are composed of a signified and a signifier, and any "bond between the signifier and the signified is arbitrary."[8] More interesting, perhaps, is the bond between writing and speech itself. Writing is the supplement to speech, and it is writing that speech is dependent upon to be seen as unitary, as original.[9] The notion of the supplement is deeply linked with the false hierarchising of speech above writing. A supplement "adds itself, it is a surplus, a plenitude enriching another plenitude . . . but the supplement supplements. It adds only to replace. It . . . insinuates itself *in-the-place-of*."[10] That is, it both adds and substitutes. Writing adds to speech, it borders it off, and in some sense replaces it. Speech is therefore only speech when writing is supplementing it. And it is this facet of the supplement that "is what neither Nature nor Reason can tolerate."[11] It is thus that we see that writing, far from being the unnecessary pollutant of speech, is in fact *integral* to the very concept of speech. This fact can't be tolerated by the courts (which are run according to Western Reason); such a metaphysic is unable to handle the *différance*, the deferral and difference, implicit in the speech/writing (false) dichotomy, which is just one of the relations "which are unacceptable to logic . . . [in which] every element is . . . marked by all those it is not" and "thus bears the trace of those other elements."[12] It is impossible therefore that any hierarchy should be set up between orders of signifiers such as speech and writing. This hierarchising of speech above writing is active in the Western legal system and has particular relevance to cases involving indigenous peoples.

There has been much controversy surrounding the issue of the absence of written historical records of property in Australian native title cases.[13] The natural assumption is that indigenous Australians were peoples without a written language. As such, the assertion that their spoken testimony is taken as secondary to actual written records of history due to

[7] *Ibid*., p. 44.

[8] F. De Saussure, *Course in General Linguistics*, trans. Baskin, W. (New York: McGraw-Hill, 1974), pp. 65–67.

[9] N. Lucy, *Postmodern Literary Theory* (Oxford: Blackwell Publishers Inc, 1997), p. 118.

[10] J. Derrida (1976), 144–145.

[11] *Ibid*., p. 148.

[12] G. Bennington, *Jacques Derrida* (London: The University of Chicago Press, 1999), pp. 74–75.

[13] For example, in *Yorta Yorta v. Victoria*, [2001] FCA 45, Black CJ notes the "difficulties about historical fact finding in cases of this nature."

the privileging of presence (and therefore speech) in Western metaphysical thought may seem absurd. However, writing is characterised in the Derridean sense not by simple markings on a page, but by the "original absence of the subject"[14] which also means that "writing can never be thought under the category of the subject."[15] It is because of this that "the peoples said to be 'without writing' lack only a certain type of writing" and that "to refuse the name of writing to this or that technique of consignment is the 'ethnocentrism that best defines the prescientific vision of man.'"[16] It is in this sense then that much indigenous testimony before Australian courts is a form of 'writing.'[17] The original subject who handed down the laws or rules or narratives that are recited (as much as they can be) in the courts is regarded *in absentia*. The speaker of the deposition or statement is not present; rather their testimony is given via a media-tor, literally, the person becomes the media. Compare this to the absolute presence of the state or crown in the person(s) of the legal team assembled in the courtroom. They are un-media-ted, they are seen as pure presence, and their speech and interpretation of legal documents is "the spirit . . . breath . . . speech . . . the logos" to which the 'written' testimony of the indigenous elders is external, "the body and matter":[18] for example, in *Yorta Yorta v. Victoria*, evidence in the possession of the state that was perhaps composed by a colonial missionary was taken as much stronger than oral evidence to the contrary.[19] As was noted above however, the very idea of speech

[14] J. Derrida (1976), 69.

[15] *Ibid*., p. 68.

[16] *Ibid*., p. 83.

[17] This is not of course, to deny that *all* acts of speech and language are effectively a form of writing. Rather, it can be argued that even pre-Derrida thought on language could see such indigenous testimony as writing rather than speech.

[18] *Ibid*., p. 35.

