New ways for exploring who knows what in a native title case: a sociological approach

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Abstract: *This paper explores native title legal processes. It seeks to build on earlier scholarship that has investigated what goes on in the tribunal encounter; in particular, it examines what makes it so hard for Indigenous claimants to be heard in the courtroom. Making an intervention into this broad debate, we present a new sociology of knowledge model that can be used to read native title legal processes in a slightly different way — one that brings knowledge and legitimacy to the fore. Drawing on Legitimation Code Theory and postcolonial theory (Homi Bhabha, in particular), we establish some of the structural relations that enable or disable the voices of Indigenous peoples being heard in native title cases. Our key case study is the Yorta Yorta native title case and the interpretation of a squatter's diary, a piece of knowledge that was central to the outcome of the claim.*

Introduction

In 1998 the Yorta Yorta Community presented a case to the Federal Court asserting native title rights over about 150 or so parcels of land. In his summary of the case, the presiding judge, Justice Olney, offered some notes on the presentation of the evidence by some of the Yorta Yorta applicants:

> Another unfortunate aspect of much of the applicants' evidence was frequent, and in some instances, prolonged, outbursts of what can only be regarded as the righteous indignation of some witnesses at the treatment they, and their forebears, have suffered at the hands of the colonial, and later the various State, authorities. (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 21)

Justice Olney followed this comment by saying that the:

> case is not about righting the wrongs of the past, rather it has a very narrow focus directed to determining whether native title rights and interests in relation to land enjoyed by the original inhabitants of the area in question have survived to be recognised and enforced under the contemporary law of Australia. (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 21)

Reading Section 21 of Justice Olney's ruling, the question that comes to our minds is whether the 'unfortunate aspect' of the applicants' evidence was that, legally, it could not be taken into consideration or that is was offered in the form of an 'outburst'. Drawing on concepts from the sociology of knowledge and postcolonialism (specifically, Homi Bhabha's concept of mimicry), and using the now well-known Yorta Yorta case, this paper maps out some of the structural relations that enable or disable the voices of Indigenous peoples being heard in native title cases.

Since its recognition by the High Court of Australia in 1992, the legal and popular idea of native title has become an important way in which Indigenous and non-Indigenous Australians frame debates about land, identity, national belonging and race. Yet, as has been noted, there are few areas in the law with such ambiguous and altering definitions as native or Aboriginal title (Pearson 1997). Nor are there many other subjects that present such a fundamental challenge to 'colonial consciousness' (Tate 2003:114). The large body of scholarship analysing the new field of native title claims is testament to this instability and contention. This scholarship, often exploring why native title claims do not succeed, is frequently underpinned by theories of power and informed by postcolonial and critical race concepts. This paper seeks to build on this work, making an intervention into this broad debate and presenting a new model that can be used to read the native title legal space in a slightly different way — one that brings questions of knowledge and legitimate forms of knowing to the fore.

Taking the nuanced academic discussions about the role of colonial relations of power in native title hearings and the Yorta Yorta case, in particular, as a starting point, we explore the same ground from the perspective of knowledge. The model we present draws on an innovative sociological theory of knowing called Legitimation Code Theory (LCT) (Maton 2000a), which we have modified by making it race and Indigenous 'sensitive'. What is noteworthy about the model we are developing is that it aids in the deconstruction of knowledge into its constituent parts, facilitating examinations of how knowledge sharing and transference work within social relations. The question of native title hearings then becomes more complicated than who is presenting the knowledge, and includes the type of knowledge they are presenting and how it is understood. The model will enable us to 'uncover' the hidden assessment criteria of native title claims, making it clearer to understand what makes a native title claim 'legitimate' and what knowledge forms tend to be excluded from the realm of the possible. Through this we demonstrate how a sociological approach to the relation between different claims of knowledge can assist in understanding what happened in this unsuccessful case.

This paper has five sections. In the first we use some early sociology of knowledge ideas to frame who is involved in a native title hearing and how they are understood by the court. In the next we review the existing literature about Indigenous peoples in the native tile legal system. The third section extends Basil Bernstein's ideas and adds LCT to explore when and how knowledge is heard in the court. In the fourth section we explore how Indigenous knowledge is heard. Lastly, we analyse the reception of a squatter's diary in the Yorta Yorta case.

Setting the scene — who knows what?

