

## CUSTOM AND TRADITION: INNOVATION AND INVENTION

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### I INTRODUCTION

*Custom* and *tradition* are our main terms of interest, but others such as *addiction*, *compulsion*, *convention*, *fashion*, *habit*, and *law* signify closely related meanings.<sup>1</sup>

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\* Dedicated to the memory of Homer Barnett, anthropologist at the University of Oregon, 1939-1985. I thank Don Dumond, John Taylor, Bob Tonkinson and Phil Young for assistance and comments on Barnett and his work. A version of this paper was prepared for the Workshop on 'Custom: The Fate of Non-Western Law and Indigenous Governance in the 21<sup>st</sup> Century', Canberra, 1-2 October 2002, sponsored by the Academy of Social Sciences in Australia, the UNESCO Australian National Commission and the National Institute of Social Sciences. I thank the editors of this journal and two anonymous readers for comment and advice. The views expressed are my own, except where noted otherwise. Bruce Rigsby is Emeritus Professor of Anthropology at The University of Queensland, where he taught 1975-2000. Born and educated in America, he is Australian by choice. He earned his PhD in Anthropology at the University of Oregon in 1965. He has done anthropological and linguistic research with the Sahaptin-speaking people of eastern Oregon and Washington since 1963 and with the Gitksan people of British Columbia since 1966. He has done similar work with the Lamalama people of the Princess Charlotte Bay region of eastern Cape York Peninsula since 1972. His current research interests and publications mainly concern traditional-customary land and sea tenure and matters of native title. He is a co-editor (with Nicolas Peterson) and author of *Customary Marine Tenure in Australia* (Oceania Monograph 48, 1998) and *Donald Thomson. The Man and Scholar* (Academy of the Social Sciences in Australia, 2005). He worked as an expert on a number of land claims in Australia and Canada. These include the *Delgamuukw* Case, the Lakefield and Cliff Islands National Parks land claims, the Wellesley Islands native title sea claim, the Western Cape Communities Co-Existence Agreement (the Weipa Indigenous Land Use Agreement) and the Yarrabah combined native title claims. He received a Centenary Medal in 2003 'for distinguished achievements through anthropology and native title in Australia'.

<sup>1</sup> In "'Law" and "Custom" as Anthropological and Legal Terms' in J Finlayson and A Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996), I looked at some legal and anthropological literature on law and custom, but did not survey major traditions of jurisprudence. Later I suggested considering the work of H L A Hart as background to the view of law as a system of normative rules found in Toohey J's reasoning in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. That was prescient in view of Gleeson CJ and Gummow and Hayne JJ's use of Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994) – see *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 442. See Bruce Rigsby, 'Some Thoughts on Native Title and Normative Rules after the *Yorta Yorta* Appeal Decision' (invited paper prepared for the ATSIC Technical Advisory Group Meeting, Adelaide, 7 April 2003) and 'The *Yorta Yorta* Appeal Decision and Social Theory in Native Title Claims:

These are basic concepts of anthropology and sociology whose meanings are often taken to be already known, even self-evident. I selectively review some of the literature on the 'invention of tradition' and the view that tradition is an on-going interpretive process, a process of interpreting the past in the present. Finally, I discuss the work of Homer Barnett on processes, configurations of ideas and experiences and the innovative process. In Barnett's model, custom, tradition and their congeners are not processes, but qualities which enter into the innovative or interpretive process by way of conventional rules, traditional beliefs, customary norms and the like. Our past experiences provide us with prototypes for constituting and interpreting new experiences.

## II WHY OUR CONCERN WITH CUSTOM AND TRADITION?

Custom and tradition are terms that appear in legislation relating to Aboriginal land rights and cultural heritage. Increasingly they appear in the transcripts and decisions for native title cases, but our judges display little agreement on their meanings.

Black CJ of the Federal Court said in *Members of the Yorta Yorta Aboriginal Community v Victoria*:<sup>2</sup>

The Oxford English Dictionary ... [emphasises] that tradition is the handing down of statements etc., especially by word of mouth or by practice, *and not by writing*.<sup>3</sup> [T]he very notion of 'tradition' as involving the transmission from generation to generation of statements, beliefs, legends and customs orally or by practice implies recognition of the possibility of change.

When the case reached the High Court, Gummow J commented:

Yes, Australians always talk about traditions when they mean habits. I am talking about Australian Anglo-Saxon culture. They are always talking about tradition; they just mean habits. When does it become a tradition in this expression, 'traditional law'?<sup>4</sup>

Hayne J replied that 'the traditional law and custom with which we are concerned is

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Norms, Rights and Interests' (invited paper prepared for *Delgamu'ukw, Mabo, and Ysleta: Native Title in Canada, Australia, and the United States*, a conference sponsored by Socio-Legal Studies (RUSLS) The University of Calgary, 18-20 September 2003).

<sup>2</sup> (2001) 110 FCR 244 ('*Yorta Yorta*') 256.

<sup>3</sup> Callinan J expressed his distrust of oral transmission in the *Yorta Yorta* Appeal decision before the High Court (2002) 214 CLR 422, 471: 'The appellants suffered ... disadvantages to which regard had to be made: ... [they included] the lack of a written language and the absence therefore of any indigenous contemporaneous documents, the need to rely extensively upon the spoken word of their forebears, which, human experience knows, is at risk of being influenced and distorted in transmission through the generations, by, for example, fragility of recollection, intentional and unintentional exaggeration, embellishment, wishful thinking, justifiable sense of grievance, embroidery and self-interest ...'

<sup>4</sup> Transcript of Proceedings, *Members of the Yorta Yorta Aboriginal Community v Victoria* (High Court, Gummow J, 23 May 2002). Transcript available <<http://www.austlii.edu.au/au/other/hca/transcripts/2001/M128/1.html>> 16 September 2006.

not simply a question of habit; it is a question of normative rules for the society under consideration'.<sup>5</sup>

Callinan J indicated doubts about *Yanner's Case*<sup>6</sup> in *Members of the Yorta Yorta Aboriginal Community v Victoria*:

The extent to which longstanding law and custom may evolve without ceasing to be traditional may raise difficult questions. The matter went uncontested in *Yanner v Eaton*, although for myself I might have questioned whether the use of a motor boat powered by mined and processed liquid fuel, and a steel tomahawk, remained in accordance with a traditional law or custom, particularly one of alleged totemic significance.<sup>7</sup>

Second, we should be aware that cross-culturally what humans call tradition generally carries with it a normative halo of positive feelings. Tradition is good because it is old, carries the ancestors' wisdom and arouses positive sentiments. In the English-speaking settler democracies, indigenous people have a better chance of success of asserting rights presented as traditional, part of their indigenous culture.<sup>8</sup>

Third, these technical terms warrant attention so we can make explicit any presuppositions we make when we employ them. When we anthropologists prepare expert reports and give expert opinion evidence in court, we speak often of custom(s), tradition(s), law and custom, etc. They have commonsense ordinary English meanings, but as social scientists and scholars, we need to go beyond popular usage so that we can better understand the phenomena they signify.

### III SOME SEMANTIC DISTINCTIONS

Finer distinctions of meaning help us compare terms signifying distinct but closely related meanings. Four such dimensions are:

- 1 *The socio-spatial distribution or locus of the phenomenon*: Who has/holds/acknowledges/observes/acts out the custom or tradition? This ranges from the individual person or mind through various social categories and social groups, perhaps so inclusive as an ethnic group, a nation, a society or the global world-system. Briefly think about addiction, compulsion, habit and compare them with custom, convention and tradition. (*Individual/Group or Category*).

<sup>5</sup> Transcript of Proceedings, *Members of the Yorta Yorta Aboriginal Community v Victoria* (High Court, Hayne J, 23 May 2002). Available <<http://www.austlii.edu.au/other/hca/transcripts/2001/M128/1.html>> 16 September 2006.

<sup>6</sup> *Yanner v Eaton* (1999) 201 CLR 351.

<sup>7</sup> (2002) 214 CLR 422 ('*Yorta Yorta* Appeal Decision') 493. For further High Court discussion in the same decision of the matters of tradition and traditionality and their continuity, see also 444-7, 463-5, 466, 491-493.

<sup>8</sup> Robert Tonkinson, 'Understanding "Tradition" – Ten Years On' (1993) 6 *Anthropological Forum* 597, 603.

- 2 *The socio-temporal distribution of the phenomenon:* Do the customs, traditions or whatever recur, and if so over what period of time? While we can contrast unique acts or behaviours with regular or usual ones, what seems to be an essential feature of customs, traditions and the like is that they do recur, ie, people repeat and reproduce them. But over what period of time? Briefly compare fashion and style with custom and habit. (*Short-term/Long-term*).
- 3 *The individual psychology typically accompanying the phenomenon, ie, its phenomenology:* Do people think consciously about the habit, custom or tradition when they act it out: do they make a conscious choice to act? This ranges from behaviours where the actor is thought to be unconscious of their motivation, non-reflexive or the like to actions where the actor is alert, perhaps aroused, with conscious intentions and reflexivity. Habitual, customary and traditional behaviour and action fall closer to the non-reflexive pole of the opposition. An older view sees custom and tradition as constraining. (*Automatised behaviour/Reflexive action*).
- 4 *What are our epistemological assumptions when we use terms like custom and tradition?* Are they natural objects, the kind of things for which a positivist approach is appropriate? Or are they better regarded as symbolic constructions, phenomena constituted by human interpretive processes? Do we need to adopt an interpretivist approach to understand them better? Are they like plain water or holy water? Or alternatively, might we more productively assume a nominalist epistemology?<sup>9</sup> (*Positivist/ Subjective*)

#### IV CUSTOM AND ITS CONGENERS

Let us consider custom first. Contemporary anthropologists do not usually speak of custom(s) except in works written for wider audiences. Winthrop argued that custom is a term superseded by the modern concept of culture due to its ethnocentric connotation which dramatises the differences between the culture of the observer and that of the observed.<sup>10</sup> However, the terms are back on the agenda in Australia in native title matters. They have become reproblematised! Whether we approve or not, we must use them in our native title research and writing.