[19] The primary trial judge concluded that the most credible source of information about traditional laws and customs was to be found in the writings of the pastoralist 'Curr' and not the oral testimony of members of the Yorta Yorta community. Although he reacted favourably to the oral evidence of many elders, he was less enthusiastic towards some evidence given by younger members of the community. He commented favourably on evidence given by the states of Victoria and New South Wales with relation to the tenure history and status of the claimed lands and waters. Importantly, he stated that "the evidence is silent concerning the continued observance . . . of aspects of traditional lifestyle" and that "furthermore, there is no evidence to suggest that [indigenous Australians at the time] continued to acknowledge the traditional laws or . . . customs," but that some evidence for a lack of occupation is provided by a petition which was delivered to the then Governor of New South Wales, and perhaps composed by the missionary Matthews – an occurrence which could be validated by the state, a form of speech with a present subject. Evidence of contemporary activity meanwhile, was presumed to offer no evidence that such activity was related to traditional law or custom.

is reliant upon the supplementarity of writing, and here we see that the Crown itself cannot be thought of as present, as giving speech, unless there is the concomitant notion of writing. The 'writing' of indigenous peoples in the court is deferred-to by, and differs from, the 'speech' of the crown. The two are deeply entwined, they cannot be separated, and speech most certainly can't be viewed as primary to, and privileged over, writing. The inconsistencies in the court system's designating indigenous narrative evidence as writing, and as less truthful than Crown evidence are displayed here,[20] and the effects are shown with respect to Lyotard's concept of language games. Writing is, in a sense, one such game.

1.2. *Lyotard's differend*

Lyotard's notion of the language-game was borrowed from Wittgenstein's theory of the same name, in which language, rather than being a homogenous mass, is actually composed of a number of substructures. These substructures were known as language games. The language game as Lyotard defines it is an activity in which players agree to a set of rules that will define their "categories of utterances."[21] He argues that there are various language games which are incommensurable, that if "a move or utterance . . . does not satisfy the rules [it] does not belong to the game they define."[22] That is, language games cannot necessarily interact with each other; in fact, they will often not be able to interact at all and will be engaged in a differend, "a case of conflict between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgement applicable to both parties."[23] The importance of this occurs when there is a certain dominant language game, leading to a permanent differend

[20] In Yorta Yorta, the primary trial judge found that the community had irretrievably lost its character, a belief that was iterated by Professor Kenneth Maddock. On the other hand, members of the community stated that traditional knowledge could be revived; that is, the knowledge was not lost.

[21] J-F. Lyotard, *The Differend: Phrases in Dispute*, trans. G. Van Den Abbeele (Manchester: Manchester University Press, 1988), p. xi.

[22] *Ibid*.

[23] *Ibid*. Bennington states that *différance* is "nothing outside of differences and differends." The undecidability of the differend is what links it to the concept of *différance*. The former is explicitly undecidable, by definition. The latter displays more perhaps the inevitability of undecidability itself. We see this inevitability in the constant deferral and difference inherent to all concepts. We can never 'decide' upon meaning because such meaning is always to come. Moreover, the two concepts are intimately linked in this specific case: by not recognising its own privileging of speech, the court system cannot see the *différance* inherent in the relationship between speech and writing, and reject any notion of undecidability by 'deciding' upon the privileging of speech, at the expense of the 'writing' language game.

for marginalised voices. Lacking "a universal rule of judgement between heterogeneous genres,"[24] the "plaintiff is divested of the means to argue and becomes for that reason the victim."[25] This leads him to ask the question "what do I do, when you do not, will not, and so on, understand me?"[26] More precisely, what is the position of the marginalised voice within the differend?

Placed in an impossible position with the insistence on "a single standard of justice,"[27] marginalised voices are treated unjustly because they can't communicate their point of view to the dominant position. In response to this, Lyotard calls for a "war on totality,"[28] urging us to "give a voice to groups which have been excluded by the dominant culture, to positions which have gone unrepresented."[29] (One method of this war on totality is the striving towards justice for indigenous peoples through the legal system – which could be seen as that system which is most closely aligned to such a striving in contemporary society, for better or for worse.) Indigenous testimony, as a form of writing, is given less weight than that of present interests such as the crown or other Western interests. Such testimony often takes the form of a metaphysical narrative, and this can be opposed to the infamous loss of credibility suffered by the grand narrative in Lyotard's schema.[30] While the West languishes with no credible notion of the source of knowledge or concomitantly, justice, much Aboriginal law is intimately bound up with metaphysical narrative. "The law is who we are, we are also the law. We carry it in our lives."[31] Watson describes narratives that speak "of the capacity of the law to transcend human behaviour, its very essence is that it is a spiritual law."[32] It is this contrast, between a

[24] *Ibid*., p. 69.