At the time of its conception, native title within Australia was seen as a significant step forward for Indigenous peoples' rights and the broader reconciliation movement. However, as time progressed, the *Native Title Act 1993* (Cth) showed itself to be highly complex and controversial both for Indigenous peoples and the wider Australian community. One problem was the different understandings that Indigenous and non-Indigenous people have around land and their relationship to it. These different conceptions had long gone largely unspoken (particularly in regards to European approaches to land). Native title brought the differences to the fore. The debate around what it meant to be attached to land that arose in the early years of the *Native Title Act 1993* was undoubtedly productive, creating what Pearson (1997) refers to as a 'space between the two' logics — where new understandings might emerge. Yet the courtroom proceedings, through which the debate was enacted, often led to a failure in the recognition of the co-existence of Indigenous and non-Indigenous rights and knowledges.

Power — in particular, racialised power — is, of course, also a significant contributor to the processes and outcomes of native title cases. And much of the work on native title explores the power relations that are enacted between Indigenous and non-Indigenous peoples. This scholarship makes clear that power is not something that simply 'exists'; it is enacted and legitimated through interactions between people within given contexts. We stress, additionally, that knowledge has a significant impact on how all involved parties approach native title cases and

the credence given to particular knowledge claims effects the final decision made about the claim. Through a sociological deconstruction of the knowledge and claims to knowing put into practice in a hearing, it is possible to develop a new approach to understanding some of the mechanisms through which power is exerted and legitimised within native title claims.

In developing a model that maps the knowledge dynamics of the field of native title processes, a sociology of knowledge perspective is useful. Basil Bernstein (1990, 1996), a key theorist in this subdiscipline, argued that explorations of knowledge have often disregarded the impact of knowledge structures themselves in preference to a focus upon the power relations (e.g. class, race or gender) that were understood to have produce them (Maton 2010). Bernstein (1990) proposed that underlying or implicit 'rules' that guide the production, transmission and evaluation of knowledge practices are *just as significant* to sociological research as the influence of external power structures. He suggested that legitimate claims to knowledge are regulated by two types of rules (Bernstein 1995:135). The *classification* rules are associated with determining the legitimacy of who has a right to make a claim within a specific context and what that claim can be made about. The *framing* rules refer to the level of control that either the transmitter or acquirer can have over the acquisition of knowledge. Through explorations of rules such as these, Bernstein demonstrated that it was possible to come to an understanding of why some social groups perform better or worse within certain areas (Bernstein 1990).

In the hearing of native title cases over the past 20 years, a set of players has emerged and roles have been assigned and settled. Though the field of native title proceedings is never fixed, various forms of knowledge and ways of knowing are now routinely drawn on within the process of native title hearings. These include those crafted by the legislature (such as the native title acts), the judiciary who hear the cases, non-Indigenous respondents and the Indigenous claimants themselves. The power dynamics that inhere in postcolonial relations mean that particular forms of knowledge are legitimated and others are discounted. In many readings of the field this is understood in terms of a binary of non-Indigenous/Indigenous, with Western modes of knowing being privileged. In this reading Indigenous peoples are pitted against non-Indigenous peoples.

One of Bernstein's breakthroughs was his demonstration that knowledge practices are not limited to the obvious dyad (knower/learner), but must be extended to include 'all agencies of symbolic control' (Bernstein 1995:135). Taking this approach, the native title field can be understood a little differently and in a way that is not always binarised. Further, Bernstein's theoretical framework enables us to establish that interactions between the structuring of knowledge and external power relations have significant impacts for the success of actors within a given field or arena. Application of such a framework makes visible the hidden assessment criteria in any evaluation of a claim to legitimate knowledge. Such criteria may not be made equally clear to all participants within an arena of knowledge practice and may significantly disadvantage those without an understanding of what these are.

At the centre of the space are the *Native Title Act 1993*, the *Native Title Amendment Act 1998* (Cth) and the National Native Title Tribunal, which, unsurprisingly, are all structured in terms of the traditional Western legal system. This means that a knowledge of law and the Australian legal system, particularly the *Native Title Act 1993* and subsequent amendments, as well as a considerable awareness of international legal precedent and findings in regards to native title outside Australia, is critical to participation in the legal processes associated with native title claims (Gilbert 2007; Nettheim 2007). Classification rules mean that this knowledge is highly valued and easily understood as legitimate. It is also understood as specialist and insulated — requiring legal scholarship to use it. Participants have to be recognised as possessing such knowledge, via the court, in order to be part of the process, and today this type of knowing can be the domain of both Indigenous and non-Indigenous lawyers. Another set of legitimated knowers in the native title legal space, who acquire their legitimacy through classification rules, are experts. In the Yorta Yorta case, archaeologists, historians, anthropologists and linguists were called to support claims and counterclaims made about Indigenous knowledge. A professional genealogist was also a witness for

the respondents. The classification rules mean that this knowledge had a high degree of legitimacy but was not held in such high esteem as the legal knowledge.