Edward Sapir, the well-known American linguist and cultural anthropologist, wrote an insightful entry for *custom* in the *Encyclopaedia of the Social Sciences*:

Custom is a ... common sense concept which has served as the matrix for the development of the ... technical anthropological concept of culture... When applied to ... one's own group the term is usually limited to relatively unimportant and unformalized behavior patterns which lie in between individual habits and social

<sup>9</sup> See Barnett's dissent from his colleagues of The Social Science Research Council Summer Seminar on Acculturation in 'Comment on "Acculturation: An Exploratory Formulation"' (1954) 56 *American Anthropologist* 1000.

<sup>10</sup> Robert H Winthrop, *Dictionary of Concepts in Cultural Anthropology* (1991) 70-72.

institutions. ... The hesitation to describe as custom any type of behavior in one's own group that is not at once collective and devoid of major importance is perhaps due to the fact that one involuntarily prefers to put the emphasis either on significant individualism, in which case the word habit is used, or on a thoroughly rationalized and collective intention, in which the term institution seems in place.<sup>11</sup>

Pursuing individual behaviour further, I note the distinctions Giddens drew among patterns of action, habit, compulsion and addiction:

All social life is substantially routinised: we have regular modes of activity which we repeat ..., and which give form to our individual lives as well as reproducing larger institutions. ... A *pattern* is simply a routine which helps order daily life, but which an individual can alter when needs be. Thus someone may take the dog for a walk most mornings, but can switch to evenings if necessary. A habit is a more psychologically binding form of repetitive behaviour than a pattern; a distinct effort of the will is needed to alter or break it ...

A compulsion is a form of behaviour which an individual finds very difficult, or impossible, to stop through will-power alone, the enactment of which produces a release of tension ...

Addictions are compulsive, but ... not minor rituals; they colour large areas of an individual's life. ... It can be defined as a patterned habit that is compulsively engaged in, withdrawal from which generates an unmanageable anxiety ...<sup>12</sup>

Addressing the distinction between custom and law, we can say that customs<sup>13</sup> are simply patterns for action or behaviour that members of a social group share. They are social, not individual phenomena. They are also social norms or rules for action or behaviour – not the action or practice itself. Hoebel wrote, 'A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting'.<sup>14</sup> Law, then, is backed by legitimate force and administered by an authorised agent acting in a manner consistent with precedent. For Fried the essential distinction between law and custom 'is that concentrated force is available to make the breaking of a law both dangerous and expensive, whereas the breaking of a custom initiates a crisis that requires only a strong ego'.<sup>15</sup>

<sup>11</sup> Edward Sapir, 'Custom' in R A Seligman (ed), *Encyclopaedia of the Social Sciences* (1931) 658, 658. The entry goes on to compare custom to convention, tradition, mores, fashions and law 658-662.

<sup>12</sup> Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love & Eroticism in Modern Societies* (1993) 71-2. For a discussion of addiction and traditions see Anthony Giddens, 'Living in a Post-Traditional Society' in Ulrich Beck, Anthony Giddens and Scott Lash (eds), *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (1994) 56, 66-74.

<sup>13</sup> Note that *custom* has at least two senses in English, corresponding to whether it is understood or construed as a count noun or as a mass noun. In the former case, we can count as in 'one custom, five customs, etc', and in the latter, we cannot pluralise *custom*.

<sup>14</sup> Edward A Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (1954) 28.

<sup>15</sup> Morton Fried, 'State: The Institution' in D L Sils (ed), *International Encyclopedia of Social*

So, then, all laws are customs, but not all customs are laws. Law is to custom as part to whole.<sup>16</sup>

We now focus in on custom and tradition with some semantic analysis. In Standard English, many nouns have popular senses or meanings related metonymically as processes and the products of those processes.<sup>17</sup> *Tradition* is such a term. Its core sense signifies the process of the transmission of culture across the generations. Kroeber wrote of 'the passing on of culture to the younger generation' and said that 'the internal handing on through time is called *tradition*'.<sup>18</sup> In this sense, tradition refers to the same phenomena that in other contexts we might call *enculturation*, *socialisation*, *learning* and the like.<sup>19</sup> *Tradition* also has a second, metonymic sense of signifying the product or products of this process, so that we can call those elements of culture, eg, traits, customs, norms, institutions or whatever which have a history of inter-generational transmission, traditions as well. Note then that the term tradition has (at least) two related senses: a process and the product of the process.

As a first approximation, we can say that traditions (as products of the process of tradition) seem simply to be old customs. They are customs which have been handed down across the generations from the past.<sup>20</sup>

#### V CUSTOM, HABIT AND *HABITUS*

On this reading, habits and customs refer to the same behavioural phenomena, but they differ as to whether we are talking about individual persons/minds or social collectivities. They differ as to their socio-spatial distribution or locus, but may be the same as to their socio-temporal distribution. In our time, Goodenough pointed out that it is the *routinising of choice* that makes a particular pattern of behaviour or action into a custom, not just the fact of its being shared.<sup>21</sup> In other words, customs have a recurrent pattern of socio-temporal distribution.

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*Sciences* (1968) vol 15, 143, 148-149.

<sup>16</sup> See Rigsby 'Law and Custom as Anthropological and Legal Terms', above n 1, 235-8.

<sup>17</sup> *Education* and *learning* come to mind as examples. Contrast 'his early education involved much rote learning at school' with 'she was a person of much education and learning'.

<sup>18</sup> A L Kroeber, *Anthropology: Race, Language, Culture, Psychology, Pre-History* (1948) 411.

<sup>19</sup> While we can in theory distinguish between the inter-generational and intra-generational transmission of culture, the task is difficult empirically. Giddens commented on the diminution of generational differences under modernity and note that while age-grading is common cross-culturally, the presence of large age-graded peer groups is not. We cannot really distinguish tradition as a process from enculturation, socialisation and learning more generally. See Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (1991) 146.

<sup>20</sup> There is an older common law view of custom which is quite akin to tradition as defined here: '*custom n.* A practice that has been followed in a particular locality in such circumstances that it is accepted as part of the law of that locality. It must be reasonable in nature and it must have been followed continuously, and as if it were a right since the beginning of legal memory' *Oxford Concise Dictionary of Law* (2<sup>nd</sup> ed, 1990) 112.

<sup>21</sup> Ward H Goodenough, *Culture, Language and Society* (1981) 86. See also Giddens 'Living in a Post-Traditional Society', above n 12, 71 and 101 on routinisation.

In plain English we can say that most urban Australians know about chopsticks and how to use them. They might sometimes use chopsticks when eating Chinese or Japanese food. Yet we would hesitate to say that the use of chopsticks is an Australian custom,<sup>22</sup> as contrasted with the use of knives and forks, because we more often eat with cutlery than with chopsticks. We generally keep cutlery, but not chopsticks, in our kitchens.<sup>23</sup>

This leads us to another, older perspective in which habit differs from custom and such in its phenomenology or individual psychology. Camic surveyed and discussed 'the matter of habit' in the historical context of its earlier widespread use and its later demise in sociology (also true of anthropology) as we conceded it to behaviourist psychology. He wrote:

The core meaning that is pertinent here stands out most sharply when the previous definition of reflective conduct is recalled, for 'habit' ordinarily designates actions that 'are relatively unmotivated'<sup>24</sup> ... [T]he term 'habit' generally denominates a more or less self-actuating disposition or tendency to engage in a previously adopted or acquired form of action.<sup>25</sup>

But Camic would disagree with our earlier formulation that regarded habit as residing strictly in the individual,<sup>26</sup> pointing out that others have variably drawn or extended the scope of habit:

[I]t should be noted that most writers on the subject maintain that members of social groups exhibit many common habits. Weber, in fact, employed the separate term 'custom' to denote such 'collective way[s] of acting' that derive from habit rather than from self-interest or shared norms. But this particular usage remains an *idiosyncratic one* ...<sup>27</sup>

Camic drew a distinction which crosscuts or perhaps combines the socio-spatial and phenomenological dimensions we sketched earlier. He asked 'whether the "form of action" that is being repeated is simple and circumscribed or generalized and

<sup>22</sup> Customs as routinised choices often acquire metonymic or indexical relationships and become *social diacritics* or *ethnic markers* which signify membership in a social group or social category and perhaps identification with it. See Rigsby, 'Law and Custom as Anthropological Terms', above n 1, 237 for examples.