[25] D. Litowitz, *Postmodern Philosophy and Law* (Lawrence: University Press of Kansas, 1997), p. 120.

[26] A. Carty (ed.) *Post-Modern Law* (Edinburgh: Edinburgh University Press, 1990), p. 34.

[27] D. Litowitz (1997), 114. Justice is, of course, separate and different to law. It is the possibility which we are striving towards. The legal system is one method of this striving, and the one we are focussing on here.

[28] J-F. Lyotard (1984), 82. Similarly, "what Derrida calls 'the law of supplementarity,' targets ... any metadiscourse ... that claims univocity and domination over its subject matter." [L. Lawlor, *Imagination and Chance* (Albany: SUNY Press, 1992), p. 11.] Both thinkers target discourses that threaten the audibility of marginalised voices, discourses that threaten totality.

[29] D. Litowitz (1997), 114. Re: footnote 25.

[30] J-F. Lyotard (1984), 37.

[31] I. Watson, "Indigenous Peoples' Law-Ways: Survival against the Colonial State", *The Australian Feminist Law Journal* 8 (1997), 39.

[32] *Ibid*., p. 42.

loss of faith in grand narrative, and the intricate involvement of narrative and law that leads to the differend. While the narrative of indigenous law, as Derridean writing, is rejected as inferior to the courtroom presence of its opponents, the two different laws will never be commensurable.

Although Lyotard insists that modern (Western) knowledge is always reverting back to the narrative form for legitimation,[33] there is no overt recognition of the value of narrative legitimation as there is in Watson's Tanganekald peoples. This 'written' form of knowledge has been marginalised by the colonial state; that is, 'written' Aboriginal narrative knowledge has become a marginalised language game. Because the central form of knowledge in the legal sense comes from the Western legal language game, it is inevitable that indigenous peoples will be caught in a differend with the state. Ward Churchill states that an excellent example of a differend is the position of indigenous peoples in the United States,[34] and this position can be carried across to the colonised peoples of most colonial states. The cause of this differend is the fact that law is premised on what Lyotard calls an intellectual basis rather than a philosophical one, it is innately modern in that it is always "concerned to prove a case . . . to try to impose conditions of 'proof' so strict that they can be all but impossible for one's opponent to meet."[35] Proof then, is often based upon the presence of the witness, and once such a requirement for proof has been set, any failure to meet it will result in the turning of that lack of proof against the plaintiff as proof of the intellectual's (or state lawyer's) case. This becomes "more important to the intellectual than bearing witness to the silencing of victims."[36]

In the Hindmarsh Island Bridge royal commission, Iris Stevens reported that the women's business that was harmed by its building was "not supported by any form of logic, or by what was already known of Ngarrindjeri culture."[37] Watson asks "whose knowledge and whose

[33] J-F. Lyotard (1984), 27.

[34] D. Caudill and S.J. Gould (eds.), *Radical Philosophy of Law* (1995).

[35] S. Sim (1996), 78.

[36] *Ibid.*

[37] *Report of the Hindmarsh Island Bridge Royal Commission*, quoted in I. Watson (1997), 50. In this case, the development of a bridge in South Australia was challenged by certain indigenous groups. An enormous furore was precipitated; the only detail which was given to the courts was that such a bridge would disturb an area relevant to 'women's business.' The fact that such business could not be known by males created difficulties in proving the matter. Watson points out that the women who asserted women's business didn't give evidence to the relevant commission; they never accepted the authority of the commission to judge such matters. All evidence as to such business was referred to dismissively as analogy: Stevens' report focuses on the fact that such secret women's

logic?"[38] The required proof was impossible to give, because the traditions could not be put into the Western legal language game; as Watson states "we have had to translate into the English language ideas that have been alien to westerners for thousands of years."[39] Oftentimes, evidence can't be given under indigenous laws making the 'proof' even harder to establish. Indigenous peoples who appear before a law court are in an impossible position, engaged in a differend; their voice marginalised to the major language game, their forms of narrative knowledge incommensurable to the (new) Western tradition of logic. It is clear that so long as courts continue to privilege the logos of speech over the 'writing' of indigenous narrative knowledge they are not the correct venue to hold the land rights cases. The question that remains is what the consequences of such a differend are for the indigenous people involved in litigation.