Indigenous claimants are central to the native title legal field. Their knowledge is often presented to the court as a historical account of the practices of their ancestors in relation to tradition, law, custom and ways of life. Justice Olney is clear about this: 'Many witnesses also described what they understood to be the traditional laws and customs of their ancestors, information which was frequently said to have been derived from parents or grandparents, or simply "from the old people"' (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 22). Claimants must establish that these, or at least the spirit of these practices, have been maintained since first European contact and are still practised today. It is important to note that the courts have, and do, make allowances for changes and evolutions to occur within these practices (McNeil 2004). Even with this caveat in place, it is still necessary for Indigenous claimants to establish not only what these 'spiritual connections' were (in such a way that the court can understand them) (Povinelli 1998), but also to provide specific examples of how these connections are maintained in the present day.

Lastly, respondents play a part in native title claims. This is a more diverse group than the claimants. In the Yorta Yorta case, they included the state governments of New South Wales, Victoria and South Australia, shire or local councils, government bodies such as the Murray Darling Basin Commission, private groups such as a recreational users group, companies such as Telstra and irrigators, and the New South Wales Aboriginal Land Council. Just as it is too simple to argue that the space of native title law is about Indigenous peoples versus non-Indigenous peoples, the respondents are differently resourced and placed groups. As with most of the participants, they generally share and operationalise knowledge approaches informed by Western epistemologies to frame their arguments. For example, the New South Wales Aboriginal Land Council simply noted in the case that it 'submits that the transfer to and vesting of land in the Yota Yota [sic] Council was and remains valid and did not extinguish native title rights in the land' (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 10). However, in advancing their arguments, they frequently drew on the powerful language and conceptual repertoire of economics and private land ownership. So, for example, the Corrs Respondents — a mixed group of families and businesses — framed their claims partly in terms of their freehold title over the land.

Being heard in native title legal cases

The cast of players and their differing relations to various modes of knowing animate the field of native title. As noted earlier, the native title legal field enables new and often productive dialogues between Indigenous and non-Indigenous participants in the proceedings, as well as new conversations *within* these different communities, although it also reproduces some of the power differentials associated with colonialism. This 'space between' (Pearson 1997), basically brought into being by a dynamic process of domination, incorporation and resistance over time, reflects the ongoing disparity between Indigenous and non-Indigenous people in access to or understanding of the logics by which knowledge in a particular intellectual arena is constructed as legitimate. This section of the paper outlines the key ways in which Indigenous and non-Indigenous peoples are situated in the legal process of native title claims and the burden that Indigenous people bear as a result. These are the issues that make it hard for them to be heard.

One of the most difficult requirements made of Indigenous claimants is that of authenticity. Elizabeth Povinelli (1998:27, original emphasis) suggests, 'it would be hard to over-estimate the impossible demand placed on the indigenous subject before the law', as native title claimants are required to 'transport to the present ancient pre-national meanings and practices in *whatever* language and moral frameworks prevail *at the time of enunciation*'. Further, these claimants have to grapple with a system that privileges a mode of social identity understood as traditional. The definition of 'traditional' has also been widely criticised in commentaries of the native title process as a '"frozen rights" approach' (Gilbert 2007:598), particularly when 'traditional use' is deemed to

mean pre-colonial practices. This notion of 'traditional' implies, first, that 'traditional practices' can be understood in an unproblematic fashion, not recognising that the observations on which they are based were made by Europeans during early settlement. Second, 'traditional' implies that Indigenous practices have been static and have not have evolved throughout the centuries prior to colonisation, highlighting the Eurocentric notion that Indigenous practices are essentially crude, simple, unadaptable and, in many cases, uniform across continents (Gilbert 2007:600).