<sup>23</sup> The Brisbane *Courier-Mail* reported that some city bars removed meals requiring cutlery from their menus and substituted dishes eaten with chopsticks, querying whether chopsticks count as cutlery under new legislation that bans smoking in licensed areas where meals are served. They compared the *Macquarie Dictionary* definition of cutlery as 'cutting instruments collectively, especially for dinner table use' with the legal definition of a meal as anything 'eaten by a person sitting at a table ... with cutlery provided for the purpose of eating the food'. Catriona Mathewson, 'Smoking Ban Means Cutlery Gets the Chop', *Courier-Mail* (Brisbane), 19 August 2002, 4.

<sup>24</sup> Anthony Giddens, *Central Problems in Social Theory* (1979) 218.

<sup>25</sup> Charles Camic, 'The Matter of Habit' (1986) 91 *American Journal of Sociology* 1039, 1044.

<sup>26</sup> For a discussion of relationships among habit, routinisation and custom, see Giddens, 'Living in a Post-Traditional Society', above n 12, 74 and 101-2.

<sup>27</sup> Camic, above n 25 (emphasis added).

complex' and he formulated the opposition as scalar or graded, not as binary.<sup>28</sup> At its individual automatised endpoint, 'habit sometimes refers to the disposition to perform certain relatively elementary and specific activities skillfully', eg, 'habits of writing, speaking, perceiving, evaluating, task execution, problem solving, and the like'. As we proceed through the continuum to its socialised reflexive endpoint, 'habit broadens to various more extended lines or more involved patterns of conduct in the social world', such as 'habits of interpersonal interaction; habits of economic, political, religious, and domestic behavior; habits of obedience to rules and to rulers, habits of sacrifice, disinterestedness, and restraint; and so on'.<sup>29</sup>

But at the same time, we must not suppose that:

these kinds of conduct ... are uniformly habitual. When the habit label is applied, it is generally to suggest that an action, which may in some situations come about as a motivated actor selects appropriate means to his or her ends, has – in the instance of the actor being described – emerged apart from such a reflective process. That habitual and non-habitual (reflective or other) considerations may actually be mixed together simultaneously is something no commentator I know of denies.<sup>30</sup>

And as we approach the fully conscious and reflective end of the behavioural spectrum:

[H]abit is the durable and generalized disposition that suffuses a person's action throughout an entire domain of life or, in the extreme instance, throughout all of life – in which case the term comes to mean the whole manner, turn, cast, or mold of the personality. Today the word 'character' probably comes closest to evoking this nearly forgotten meaning of habit, although even 'character' tends to suggest a system made up of numerous, more specific personality attributes, whereas the point of using habit in its broadest sense is to denote not a sum of parts but a more nearly all-encompassing modality of action that ... then assigns rank and influence to other components of the personality. Among European thinkers, this distinct conception of habit has often been denoted by leaving the word in its Latin form, *habitus*.<sup>31</sup>

The disciplines of law, social anthropology and sociology have an enduring concern for the problem of social order, the question of what brings about the order and stability that we generally can see in societies. For example, we don't change the traffic rules every day in Australia – we always drive on the left-hand side of the road, etc. Some social scientists believe that social order results from the sharing of norms and values, while others emphasise the exercise of power and hegemony by groups and individuals. Both viewpoints capture truths about human situations, and they are not far from the view of the role of law as a system of social control which H L A Hart developed in *The Concept of Law*.<sup>32</sup> This leads us to a more critical view

<sup>28</sup> Camic, above n 25, 1045.

<sup>29</sup> Camic, above n 25, 1045.

<sup>30</sup> Camic, above n 25, 1045.

<sup>31</sup> Camic, above n 25, 1046. See also Michael Young, *The Metronomic Society: Natural Rhythms and Human Timetables* (1988) 79-80, 95; David Riesman, *The Lonely Crowd* (1950) 11-12.

<sup>32</sup> (2<sup>nd</sup> ed, 1994). Hart cited and referred to E E Evans-Pritchard's and Max Gluckman's two

of the relationship between law as custom and ‘mere habit’, as our judges are wont to characterize it.

The majority opinion of Gleeson CJ, Gummow and Hayne JJ in the High Court *Yorta Yorta* Appeal Decision made much use of Hart’s thought in their section ‘An intersection of two normative systems’.<sup>33</sup> See also Gummow J’s remarks above, which also reflect Hart’s thought closely. It is revealing to read Hart to understand why the High Court Justices distinguished “‘merely convergent habitual behaviour in a social group’” and legal rules’.<sup>34</sup>

Hart famously discussed ‘the difference[s] between saying of a group that they have the habit, eg of going to the cinema on Saturday nights, and saying that it is the rule with them that the male head is to be bared on entering a church’.<sup>35</sup> He commented that the fact of the convergence of their behaviour suffices to say the group has a habit, but in itself that doesn’t provide evidence that there is a rule requiring the behaviour, such that deviations ‘are regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity’.<sup>36</sup> He noted that where there are such normative rules, people not only criticise deviations, but appeal to them as reasons for criticism.<sup>37</sup> And finally Hart observed that members of the group displayed internal ‘acceptance’ of the rules, ie, they felt bound by them, without experiencing feelings of compulsion. They had ‘a critical reflective attitude to certain patterns of behaviour as a common standard’ that displayed

itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’.

The Hartian view of norms and what is normative differs from the conventional view and usage of social anthropologists that there are both ‘real’ and ‘ideal’ norms, ‘statistical’ and ‘expected’ norms. Spencer and Barnard defined ‘norm’ thus:

[u]sually, in any given culture the established mode of behaviour to which conformity is expected. Sometimes the term refers to the average or typical behaviour, referred to as the statistical norm, rather than the expected behaviour, or ideal norm.<sup>38</sup>

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important social anthropological works treating customary law at 291-2.

<sup>33</sup> (2002) 214 CLR 422, 441-2.

<sup>34</sup> Ibid 442.

<sup>35</sup> Hart, above n 32, 55.

<sup>36</sup> Hart, above n 32, 56.

<sup>37</sup> ‘We need only remember that the statement that a group has a certain rule is compatible with the existence of a minority who not only break the rule but refuse to look upon it as a standard either for themselves or others’: Ibid.

<sup>38</sup> Alan Barnard and Jonathan Spencer (eds), *Encyclopedia of Social and Cultural Anthropology* (1996) 615. Hart’s view which restricts the normative to the ideal and expected is not at all unconventional for many social scientists hold it too. Anthony Giddens, the well-known British sociologist, wrote that ‘norms are definite principles or rules which ... [members of a group] are expected to observe. Norms represent the “dos” and “don’ts” of social life’ in *The*

The late Roger Keesing, erstwhile Professor of Anthropology at the Australian National University and author of a classic textbook, differentiated ‘public’ norms from other rules for behaviour and action:

Some norms are ... public and are consciously followed or broken. But other ‘rules’, hidden below the surface, have been uncovered by researchers in anthropology following the clues provided by the [unconscious or tacit] rules of grammar. These rules are implicit in our behaviour, deeply ingrained in habit and unconscious mental processes. Yet our following them lies at the heart of ordered social life...

The rules we break, or would like to break, lie toward the surface of that complex and intricate system of shared knowledge we call culture. To communicate we are and must be rule followers. We will, for ease or explication, call those standards of behaviour we talk and consciously think about as public norms. Our unconscious rule-following on lower, hidden levels does not explain why we follow public norms as often as we do, but it gives a different perspective on them.<sup>39</sup>

Social anthropologists need to bear this in mind when we analyse and describe laws and customs because it is not sufficient simply to identify recurring patterned behaviour and action, ie the way people do things. Sackville J wrote dismissively, and perhaps incorrectly, in *Jango v Northern Territory*:

Professor Sutton and Ms Vaarzon-Morel had merely undertaken a statistical analysis of the practices followed recently by people of the region. In effect, the experts had described ‘observable patterns of behaviour’, not normative principles derived from traditional laws and customs. They had failed to consider, or at least consider adequately, whether the practices they had described reflected the *traditional* laws and customs of the Western Desert.<sup>40</sup>

It is the ideal and expected norms or standards that the courts want to know about, but they also should follow contemporary social theorists and attend to whether norms are acknowledged or observed or perhaps more often broken or even ignored. Our judges need to move beyond Hart’s views on normative rules. Norms do not reproduce themselves by telepathy. Rather, it is through their dialectical interactions with practice (action and ‘mere’ behaviour) that they are maintained, modified, transformed, extended, rejected and so on. By considering their practice, we gain better understanding of how they change yet remain traditional.

## VI CUSTOM AND TRADITION

Earlier, we formulated the relationship between customs and traditions such that all traditions are customs, but only old customs are traditions. However, that formulation ignores some clear cases where customs became traditions very rapidly and it also neglects the insight that traditions have a normative component in their meaning.

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*Transformation of Intimacy*, above n 12, 31.

<sup>39</sup> Roger Keesing, *Cultural Anthropology: A Contemporary Perspective* (2<sup>nd</sup> ed, 1981) 317.

<sup>40</sup> [2005] FCA 318 (unreported, Sackville J, 31 March 2006) [257].