2. The Effects of Language

"Through language certain facts are established as constants so the actor then can affect others."[40] This is the point from which I will begin to analyse the effect of the Australian courts, language and construction on indigenous Australians. Language is our means of producing truth, and law is an essentially linguistic entity; it has no basis outside of language, whether spoken or written. Law arises from a performative act, that is, it is an "autobiographical fiction."[41] It came into being by setting up an "initial standard of legality"[42] which all further acts would have to abide by. This initial standard was set up by language. The law produces truth through language by making a judgement in any case; before a case one is 'innocent until proven guilty.' After any given case, there is a set of facts erected. The law is essentially performative – by stating that a defendant is guilty, the judge or jury makes that defendant guilty. However, this does not necessarily bare any resemblance to the actual truth-value of that defendant's guilt, "truth ... is clearly dependent not on reality but on the

business was not supported by any Western knowledge of Ngarrindjeri culture, nor any known logic. The bridge eventually went ahead as planned as the women's business was labelled as fabricated.

38 I. Watson (1997), 50.

39 *Ibid*., p. 53.

40 T. Strong, *Friedrich Nietzsche and the Politics of Transfiguration* (Berkeley: University of California Press, 1988), p. 66, quoted in D. Milovanovic, *Postmodern Law and Disorder* (Liverpool: Deborah Charles Publications, 1992), p. 22.

41 D. Litowitz (1997), 93.

42 *Ibid*., p. 94.

power of law."[43] In order to achieve such a state, courts may need to use legal fictions such as the (now) famous legal fiction of '*terra nullius*.' The problem is that "fictions are not false – they induce effects of truth."[44] That is, once a legal fiction of this sort is accepted it produces a historical truth. Because Australia was (at one time) declared *terra nullius*, it was for all intents and purposes, *actually terra nullius*. This use of language is in effect bound up with questions of power and of the differend. In performatively stating a set of facts, the law sets up its own language game and continuously re-invigorates it, not in the positive manner that Lyotard often foresaw, but to the effect that the law becomes less a moving target and more a moving patch of quicksand. It is possible, with simple linguistic changes, to remove *or* construct a differend. This is the power of the law.

Moreover, language does not only construct historical or questionable truths. It can also be used to construct subjects. Law constructs a subject which is taken to be universal, that of the "reasonable man/woman in law."[45] However, this construction necessarily elevates reason above irrationality. While this alone may seem to be an essentially harmless event, the concomitant association of reason with the West and irrationality with women/nature/indigenous peoples/writing etc. ... leads to a construction of subjectivity which is essentialist in nature and politically hierarchical, favouring the male/culture/colonial/speech sides of the binaries – "the subordinated term is merely the negation or denial."[46] Moreover, such a binaristic view of identities necessarily raises the question of supplementarity – the indigenous is the supplement of the colonial, the border that marks it off. Indigenous subjectivities cannot be consistently (that is, logically) downgraded in favour of colonialist ones because they are interdependent, and yet socially they certainly are. This is because indigenous subjectivities have been constructed largely through a white lens, "it is 'our' acting imperialistically which has created 'them' "[47] (and in doing so, created 'us', which has, in doing so, created 'them' etc, etc. ... the subjectivities defer to and differ from each other, and the meaning of these subjectivities is always therefore deferred.) Law itself was a major part of the coming of imperialism to colonised states, it was a "key mode

[43] A. Howe, "A Poststructuralist Consideration of Property as Thin Air – Mabo, a Case Study", *Elaw–Murdoch University Electronic Journal of Law* 2/1 (1995), 60.

[44] *Ibid*., p. 59.

[45] D. Milovanovic (1992), 6.

[46] E. Grosz, *Volatile Bodies* (Allen & Unwin, 1994), p. 3.

[47] A. Carty (1990), 96.

of imperial power"[48] through its use of legal fictions and support of the indigenous (nature)/western (culture) dichotomy.