The burden of proof placed upon Indigenous native title claimants to establish their *ongoing* and *traditional* connection and use of land has been criticised by a number of scholars for a variety of reasons (Gilbert 2007; Jacobs 1988; Povinelli 1998; Ritter 2002). Ritter (2002) focuses on the use of continuity, claiming that it is simply a way in which systems of law can continue to appear 'just' in their consideration of native title but, at the same time, dismiss many claims. Golder (2004:46) extends this critique, arguing that the requirements of continuity and connection work to create an understanding of Indigenous peoples as objects to be known — 'timeless specimens of a primitive culture' who can be identified and studied through Western scientific methodologies. However, it needs to be noted that Indigenous peoples are not always 'pinned' or caught by this traditionality discourse; rather, they are figured as having lost their culture. Palmer and Groves (2000:35) discuss the case in which Indigenous people are seen by non-Indigenous people to have assimilated — 'become modernists'— and so are not really Indigenous anymore. They argue that Indigenous people can employ 'strategically' clever resistance to confront this prejudice (Palmer and Groves 2000:36). For example, an urbane Indigenous academic might demonstrate his or her Aboriginality — say by speaking language — confounding the settled ideas colonisers have about urban Aborigines (Palmer and Groves 2000:35).

Non-Indigenous participants in the native title hearings have at times used the discourse of a traditional or authentic belonging to explain their claims to the land. Non-Indigenous peoples have long appropriated language such as 'Dreaming' and 'country' to express their connection to the land. They also draw on notions of their own spiritual connection to suggest equivalence between their understandings of caring for or belonging to particular areas (Elder 2007:221–2). Such a deployment usually involves references to and evocations of land ownership as more than private property; of connections to the land as 'home' and of its inhabitants as carers committed to its preservation and continuity, including the human heritage created by the white families or companies that settled it over many generations. This type of argument is sometimes used to justify access to sacred spaces — such as parts of Uluru. Such an approach reflects a 'doubling technique' insofar as non-Indigenous people get to claim a legal belonging that emerged through the original claim of Crown land, plus a 'native'-esque sense of homeliness and connection the emerges from the co-option of Indigenous ideas.

Ellemor (2003) has demonstrated how this approach was used in the Yorta Yorta case. She argues that in an attempt to mask 'the different cultural framings of indigenous and non-indigenous attachments to place' (Ellemor 2003:246), non-Indigenous respondents to native title claims draw on modified Indigenous understandings of attachments and relations to space. The result can sometimes be that Indigenous peoples' claims can appear to be 'something similar to, if not copied from, the dominant (white) culture' (Ellemor 2003:246). This means Indigenous conceptions of belonging are, at best, presented as something not solely belonging to Indigenous peoples, or, at worst, inauthentic attempts to present 'Aboriginality'. Ellemor argues that by presenting their own relations to the land in question, often explicitly likening their own with 'Aboriginal' relations, non-Indigenous respondents with '"white-skin" seemed to want to be understood as in some way having "black hearts"' (Ellemor 2003:244).

The different modes of sharing/producing knowledge in Indigenous communities add to the burden incurred by Indigenous participants in the native title hearings and can undermine the legitimacy of their claims. The rules according to which Indigenous knowledge can be, and are, shared (for example, the gender of the audience) present significant challenges for the courts (Walsh 2008). Tendencies for Indigenous witnesses to prefer to

give evidence in groups not only require unorthodox witness statement collection processes, but also may result in less authority being afforded to these statements (Walsh 2008, referencing Ritter and Flanagan 2001). The oral tradition of transmission of knowledge between Indigenous individuals and generations has also caused multiple issues not only in relation to the perceived reliability of such knowledge, but also to its authenticity. Indigenous witnesses who have accessed their ancestors' knowledge through written texts can have their evidence set aside on the basis that their knowledge is second-hand and so potentially 'tainted' (Walsh 2008:250).

An additional challenge for Indigenous people is establishing the legitimacy of their claims to knowledge in the face of the legitimacy of expert, non-Indigenous knowledge about Indigenous people. For example, in an analysis of the interpretations of anthropological work submitted in the case of *Johnny Jango & Ors v Northern Territory of Australia & Ors* [2006], Dousset and Glaskin (2007:144) found that non-Indigenous decision makers within the court system were driven by views that were 'determined by expectations about "traditional" culture far removed from the social reality of that culture'. Although Indigenous oral testimony is accepted as a source of evidence, it is often placed as subordinate to European written records.

Michael Walsh (2008:261) has argued that Indigenous witnesses within native title claims face a Catch-22 situation; they wish to present their evidence articulately within the courts in order to share their knowledge most effectively, but at the same time fear that being 'too articulate' will appear to the court as though they are not 'traditional' enough. Language barriers also present significant problems for the transmission of knowledge within native title claims; partly this may be due to the fact that for many witnesses, English is their second language, but even when this is not the case, socio-linguistic variations such as those discussed by Walsh (2008) (including tendencies to use indefinite expressions, reliance upon narrative communication and even normative periods of silence) can pose significant problems for perceptions of witness reliability.