For example, the observance of ANZAC Day<sup>41</sup> became an Australian custom within a year or two of its first celebration, and I suspect that people called it a tradition very soon afterward. The ANZAC Day ceremonial complex now consists of a dawn service followed later in the day by a parade.<sup>42</sup> In 1916, about 6,500 troops marched in Brisbane city, but I have no idea how many people attended and watched them. There were other parades in towns and cities throughout the country then too. In 1919 and 1920, Captain George Harrington, a Gallipoli veteran ‘and some mates’ visited the graves of each dead soldier in the Toowoomba Cemetery, put a flower on each headstone, ‘then toasted their fallen mates with rum’. But in 1921, Captain Harrington and his mates went instead to Picnic Point on the range facing eastward and as the sun rose, they toasted their ‘fallen comrades’. Harrington said that he ‘performed the ceremony in memory of the dawn’ landing at Gallipoli. In 1923, Reverend Arthur White, Chaplain of the 44<sup>th</sup> Battalion of the AIF conducted a dawn service at Albany, WA. White had sailed with the Australian troops in November, 1914, and he conducted a dawn ceremony just before. Albany was their last sight of Australia. In 1928, the first dawn service was held at the Martin Place Cenotaph in Sydney, and presumably by then the two customs of the dawn service followed by a parade had come together as a new tradition.<sup>43</sup>

This rapid emergence contradicts what Shils wrote in his classic *Tradition*:

How long must a pattern go on being transmitted and received ... to be regarded as tradition in the sense of an enduring entity? ... [A]t a minimum, two transmissions over three generations are required for a pattern of belief or action to be considered a tradition.<sup>44</sup>

Scholars have also noted that tradition includes a normative element, ie people commonly believe that traditions are invested with moral authority, and they regard tradition generally as a conservative force. Shils wrote:

<sup>41</sup> The relevance of the ANZAC Day case was not lost on the Chief Justice of the High Court during the *Yorta Yorta* Appeal Decision. See the exchange between Gleeson CJ and N J Young QC, for the *Yorta Yorta* appellants, Transcript of Proceedings, *Members of the Yorta Yorta Community v Victoria* (High Court, Gleeson CJ and Young QC, 23 May 2002) available <<http://www.austlii.edu.au/au/other/hca/transcripts/2001/M128/1.html>> 16 September 2006.

<sup>42</sup> We need to explore more just what the prototypes or antecedents for the ANZAC Day parade and dawn service were. ‘No innovation springs full-blown out of nothing; it must have antecedents, and these are always traceable, provided that enough data are available for an analysis. An innovation is, therefore, a creation only in the sense that it is a new combination, never in the sense that it is something emerging from nothing.’ H G Barnett, *Innovation: The Basis of Cultural Change* (1953) 181.

<sup>43</sup> My reconstruction is based upon an article in *The Sunday Mail* (Brisbane) of 21 April 1996, and a letter to the Editor of *The Courier-Mail* of 28 April 1999 in response. Luke Slattery, ‘Beat of Different Drums Dawning’, *The Australian* (Sydney), 21 April 1999, 3; Marise Laybutt, Letter to the Editor, *The Australian* (Sydney), 28 April 1999, 14. Luckins writes of ‘the shift ... from a day of mourning to a day of marching’, providing fuller details and richer interpretation of the history of the observance of ANZAC Day around the country as ‘bereaved relatives’ organisations ... [were] marginalised’ by veterans’ organisations, especially the RSL: Tanja Luckins, *The Gates of Memory: Australian People’s Experiences and Memories of Loss and the Great War* (2004) 196.

<sup>44</sup> Edward Shils, *Tradition* (1981) 15.

Tradition is far more than the statistically frequent recurrence over a succession of generations of similar beliefs, practices, institutions, and works. The recurrence is a result of the normative consequences – sometimes the normative intention – of presentation and of the acceptance of the tradition as normative. It is this normative transmission which links the generations of the dead with the generations of the living in the constitution of a society.

The cohesion of a society is ordinarily conceived of as a feature of a particular moment in time; it is the cohesion of its living members with each other. The older living members help to induct the younger living members into the beliefs and patterns which they have inherited from those who went before them. In this way, the dead are influential, exercising what critics of traditionality have called the ‘dead hand of the past’. They are objects of attachment, but what is more significant is that their works and the norms contained in their practices influence the actions of subsequent generations to whom they are unknown.<sup>45</sup> The normativeness of tradition is the inertial force which holds society in a given form over time.<sup>46</sup>

We might say then that tradition is sanctified.<sup>47</sup> And what is the source of the normative character of tradition, the source of its moral authority? More recently, Giddens wrote:

The distinctive quality of tradition, which separates it from custom or habit as well as from technical or expert knowledge, is that it presumes an ideal of *ritual* or *revealed* truth – and this defining trait is also the origin of its authority. What is ‘hallowed’ about traditions is not the past but the wisdom they incorporate.<sup>48</sup>

However, it is wrong to conclude that tradition always exerts a conservative effect on social and cultural change. There are many instances where leaders and others invoked tradition in order to rationalise and to legitimate creative and innovative social changes.<sup>49</sup> For example, Martin Luther, Oliver Cromwell, the Levellers and

<sup>45</sup> Slattery wrote that the first time he attended the ANZAC Day dawn service at the Cenotaph, he found many teenagers and was ‘unprepared for the sentiments released by the service and the crackle of emotional electricity in the pre-dawn air’. He remembered a girl weeping, ‘clearly too young to have lost a father to war and too far from a grandparent for this sort of wrenching emotion. The story of the ill-fated landing at ANZAC Cove seemed to grip and to hold her’. Slattery talked with people after the celebrations and he characterised their explanations thus: ‘Australians, young and old, feel a strong and deepening attachment to the generation whose blood was spilled at that distant cove. Strains of ancestor worship mingle with nostalgia and a feeling that the men of that time were deeply Australian in ways that we simply are not. It is an entirely spontaneous act of cultural memory...’, but ‘the ritual of remembrance is not exactly self-sustaining’ because the schools and the media retell and reinforce it. Luke Slattery, ‘History as the New Novel’, *The Weekend Australian* (Sydney), Books Extra 2-3.

<sup>46</sup> Shils above n 44, 24-5. See also Giddens, above n 19, 145.

<sup>47</sup> Keesing, above n 39 wrote of ‘*sanctity*, the unquestioned ultimate truth of religious belief’ at 149.

<sup>48</sup> Anthony Giddens, *Beyond Left and Right: The Future of Radical Politics* (1994) 46-7.

<sup>49</sup> ‘Tradition is often regarded as a source of social stability and legitimacy ..., but appeals to tradition may also provide the basis for changing the present’ Nicholas Abercrombie, Stephen

the Ranters all appealed to tradition as well as to conscience when they launched and participated in the historical movements (eg, the Reformation and the English Civil War) we associate with their names.

## VII THE AUTHENTICITY OF TRADITION

In 1983, the historians Hobsbawm and Ranger published *The Invention of Tradition*,<sup>50</sup> which attracted considerable attention from social scientists. They and their contributors demonstrated that many contemporary British and American traditions were of recent origin and were consciously produced or developed, although most citizens regard them differently and do not know their history, eg Scottish kilts and the British coronation ceremony. Hobsbawm and Ranger characterised them as ‘invented traditions’,<sup>51</sup> which Hobsbawm contrasted with ‘custom’, ‘genuine traditions’, ‘old traditional practices’, ‘old practices and ‘old traditions’.<sup>52</sup> No doubt Hobsbawm and Ranger would classify the ANZAC Day ceremonial complex too as ‘invented tradition’.

Their results and conclusions lead us to the question of what is called ‘authenticity’ or ‘genuineness’, a topic that has engaged anthropologists and other intellectuals for a few decades now. In public and judicial discourse in our country, the authenticity of Aboriginal custom and tradition is a matter of great topical concern. Most laypeople consider ‘invented traditions’ to be inauthentic, and conservative politicians constantly complain that Aboriginal people invent sacred sites and myths to go with them when it is to their advantage to do so.<sup>53</sup>

So – what about their *authenticity*? In our anthropological and scientific discourse,

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Hill and Bryan S Turner, *The Penguin Dictionary of Sociology* (3<sup>rd</sup> ed, 1994) 432. See also Eugenia Shanklin ‘Two Meanings and Uses of Tradition’ (1981) 37 *Journal of Anthropological Research* 71. Shanklin has been overlooked in the ‘invention of tradition’ literature and deserves more attention. Nicholas Thomas has written nicely of how partial, ‘inverted’ representations of tradition become emblematic or indexical of whole cultures, societies or ethnic identities through a diacritical, oppositional process, in ‘The Inversion of Tradition’ (1992) 19 *American Ethnologist* 213, 215.

<sup>50</sup> Hobsbawm and Ranger are historians, not social scientists, and their usage of *invention* ignores a longer history of usage by anthropologists. Recall the differences between nineteenth-century evolutionists and later diffusionists over the relative importance of independent invention vs diffusion in the evolution and history of culture(s). Barnett noted that popular usage restricted inventions to material ‘things’ and argued that ‘[i]t is fruitless to try to establish a rigorous distinction between “discovery” and “invention”, and nothing is to be gained by redefining the words’: H G Barnett, above n 42, 8.