2.1. *Producing truth in property law*

So, the legal fictions of property law that are at work in cases dealing with Native Title are not merely fictions; they act to produce effects of truth and as such "conceal power relations at work in the conceptualisation of 'property.' "[49] Howe argues that the *Mabo (No. 2)* decision is a fictioning of history, a removal of the legal fiction of *terra nullius* to be replaced by the notion of the occupation of already occupied land. It is now the case that there *were* peoples with relationships to land and with legal systems in what we now call Australia before the arrival of European settlers – and it always was the case, despite the incidental blindness of the law to such facts for the past two hundred or so years. Following the notion of an 'abstract bundle of rights,' which allows some rights to be severed without it following that all such rights must be thus severed means that "if an assertion of native title does not fit the mould of 'the bundle of rights we now know as native title,' then there is no native title at all."[50] This, again, is a legal fiction – there is of course native title, it simply is not recognised as such by the common law courts. This "translating of conditional historical truths into legal truths has a performative function – it is to induce effects of truth."[51] This is the effect of the "recognition space idea" which requires that native title be recognised on the common law's terms.[52] The common law is free, by way of legal fiction, to resume its ignorance of the existence of any such property right and in doing so will simply use its power as truth-setter to fiction the history it wishes to represent. "Extinguishment occurs wholly within the common law";[53] the common law is seen only as protecting and recognising native title rather than being bound by it, as it is any other precedent. Extinguishment is just another fiction, a way of cancelling out the land claims of indigenous people by legislative means. Further methods of cancelling out the land claims are through the rendering of them as personal rather than proprietary rights, and their inalienability, described by Mansell as a propounding of "white domination and superiority

48 *Ibid.*
49 A. Howe (1995), 56.
50 L. Strelein (2001), 104.
51 A. Howe (1995), 57.
52 L. Strelein (2001), 115.
53 *Ibid.*, p. 117.

over Aborigines."[54] Once again, the simple pronouncement of such 'facts' by the court turns them into facts as such, and these are facts which are related to other such political facts – the right wing fear-mongers and property 'owners' who stand to lose out with the granting of proprietary title to indigenous peoples. As is becoming clear, these are simply more fictions which have, due to power relationships, become facts.

The continuing production of fictions is, of course, also a case of the continuing production of different language games that are united in their susceptibility to the differend. There is no Western legal language game that can be 'fictioned' into existence to deal fairly with indigenous demands as the legal system stands, because all language games are affected by *différance*. Their meaning and function is reliant upon the difference of that language game to those that it is set above, in this case, indigenous written evidence and narrative knowledge. The construction of new games must not be a derivation from the existing fictions, but a wholly new production – something that is almost entirely impossible under the common law system of truth via precedent.

2.2. *Producing subjects*

Another method of construction is the construction of subjectivities. Subjects are "constituted through exclusion, through the creation of ... populations erased from view."[55] As such, native society was originally rendered deviant and thus deserving of the attention of the law.[56] More recently there has been a binary split even within the presumed indigenous subjects. There is a split between the 'real' Aborigine and the 'urbanised' Aborigine. The 'real' Aborigine is the traditional noble savage and as such follows a system of 'written' evidence giving, while the 'urbanised' Aborigine has assimilated and adopted the Western method of 'speaking' evidence. Therefore, the construction and idolisation of the 'noble savage' has had an effect on the possibility of land rights claims. The evidence of the 'urbanised' Aborigine is more acceptable, being spoken by a present subject, while with respect to land rights legislation, "covertly and overtly the popular attitude [is] that the only true aborigines are those who are overtly traditional," that is, the "loin-clothed ... idealised type."[57]

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[54] M. Mansell, "The Court Gives an Inch But Takes Another Mile", *ALB* 5 (1992), 6, quoted in A. Howe (1995), 62.

[55] J. Butler and J. Scott (eds.), *Feminists Theorise the Political* (1990), quoted in A. Howe (1995), 55.

[56] A. Carty (1990), 102.

[57] J.R. Beckett, *Past and Present* (Canberra: Aboriginal Studies Press, 1988), p. 32.

Indigenous Australians are caught, therefore, in a double bind. Firstly, they are, due to binarised logic, expected to be (or constructed as) irrational and uncultured, providing 'written' evidence without a present subject. When these expectations aren't met, when an indigene is able to negotiate through the differend, he or she is dismissed as being 'inauthentic' and thus un-deserving of compensation or land rights. The ability to speak in the Western language game is gained at the expense of the status of 'indigenous Australian,' the 'urbanised' Aborigine loses his or her aboriginality at the moment that he or she attains the ability to speak rather than 'write'. Furthermore, *différance* is at work yet again. The relation of 'urbanised' and 'authentic' indigenous Australians is one of difference. They define each other, almost circularly, and the description of each implies the existence of the other. Each is privileged in different ways (although a more apt way of speaking perhaps, is that each is discriminated against in different ways), but these differences are only coherent in the case that both are equal and intertwined, supplementary. That the ability to 'speak' is inherent in the subjectivity of 'urbanised' indigenous Australians, and the inability to do so in that of 'authentic' indigenes, shows also that the supplementarity of writing to speech operates on perhaps a second level here: not only in the abstract, but related to concrete individuals. The existence of 'authentic' indigenous Australians is supplementary to the existence of 'urbanised' Aborigines as writing is to speech.

One example of this trap is the situation of the Kokatha in South Australia. A largely urbanised community residing in Port Augusta, the Kokatha sought to gain land rights over an area of land to the northwest of that city.[58] However, in their negotiations they faced the familiar differend situation – unable, unwilling or reluctant to disclose specific tribal information, they were unwilling to 'prove' their connection with the land in the traditional Western manner.[59] The well-known Pitjantjatjara tribe were in a similar situation in a previous encounter – both tribes followed a similar strategy, but the Pitjantjatjara were a 'traditional' tribe and were well documented as such. The Pitjantjatjara identity was recognised and legislation was passed in respect to their lands. The Kokatha followed the Pitjantjatjara strategy and were defeated, because their identity did not match up to that which was constructed for indigenous Australians by the

[58] *Ibid.*, p. 33.

[59] In the court-room, such tactics are further complicated by the tendency of the courtroom to change the writer or reciter of history or metaphysical law into a speaker who can easily be refuted. The witness is caught in a personal differend – take the place of a speaker and be easily 'disproven,' or take the place of a reciter of a 'written' history and have any such testimony discounted.

dominant social structure. This meant that, for them, there was no way out of the differend, because the Australian court system was unable to acknowledge the *différance* that was operating, the supplementarity of the 'noble savage' and the urbanised Aborigine, two terms which supplement each other and are privileged at different times. Although there is therefore no clear-cut case of privilege here, the variable privileging itself is not acknowledged, and this is a weakness of the court system.

3. CONCLUSION

The indigenous peoples of Australia are locked into a system of law that cannot and will not recognise their rights or methods of communication. The metaphysical basis of this legal system denies the possibility of their proving their knowledge by instituting systems of proof that privilege spoken testimony over the narrativised knowledge of the indigenous peoples. Such knowledge can be defined as written testimony in the light of Derrida's remarks – the subject is missing for the testimony of indigenous peoples in Australian courts. Therefore, the use of the legal system to deal with land rights questions and issues of native title must raise the question "of whether and on what terms a decision should be made by the legal system at all."[60] While a thoroughgoing deconstruction of the metaphysics of presence can alert the courts to the inappropriateness of neglecting indigenous 'written' testimony, and the presence of *différance* and supplementarity, it may be that questions such as those raised by native title claims can't be solved by our present legal system due to the presence of the differend. The legal system would have to adapt to indigenous needs in a manner that is, at best, unlikely – a total overhaul of present methods of the giving of evidence and its reception would be necessary. It may appear on one level that a more social response would be preferable. However, if we heed Lyotard's advice and aim to give a voice to groups that have been excluded, to positions that have been silenced[61] through the actions of the differend, perhaps the law can be used in a more effective manner. This will require the acknowledgement that the idea of justice "can only be the idea of a multiplicity or of a diversity."[62] 'Written,' subject-absent testimony would need to be as acceptable as the spoken testimony of western witnesses, and this would in turn require the acknowledgement of the supplementarity of writing to speech. Continuing to fiction current

60 S. Veitch, "Law and Other Problems", *Law and Critique* VIII/1 (1997), 106.

61 D. Litowitz (1997), 114.

62 J-F. Lyotard, *Just Gaming* (Minneapolis: University of Minnesota Press, 1985), p. 100.

history to tie in with current politics and vice versa will not be an acceptable occurrence in such a theory of justice; rather, it will be necessary to change current political thought to acknowledge and deal with what we know of history. This may require the overturning of some long held legal fictions, as well as the changing of some newer ones – in particular, the refusal of a proprietary right in preference for a personal right over land. Although such proposals could seem to be overly radical, and even impractical, there is no reason why we should not aim for the impractical with the hope that we may attain something closer to the perfect.

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