<sup>51</sup> E P Thompson’s ‘The Sale of Wives’ in *Customs in Common* (1993) 404 is an excellent essay in this vein. See also Charles L Briggs, ‘The Politics of Discursive Authority in Research on the “Invention of Tradition”’ (1996) 11 *Cultural Anthropology* 435, 435-6 for references and brief discussion of the literature evoked by Hobsbawm and Ranger; Giddens ‘Living in a Post-Traditional Society’ above n 12, 93-4 critical discussion of ‘invented traditions’.

<sup>52</sup> Eric Hobsbawm, ‘Introduction: Inventing Traditions’ in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (1983) 2-3, 8, 10,11.

<sup>53</sup> They might indeed be correct in some cases. The literature on the Hindmarsh Bridge proposal and the several legal actions it provoked is apposite here, as also that on the Bula tradition at Coronation Hill. Tonkinson, above n 8 provides good discussion and a range of references in his bibliography.

is authenticity an appropriate question? Other social scientists speak of *genuine* and *spurious* traditions. Are those terms which lead us to good understanding of the phenomena of tradition in human societies? Here I draw on Handler and Linnekin, where they argued that a naturalistic or positivist understanding of tradition is inadequate, that only an interpretive approach gives us a good understanding of the complex situations we observe in societies.<sup>54</sup> They wrote:

[D]oes tradition refer to a core of inherited culture traits whose continuity and boundedness are analogous to that of a natural object, or must tradition be understood as a wholly symbolic construction? ... [W]e have concluded that tradition cannot be defined in terms of boundedness, givenness, or essence. Rather, tradition refers to an interpretive process that embodies both continuity and discontinuity. As a scientific concept, tradition fails when those who use it are unable to detach it from the implications of Western common sense, which presumes that an unchanging core of ideas and customs is always handed down to us from the past.<sup>55</sup>

... [T]radition resembles less an artifactual assemblage than a process of thought – an ongoing interpretation of the past.<sup>56</sup>

They characterised *traditional*, *new* and *modern* as interpretive terms, not descriptive ones.<sup>57</sup> Cultures change ceaselessly, so there can only be what is new in the present moment. However, some of what is new can also acquire value for being traditional. That is, we external analysts may interpret some new phenomena as being traditional. And of course, native culture-bearers do this regularly. We constantly assess and judge implicitly or explicitly whether some current phenomenon is the same as some past phenomenon. But Handler and Linnekin argued that when we designate the parts of a culture as old or new, as traditional or modern, we are then led into naturalism and essentialism. They wrote:

First, this approach encourages us to see culture and tradition naturalistically, as bounded entities made up of constituent parts that are themselves bounded objects. Second, in this atomistic paradigm we treat culture and its constituents as entities having an essence apart from our interpretation of them; we attempt to specify, for example, which trait is old, which new, and to show how traits fit together in the larger entities that we call 'a culture' and 'a tradition'.<sup>58</sup>

Handler and Linnekin also noted Kroeber's definitional statements (see above) but they criticised him for focusing on tradition in its product sense, for identifying societies with particular traditions and for 'the notion that temporal continuity is the

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<sup>54</sup> Richard Handler and Jocelyn Linnekin, 'Tradition, Genuine or Spurious' (1985) 97 *Journal of American Folklore* 273.

<sup>55</sup> Ibid 273.

<sup>56</sup> Ibid 274.

<sup>57</sup> This is a false opposition. Qualities are always symbolic or interpretive in the sense that the interpreter apperceives them – see H G Barnett, *Qualitative Science* (1983) 7-28, especially 10-12. There are no primary (descriptive) qualities inherent in the essence of things, as contrasted with secondary (interpretive) ones we apperceive in a stimulus field.

<sup>58</sup> Handler and Linnekin, above n 54, 274.

defining characteristic of social identity'.<sup>59</sup> They regarded him therefore as a proponent of naturalism. They wrote more approvingly of Shils for including change in his view of traditional phenomena,<sup>60</sup> but thought he contradicted himself when he said that tradition 'in its barest, most elementary sense ... is anything which is transmitted or handed down from the past to the present'.<sup>61</sup> Despite Shils' and others' refinement of the concept of tradition, Handler and Linnekin say they all share the view 'that the past leaves some objectively definable inheritance, a "substantive content"'<sup>62</sup> '[T]here is no doubt that in [Shils'] formulation a real, essential tradition exists apart from interpretations of that tradition'.<sup>63</sup>

Handler and Linnekin put their own position thus:

[T]here is no essential, bounded tradition; tradition is a model of the past and is inseparable from the interpretation of tradition in the present. Undeniably, traditional action may refer to the past, but to 'be about' or to refer to is a symbolic rather than natural relationship, and as such it is characterized by discontinuity as well as by continuity. It is by now a truism that cultural revivals change the traditions they attempt to revive. We would broaden this insight and argue that the invention of tradition is not restricted to such self-conscious projects. Rather, the ongoing reconstruction of tradition is a facet of all social life, which is not natural but symbolically constituted.<sup>64</sup>

Handler and Linnekin supported their arguments with ethnographic case materials from Quebec and Hawaii. We need not recapitulate them, but they concluded:

... [I]f genuine tradition refers to the pristine and immutable heritage of the past, then all genuine traditions are spurious. But if ... tradition is always defined in the present, then all spurious traditions are genuine. Genuine and spurious ... are inappropriate when applied to social phenomena, which never exist apart from our interpretations of them.<sup>65</sup>

The invention of tradition literature<sup>66</sup> aroused much controversy and *angst* among anthropologists. Tonkinson wrote:

Anthropologists ... have been at fault on at least two counts: first, in not emphasising the universality of the process they describe, namely, that re-readings of the past in

<sup>59</sup> Handler and Linnekin, above n 54, 273.

<sup>60</sup> Shils, above n 44, 13.

<sup>61</sup> Shils, above n 44, 12.

<sup>62</sup> Handler and Linnekin, above n 54, 275.

<sup>63</sup> Handler and Linnekin, above n 54, 276.

<sup>64</sup> Handler and Linnekin, above n 54, 274 (citations omitted).

<sup>65</sup> Handler and Linnekin, above n 54, 288.

<sup>66</sup> See Briggs, above n 51, 436-8, 458-9, 461, for references to work by Sam Gill on 'Mother Earth' by Jean Jackson on Tukano culture and society and by Alan Hanson on the Maori, and responses to them. Note also Jeffrey Sissons, 'The Systematisation of Tradition: Maori Culture as a Strategic Resource' (1993) 64 *Oceania* 97 on Maori, Brian D Haley and Larry R Wilcoxon, 'Anthropology and the Making of Chumash Tradition' (1997) 38 *Current Anthropology* 761 and also Haley and Wilcoxon, 'How Spaniards Became Chumash and Other Tales of Ethnogenesis' (2005) 107 *American Anthropologist* 432.

all cultures are undertaken selectively from a perspective embedded in the contexts of present needs, orientations and aspirations ...; and secondly, in not pointing out forcefully that this re-reading of the past need not entail any conscious fabrication, trickery or manipulation of 'facts', since filtering effects, distortion and disremembering are intrinsic to the process.<sup>67</sup>

Many of us anthropologists were happy to leave the question of authenticity behind and get on with other interests. However, as Briggs said with regard to Hanson's apology for using the term 'invention',<sup>68</sup> 'I hate to say it, but what goes around'.<sup>69</sup> Indeed it does, and indeed it has. The traditionality of specific Aboriginal laws and customs which our High Court considered in its deliberations on the *Yorta Yorta* Case is nothing more or less than the question of authenticity and genuineness sprung to life again.<sup>70</sup> We cannot evade it by apologies or by clever postmodernist tropes denouncing positivism, etc. We must somehow advance beyond Handler and Linnekin's debilitating conclusions and beyond Briggs' exposition and consideration of our 'expert' practices in the politics of representation and those of people who assert indigenous identities. Briggs is correct that we cannot expect the people whose traditions we research (perhaps even 'destructively analyze'<sup>71</sup>) not to be critical and angry with us. Noel Pearson's characterisation of us anthropologists as a B-grade industry who highjacked the concept of native title and hoodwinked the High Court in *Western Australia v Ward*<sup>72</sup> should leave no doubt about that!<sup>73</sup> I still believe that we anthropologists have something to contribute to our pressing

<sup>67</sup> Tonkinson, above n 8, 598.

<sup>68</sup> Allan Hanson, 'The Making of the Maori: Culture Invention and Its Logic' (1989) 91 *American Anthropologist* 890.

<sup>69</sup> Briggs, above n 51, 461.

<sup>70</sup> A few years ago a French court recently faced a similar situation – see Adam Sage, 'Bullfight Revival a Red Rage to Activists', *The Australian* (Sydney), 29 August 2002, 7. The Alliance for the End of Corridas sought 'to prevent the town of Carcassonne holding its first bullfighting festival since 1954'. It said that the proposal breached the Penal Code, 'which allows corridas only in areas where there is an uninterrupted bullfighting tradition'. An Alliance spokesman said 'There is no tradition in Carcassonne because there hasn't been a corrida for almost 50 years. A few people who eat paella and watch three videos of corridas do not amount to a tradition'. The mayor of Carcassonne observed that 'although [the town] had not staged a festival for 48 years, it lay in the centre of a French bullfighting region' and the reporter noted that Beziers, a nearby town, 'holds an annual bullfight in mid-August' and this year it attracted 'tens of thousands of aficionados and some of the world's best matadors'. The success of bullfighting there 'is part of a movement towards regional traditions in a country where national identity has been placed under strain by European integration and globalisation'. A local civil court overruled the Alliance's objection to the bullfight – see <<http://www.planetark.org/avantgo/dailynewsstory.cfm?newsid=17553>> and <<http://www.laprensa-sandiego.org/archieve/september13-02/sherwood.htm>>. The decision noted that there were eleven bull-fighting clubs in the region, of whom 600 members were from Carcassonne, and that a bloodless bullfight there in 2001 drew 'thousands of spectators' as evidence for 'an uninterrupted local bullfighting tradition'.

<sup>71</sup> Richard Handler, 'On Dialogue and Destructive Analysis: Problems in Narrating Nationalism and Ethnicity' (1985) 41 *Journal of Anthropological Research* 171.

<sup>72</sup> (2002) 213 CLR 1.

<sup>73</sup> Noel Pearson, 'Native Title's Days in the Sun Are Over', *The Age* (Melbourne), 28 August 2002, available <<http://www.capeyorkpartnerships.com/media/articles/age-28-8-00.htm>> 20 September 2006.

social problems and, given our own English-speaking legal traditions and customs, we can do that most effectively as experts who aspire to objectivity and avoid advocacy. Self-doubt and woolly thinking on our parts are not virtues when we prepare expert reports and documents and when we are examined on the witness stand.

We should not confound the argument that the process of interpreting the present in terms of the past involves symbolism, ie, it is apperceptive and under-determined by external stimuli, with the question of whether particular interpretations of tradition are consciously reflexive (perhaps indeed deceitful, deceptive or lying) or not. Similarly, we should also be able to research particular traditions and offer expert opinions on their origins, antiquity, continuity and the like and then let our courts assess whether they measure up to the requirements of statute and precedent.

It is the quality and objectivity of our research which matters in the end game, not whether we are socially and politically right-thinking.<sup>74</sup> For example, it is a matter for empirical research by us and for informed consideration of the evidence from the plaintiffs and us by the courts as to whether contemporary Yorta Yorta traditional law and custom confer rights and interests in lands and waters upon Yorta Yorta people in ways recognisable under Australian law. In the end, our High Court confirmed the trial judge's finding that the continuity of tradition had been broken in the 1880s, and the Justices were not persuaded by the plaintiffs' and their experts' evidence. I accept their finding, but my reading convinces me that the experts and barristers could have better organized, interpreted and presented the evidence to the trial judge.

Earlier, I noted some of our judges' (eg, Black CJ and Callinan J) unwillingness to accept as 'traditional' Aboriginal witnesses' evidence based on knowledge gained other than 'by word of mouth or by practice'. It is true that their knowledge of some matter or another may be based, explicitly or not, in whole or in part on their reading of the published anthropological, historical and other sources, in addition to knowledge they may have gained by oral transmission of relevant tradition from older people and peers. As Beckett observed: 'It is ironic that while anthropologists become creditable expert witnesses by writing, 'natives' render themselves inauthentic by reading: tainted with literacy it seems they can't go home again!'<sup>75</sup>

I do not at all dismiss Aboriginal people's knowledge gained from written and other material sources.<sup>76</sup> Such written materials, tape- and video-recordings, artefacts in

<sup>74</sup> The incidental pun here leads me to say that right-thinking and left-thinking are equally compatible with objectivity.

<sup>75</sup> Jeremy Beckett, 'The Murray Island Land Case' (1995) 6 *Australian Journal of Anthropology* 15, 30.

<sup>76</sup> Bruce Rigsby, 'Representations of Culture and the Expert Knowledge and Opinions of Anthropologists' (Opening Address for the Australian Anthropological Society's Symposium on Expert Evidence in Native Title: Issues of Truth, Objectivity and Expertise, University of Adelaide, 6-7 July 2001). See also Michael Walsh, 'Tainted Evidence' in Diana Eades (ed) *Language in Evidence: Linguistic and Legal Issues in Aboriginal and Multicultural Australia*

museums, home collections, etc all are part of the contemporary body of Aboriginal tradition where members of the group read and recognise them as part of their tradition and perhaps have some control over them.<sup>77</sup> The then-Chairman of the Queensland Land Tribunal, Graeme Neate, wrote in the Cape Melville and Flinders Report:

[§]234. The evidence in this case suggested that the relevant Aboriginal people must acknowledge, and possibly have some control over the use of, material in that [non-oral] form before it is accepted as part of the store of the group's tradition...

[§]236. It is readily accepted that written, tape recorded and photographic records can provide valuable additional forms of preserving the body of traditions, observances, customs and beliefs of a particular group of Aboriginal people. The real issue is whether Aboriginal people who make a claim under the Act on the ground of traditional affiliation can establish the claim to the tribunal's satisfaction by relying on such records. The answer can only be given on a case by case basis in light of evidence given by or about members of the group.<sup>78</sup>

It is important that we identify the sources of people's knowledge and then assess and interpret the different kinds of evidence appropriately, not just summarily dismiss some of it as corrupted.

#### VIII HOMER BARNETT, SOCIOCULTURAL CHANGE AND INNOVATION

Barnett, a cultural anthropologist and student of Kroeber, was a maverick, and his relations with his old professor were ambivalent. He engaged with and opposed Kroeber's views and positions to the end of his career, sometimes openly, other times not.<sup>79</sup> Barnett was much opposed to grand theorizing. He read widely and wisely in classical experimental psychology, which provided a background for developing his interests in the mental processes which organise and structure our everyday ideas, thoughts and experiences. He also read deeply in epistemology and the philosophy of science.

Barnett's *magnum opus* was *Innovation: The Basis of Cultural Change*. He later

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(1995) 97.

<sup>77</sup> See, eg, *Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands*, Report of the Land Tribunal established under the Aboriginal Land Act 1991 to the Hon the Minister for Lands (1994) §§243-245, 247; *Aboriginal Land Claim to Lakefield National Park*, Report of the Land Tribunal established under the *Aboriginal Land Act* 1991 to the Hon the Minister for Natural Resources (1996) §§229-234, 236-237.

<sup>78</sup> Cape Melville and Flinders Report, above n 77.

<sup>79</sup> I know of no enmity or bad feeling between Barnett and Kroeber. Kroeber remained a major reference figure throughout Barnett's professional life, but 'by no means an unquestioned one': Theodore Stern, 'Obituary: Homer Garner Barnett (1906-1985)' (1987) 89 *American Anthropologist* 701, 702. Barnett also spoke of his differences with Kroeber: 'Learning About Culture: Reconstruction, Participation, Administration' in George W Stocking Jr (ed), *Observers Observed: Essays on Ethnographic Fieldwork* (1983). One of the benefits of outliving one's colleagues is that they cannot respond posthumously.

published some thoughtful essays on change,<sup>80</sup> then updated and presented his final thought in *Qualitative Science*.<sup>81</sup> Barnett was not an armchair theorist, but very much a fieldworker: Siletz and Yurok, Coast Tsimshian, Yakima, Coast Salish/Indian Shakers, Palau and Dutch New Guinea.<sup>82</sup> He frequently used examples from his own fieldwork in his theorising and writing. Barnett spent his academic career at the University of Oregon. Arguably, he was their most prominent anthropologist in the past century. Some of us Australianist anthropologists were his students or colleagues and were influenced by him: Bruce Rigsby, Lee Sackett, Jerry Schwab, Myrna Tonkinson and Bob Tonkinson. He did not encourage or sustain acolytes and advocates,<sup>83</sup> and I believe he was disappointed towards the end of his life by his apparent lack of impact on anthropology.<sup>84</sup>

In a little known paper, Robert Murphy argued that there is no principled way to distinguish the phenomena of acculturation from social change generally.<sup>85</sup> Similarly, I argue that we cannot distinguish the process of tradition (whether conceptualised as the handing on of whatever across the generations or as the interpretation of the past in the present) from the interpretive mental processes we humans operate with in our everyday experiences. This is not to say that acculturation and tradition are chimeras. Instead, they are the terms we use to label particular qualities or parts of processes or their products.

Barnett looked to the individual human mind as the source of all social and cultural change.<sup>86</sup> Favouring methodological individualism, he saw individual adaptation as

<sup>80</sup> See H G Barnett's 'Comment on "Acculturation"', above n 9; 'The Innovative Process' (1961) 25 *Kroeber Anthropological Society Papers* 25; 'The Acceptance and Rejection of Change' in George K Zollschan and Walter Hirsch (eds), *Explorations in Social Change* (1964) 345; 'Diffusion Rates' in Robert A Manners (ed), *Process and Pattern in Culture* (1964) 351; 'Laws of Socio-Cultural Change' (1965) 6 *International Journal of Comparative Sociology* 207; 'Compatibility and Compartmentalization in Cultural Change' in A R Desai (ed), *Essays on Modernization of Underdeveloped Societies* (1971) 475; 'The Shaping of Experience' in George G Haydu (ed), *Experience Forms: Their Cultural and Individual Place and Function* (1979) 147.

<sup>81</sup> *Qualitative Science* (1983) was published by Vantage, a 'subsidy press'; one suspects that mainstream publishers rejected the manuscript. This said, it is useful to revisit Barnett's work for what it might say to us today. It would be also be helpful if some cognitive psychologists were to revisit Barnett's *oeuvre*, assess it in view of contemporary knowledge and research, and perhaps revise and extend it. For his time, Barnett was remarkably *au fait* with classical perceptual and *Gestalt* psychology.

<sup>82</sup> See Barnett, above n 42, 3-5 and especially 'Learning About Culture', above n 79.

<sup>83</sup> Barnett attracted postgraduate students widely, and he was generous in supporting them and interested in their research. He was well aware of the need for advocates if an innovation is to gain acceptance and spread widely and quickly: see Barnett, above n 42, 291-328; Barnett, above n 57, 181-186

<sup>84</sup> Elizabeth Colson gave a positive account of Barnett's and his students' comparative research project on displaced Pacific communities in the 1960s, in 'Forced Migration and the Anthropological Response' (2003) 16 *Journal of Refugee Studies* 1.

<sup>85</sup> Robert Murphy, 'Social Change and Acculturation' (1963-4) 26 *Transactions of the New York Academy of Sciences* 845.

<sup>86</sup> The content and structure of this paragraph with its quotes are taken from Sheldon Smith and Philip D Young. *Cultural Anthropology: Understanding a World in Transition* (1998) 80-85.

the ultimate source of social and cultural adaptation.<sup>87</sup> The cognitive, conative and affective processes of the mind are the bases for our perceptions and for our sorting, synthesising, categorising, ignoring, discarding and recombining all our sensory input into new configurations. Innovations, whether viewed as new combinations of ideas or as things resulting from new ideas, are entirely the products of mental activity, itself culturally constituted and socially constructed. As Barnett wrote:

[M]ental content is socially defined; its substance is, in major part, dictated by tradition. But the manner of treating this content, of grasping it, altering it, and reordering it, is inevitably dictated by the potentialities and the liabilities of the machine which does the manipulating; namely, the individual mind.<sup>88</sup>

Barnett also contrasted processes with histories. First, a process is recurrent, and it can be made to repeat itself, continually so if its instigating conditions persist. But the history of something is whatever happens to it during the time it is that thing, bearing in mind that its 'thingness' is not natural, but arises from our apperception of it.<sup>89</sup> Processes have a beginning, a course of action and an end – and so they are discontinuous action systems, ie, closed dynamic action systems. They occur in time and space, but it is recurrence that makes them processes. In contrast, 'time is intrinsic to history; its essence is that of events occurring in a temporal dimension'.<sup>90</sup> Second, processes are the mechanisms that transform things from one state to another, and so they produce histories. 'History is ... not a process; it is the product of the action of a very great number of processes'.<sup>91</sup> It is not processes that are changes; instead, it is their products which may be changes. And their products change when the processes that produce them change, and this happens through the operation of the process Barnett calls 'innovation'.<sup>92</sup>

By 1953, Barnett had developed a model of the mental processes by which we humans register and interpret in our minds present experiences against past ones. The former activate or call up past experiences from memory and we interpret the present with respect to the past – and vice-versa. The innovative process constantly produces changes – *innovations* – even when we do not recognise them and call

<sup>87</sup> Barnett, 'Shaping of Experience', above n 80, 172.

<sup>88</sup> Barnett, above n 42, 16.

<sup>89</sup> Barnett, above n 42, 201, 411-448. The mental representations of material and non-material 'things' do not differ qualitatively. Both are at base interpretations, products of our apperceptions, underdetermined by external stimuli: 'We are accustomed to thinking in terms of [material] things, somehow supposing that things are the materials for innovation and that they are more stable and absolute than the ideas we have about them. The truth is that the reverse is the case. We tend to regard a table as a unit because it has substance and because it is segregated from other things around it. Actually, however, the existence of the table is real only because we have mentally segregated it and given a discrete reality to it. It has no more internal consistency than we are wont to give it. Obviously there are times when we regard it, not as a discrete whole, but as a mere assemblage of lesser parts, themselves at the moment wholes. Clearly these differences are due to mental operations, in which ideas define the nature and extent of things: Barnett, above n 42, 182.

<sup>90</sup> Barnett, above n 57, 132.

<sup>91</sup> Barnett, above n 57, 133.

<sup>92</sup> Barnett, above n 57, 134.

them changes or innovations.

Barnett (1953) and later works dropped the use of (*culture*) *trait, thing, idea* and the like, preferring instead *configuration*, which has four characteristics:

- 1 It is a mental composition of sensory stimulation.
- 2 It is complete in itself, a homogeneous unit without parts or internal structure and with uniform qualities throughout its extent.
- 3 It has shape or form whether it be the perception of an iron bar, the sound of a musical tone, or the mental image of a fictitious character.
- 4 It protrudes from its matrix as does a figure from its ground in ambiguous designs, or the face of a friend in a group photograph.<sup>93</sup>

Basically, configurations are mental activity systems that are somehow the counterparts of external referents. But any perceived quality of a thing is a *mental* composition. It is a configuration, an organization of lesser activity systems.<sup>94</sup>

Anthropologists have long argued over the character and nature of the basic units of culture and the kinds of processes they might be implicated in. Earlier generations of anthropologists talked of culture traits, trait-complexes, customs and patterns, their independent invention or diffusion and their evolution perhaps. Functionalist anthropology spoke of the sharing of customs, norms, institutions, statuses, roles and such and of the integrative role of value-sharing and even conflict. More recent generations seem to have given up the quest for or concern with units, although *identity, agency, reflexivity, voice* and *power* are often heard. One would think that we humans go through our lives in a constant reflexive state and that such structure as we can identify are always contestable and transient. However, we are not always fully conscious of our actions – sometimes, perhaps more often than we care to admit – we are on automatic pilot, so to speak, while we may even be contemplating something else.

Some natural scientists like Richard Dawkins (1976) write about ‘(cultural) memes’ and their evolution by processes of natural selection and such. Barnett was quite clear that it was at the level of pan-human mental processes, operative in all normal minds, we should focus our attention. He thought there were strong constraints on the operations of mental processes, ignoring matters of content, that made it possible to find regularities and laws in the combination and recombination or amalgamation of old configurations into new configurations. If memes are intended to be more than descriptive units, then surely their psychological properties and characteristics are relevant to understanding their evolution (ie, their ‘descent with modification’) in the same way that the hereditary and phenotypic expressions of genes (and now their molecular composition and properties) are relevant to understanding their evolution. Configurations are structures, but they are not ultimate molecular units. They break down when we focus on them and they dissipate on analysis, but they can also be synthesised as parts of larger

<sup>93</sup> Barnett, ‘Shaping of Experience’, above n 80, 151.

<sup>94</sup> Barnett, above n 42, 183 (citations omitted).

configurations.

Here follows my exposition of Barnett's model of the innovative (or interpretive) process.

- 1 The process begins with the registration or storage in our mind of a past experience having the properties of a configuration (wholeness, unity and an external relationship which is as background to figure or context to focus). This prototype configuration 'provides a medium for the processing of future experience'.<sup>95</sup>

Here is my graphic modelling of the first stage of the process<sup>96</sup> when a past experience is registered or stored in memory as a prototype configuration.

**A ——— R<sub>1</sub> ——— B**  
stimulus – relationship – correlate

- 2 The process continues when a present stimulus, whether external or internal (by memory or whatever), activates or 'redintegrates' the prototype configuration in our mind.<sup>97</sup> That is, a present experience activates or awakens the prototype configuration.

**X ——— R<sub>2</sub> ——— Y**  
stimulus – relationship – correlate

- 3 It continues when we 'internalise' the present experience by equating it with the prototype (are they the same?)<sup>98</sup> or discriminating (Barnett it from the prototype (are they different?).<sup>99</sup> We can equate or discriminate it by axiomatic or conventional equation or discrimination, convergent or divergent analysis or by convergent or divergent incorporation, respectively. If we successfully equate the present experience with the prototype, we produce a new configuration. If we discriminate the present experience from the prototype, we cannot produce a new configuration, but we may activate

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<sup>95</sup> Barnett, above n 57, 70.

<sup>96</sup> In the formalisations below, B and Y are the 'correlates' of the ideas or experiences A and X, respectively, which all can also be called 'components' or 'elements' or 'parts'. A and X are related to B and Y, respectively, as focus to context, figure to background, etc and R<sub>1</sub> and R<sub>2</sub> signify the relationships which bind A to B and X to Y, respectively. Barnett explained: '[E]very innovation can be structured to conform to the pattern of X R Y; meaning that ... any given sectioning of a stimulus field is specific and polarised such that it consists of two and *only* two components with one and only one relation per section existing between them. This does not forbid multiple sectioning; in fact, this frequently happens. Moreover, a shift from one sectional axis, plane or perspective of the field to another can occur instantaneously, as it does in the fluctuations of ambiguous figures: Barnett, 'The Acceptance and Rejection of Change' above n 80, 348.

<sup>97</sup> Barnett, above n 57, 70.

<sup>98</sup> Barnett originally called equation 'identification' in above n 42.

<sup>99</sup> Barnett, above n 57, 71-8, 83-5.

another linked prototype configuration from memory which does lead to successful equation. In other words, one or both elements of the present experience is/are equated with their correlate(s) in the prototype – we ignore the possibility of its discrimination here for heuristic purposes.

**A — R<sub>1</sub> — B**  
stimulus – relationship – correlate

**X — R<sub>2</sub> — Y**  
stimulus – relationship – correlate

4. The process ends when we produce a new configuration, whether directly or indirectly. In any case, we produce a new configuration by substituting one or another element of the stimulus and prototype configurations for another through assimilation or projection.<sup>100</sup> That is, one or another element of one configuration is substituted for its counterpart in the other configuration, thus producing a new configuration which amalgamates past and present experience. There are six basic patterns of innovation, which are:

- A — R<sub>1</sub> — Y** by assimilation<sup>101</sup>
- A — R<sub>2</sub> — Y** by projection<sup>102</sup>
- X — R<sub>1</sub> — B** by assimilation
- X — R<sub>2</sub> — B** by projection
- A — R<sub>2</sub> — B** analogy by double projection
- X — R<sub>1</sub> — Y** parallel by double assimilation

Let's first consider the ANZAC Day parade. In 1916, one or more Australians might have had the present experience, configured as:

Australians **X** — remember **R<sub>2</sub>** — their ANZAC dead **Y**  
stimulus – relationship – correlate

which recalled the past experience or prototype configuration:

Australians **A** — honour with a parade **R<sub>1</sub>** — their Boer War dead **B**  
stimulus – relationship – correlate

From these two configurations, they amalgamated a new configuration as a parallel

<sup>100</sup> Barnett, above n 57, 78-83.

<sup>101</sup> In assimilation, a relatively unfamiliar stimulus X or Y is absorbed or amalgamated into a familiar framework/configuration **A — R<sub>1</sub> — B**: Barnett, 'The Acceptance and Rejection of Change', above n 80, 352-5.

<sup>102</sup> In projection, one or both correlates of the prototype configuration **A — R<sub>1</sub> — B** has a pre-emptive character with respect to their counterparts **X** and/or **Y** and replaces one or both of them: Barnett, 'The Acceptance and Rejection of Change', above n 80, 354-355.

by double assimilation:

Australians **X** ——— honour with a parade **R<sub>1</sub>** ——— their ANZAC dead **Y**  
stimulus – relationship – correlate

So, although the specific celebration of ANZAC Day with a parade was a new practice, an innovation, its link with the past honouring of the war dead with a parade made it customary practice, if not also traditional.<sup>103</sup> The dawn service innovation apparently had different antecedents.

But for an innovation to catch on and become customary, other people must adopt and practice it. Such history as we know indicates that individuals and groups took up the ANZAC Day parade in increasing numbers from 1916; the dawn service emerged and spread later. In Barnett's view, the innovation of a new configuration involves the same processes as those involved in its spread (adoption/acceptance or rejection) through a population, and both can be analysed and described in the same framework:

[I]mitation is innovation, for when it happens that one person identifies himself X with another person Y and instead of doing what he is accustomed to do Y he does what his paragon B does. The reason this seems [not] to be ... innovative is that in many instances no one questions the equation of the one person with the other. But there are numerous occasions on which the equation and its consequences would seem to be scandalous, presumptuous, or ridiculous ... [such as] children behaving like adults and vice-versa; natives incongruously garbed in alien finery; social climbers and passers of class boundaries – not to mention outright imposters.<sup>104</sup>

A further example. We can be sure that at contact on eastern Cape York Peninsula, any number of Aboriginal people would have had a prototype configuration something like this:

Aboriginal men **A** ——— hunt and kill game animals with **R<sub>1</sub>** ——— spears **B**  
stimulus – relationship – correlate

But on seeing white men hunt and shoot game animals with rifles (or shotguns), one or more Aboriginal men might have the experience:

White men **X** ——— hunt and kill game animals with **R<sub>2</sub>**<sup>105</sup> ——— rifles **Y**

<sup>103</sup> These are points for which supporting or contradicting data can be found in a range of primary sources.

<sup>104</sup> Barnett, 'Shaping of Experience', above n 80, 167.

<sup>105</sup> The different indices here indicate that Aboriginal and settler hunting and killing of kangaroos and wallabies differ in their temporal placement. The first is a prototype from previous experience, the second a new configuration. But during equation or discrimination, the subject relates them as similar/same or different in whatever ways with respect to other prototypes. Callinan J's misgivings above about the acceptance of the use of modern technology as not rupturing continuity of traditional hunting law and custom perhaps express his views on the difference between hunting in an animist worldview and in a non-animist one. I do not know whether Murandoo Yanner's religious beliefs and knowledge were an object of examination

stimulus – relationship – correlate

They might have related that present experience to their past experience by equating rifles (or shotguns) with spears through convergent analysis via assimilation on the basis of function, producing a new configuration:

Aboriginal men **A** — hunt and kill game animals with **R<sub>1</sub>** — rifles **Y**  
stimulus – relationship – correlate

And then acted on it by substituting rifles for spears in their hunting.<sup>106</sup>

Or they might have related that present experience to their past experience by equating themselves with white men through convergent analysis via projection, say, on the basis of whatever similarity, producing a new configuration:

Aboriginal men **A** — hunt and kill kangaroos and wallabies with **R<sub>2</sub>** — rifles **Y**  
stimulus – relationship – correlate

And then acted on it by hunting and killing kangaroos and wallabies with rifles. These are events which we anthropologists also call *diffusion*, *borrowing*, *mimesis*, the spread of an innovation and the like.

Our courts have been willing to accept such innovations as not disruptive of hunting traditions, as in the *Yanner* case where Murradoo Yanner used an outboard-powered dinghy and steel tomahawk together with a harpoon to take young freshwater crocodiles (but see Callinan J's reflective comment above). During the Lakefield and Cliff Islands National Parks land claims under state law in 1994, the claimant witnesses emphasised the continuity of their norms of taking only what they required ('not too much'), sharing it with others and not letting anything go to waste. They clearly rejected the argument that the adoption and use of firearms and such disrupted or qualitatively transformed their hunting and fishing traditions.<sup>107</sup>

## IX CONCLUSION

In Barnett's view, the terms *tradition*, *custom*, *habit*, *convention* and the like characterise the qualities of the prototypes we humans use in axiomatic equation. In other words, the process of equating new experiences with old ones not by convergent analysis or incorporation, but simply by convention (ie, by and large

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during the original hearing in a magistrate's court or later, but in any event, the question of the 'totemic significance' of the freshwater crocodiles he shot in his religious belief and practice was and is open to empirical investigation, as also are his views on whether he acted in accord with his Aboriginal tradition. See further discussion in my main text.

<sup>106</sup> There is some historical evidence bearing on Aboriginal access to firearms and their use in specific areas or regions and times. Until well into the twentieth century, it was unusual, indeed difficult, for Aboriginal men to acquire for themselves and use rifles and shotguns on Cape York Peninsula, and it was common for Europeans to carry firearms (including pistols) for self-defence and hunting, if not also for asserting one's will over Aboriginal people.

<sup>107</sup> See, for example, pp. 910-912, 939-940, 943-944 and 953-954 of the Transcript of Proceedings.

unconsciously and automatically).<sup>108</sup> which ‘means that X and A are parts of ... a third and independent configuration that are bonded by the relationship of sameness or similarity’.<sup>109</sup> Conventional equation and discrimination are doubtless much more frequent than analytic and incorporative equation and discrimination.

The conventions that we employ in our processing of new experience are a good part of the phenomena we also call culture, but they do not spring up anew and afresh everyday from nothing. Conventions, customs, traditions and the like lie at the base of:

the necessary economy of everyday living for all of us to assume that there is constancy in the objects of our experience ... [T]he room in which we awake is the same as the one in which we fell asleep ... [W]e are the same person asleep and awake. The assumption of continuity and stability in such contexts is not only essential to our sanity, but is a prerequisite for the least measure of effective reaction to our environment. It is also basic to the learning process, because it would be impossible to build upon past experience if every moment brought an entirely new order of events. Despite these[,] ... we cannot fail to be aware that not only do things change over time, but that they are apperceptively transformed in the context of other things and events ...<sup>110</sup>

When I relate Barnett’s model of innovation back to Handler and Linnekin’s view that tradition is nothing more nor less than the process of interpreting the past in the present, I think they have confused a part with its whole. Tradition is not a process; innovation (or interpretation) is. Past experience provides the qualities of the prototypes we employ for interpreting the present. I reject their conclusions that we inescapably get caught up in naturalism and essentialism when we designate ‘any part of culture as old or new, traditional or modern’.<sup>111</sup> I see no difficulties in principle in gaining sufficient ethnographic and historical knowledge to make expert judgements about the matters of sameness and difference, continuity and discontinuity that the courts expect from us, nor should we resile from trying to make them as objectively as we can. Attending to empirical data and interpretivism are not antithetical. We cannot entirely banish metaphysics from human interpretation – even sub-atomic physicists and astrophysicists recognise the metaphysical gap between their measurements and their interpretations of phenomena.

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<sup>108</sup> Note Giddens’ slightly different, but related use of *convention* in *Modernity and Self-Identity*, above n 19, 36-7, 41, 52, 61-3, 99.

<sup>109</sup> Barnett, above n 57, 71.

<sup>110</sup> Barnett, above n 57, 28-9.

<sup>111</sup> Handler and Linnekin, above n 54, 273.