Legitimating knowledge

The above analyses of native title provide an in-depth understanding of how power relations work in the hearings. Building on Bernstein's work and now introducing LCT, we add a way of exploring how individuals can (and do) shape their claims to legitimate knowledge and knowing within a pre-established yet constantly contested field. LCT theorists contend that the behaviours of individuals signify 'competing claims' about the legitimacy of their knowledge. These behaviours are adopted in order to try to establish one approach as the 'dominant basis of achievement within a social field of practice' (Maton 2009:45). Maton (2007) argues that within any field — and here we are thinking of native title — there is an *epistemic device* that works as the mechanism through which particular claims to knowledge are constructed as legitimate. This becomes highly significant in regards to the interaction between knowledge and external power structures, because 'whoever controls the epistemic device possesses the means to set the shape of a field in their favour, making what characterizes their own practices…the basis of status and achievement in the field' (Maton 2007:10). In the Yorta Yorta claim, Justice Olney, the presiding judge, is the player who controls the epistemic device. What this means is that he can to some degree determine what can be claimed and how something can be claimed to be legitimate knowledge within his court.

In any field there will be explicit and implicit forms of knowledge. The *Native Title Amendment Act 1998* is one of the key explicit statements of the 'rules' of native title. In Bernstein's language, it reflects strong framing — it is highly directive and sets out the procedures for speech and action. Justice Olney, as the presiding judge, can set more implicit rules by which knowledge claims are judged to be more or less legitimate within this field. Implicit rules are those that are rarely identified or explained, but may greatly influence the result of any claim. An example of this might be Justice Olney's legal attitude to lost knowledge. In a now infamous metaphorical declaration, he argued that some aspects of Indigenous knowledge had been erased: 'The tide of history has indeed washed away any real acknowledgment

of their traditional laws and any real observance of their traditional customs' (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 129). In another instance, Justice Olney used a completely different type of language and response to 'lost' knowledge. In this case, state land records had been burned in a fire and so were unable to be produced. Yet the implicit rules of Justice Olney led him to conclude that the piecing together of lost knowledge from other sources was sufficient. He noted, 'I accept as credible the expressions of opinion of witnesses familiar with the relevant processes relating to dealings in land in circumstances where documentation is not available' (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 23). An implicit rule was deployed here that privileged written over oral knowledge.

Extending the model, it needs to be added that LCT is based upon the assumption that whenever an individual makes any claim to knowledge within a field, it is based disproportionately upon two factors. The first is the procedures, skills and techniques they used to 'find' knowledge (the *epistemic relation*); the second is about the individual who is claiming the knowledge (the *social relation*) (Maton 2000b:85). Any individual always has these two relations to knowledge, but they obviously change depending on the person and the context. An instance where there is a relatively strong emphasis upon the epistemic relation coupled with a relatively weak emphasis upon the social relation is called *a knowledge code*. Within a knowledge code, a much stronger emphasis is placed upon the specific object of study and the specialised procedures and tools that are used to 'know' it (Maton 2000a:86). The objects of study within native title claims are varied, ranging from the *Native Title Amendment Act 1998* to the historical and contemporary culture and spirituality of the Indigenous group(s) making a specific claim, and the knowledge code can be applied to all of them. Both barristers and solicitors, whether they are non-Indigenous or Indigenous, are situated almost entirely within this code. Their social characteristics are downplayed in comparison to their knowledge of relevant legal codes and the collation and presentation of specific forms of evidence to support their claims. Similarly, in the Yorta Yorta case the respondents were represented by firms of lawyers. Groups as diverse as the 'Recreational Users' or 'Other Sheed Respondents' did not present themselves in terms of their status as golf or boat enthusiasts or local council member but through the more highly esteemed knowledge code of the legal practitioners.

In addition to the knowledge code, the LCT approach also draws on the concept of the *knower code*. In this relation the epistemic relation is less significant than the social relation. Individuals adopting a knower code will rely upon their status as knowers, rather than specialised procedures or techniques, to legitimate claims to knowledge. Applying this model to the native title field, it becomes possible to see the relationship of the different players to each other and the credence that might be given to the knowledge they impart in the hearings.

The traditional way of understanding what happens in a native title hearing is that epistemic relations and knowledge codes are associated with the court and respondents, and social relations and knower codes are associated with the claimants. This is most obvious in the requirement that one must be a demonstrably Indigenous person (or peoples) to make a native title claim. However, not all Indigenous people in the field position themselves through this relation. As a respondent, the New South Wales Aboriginal Land Council did not draw on this mode of knowing, but that of the knowledge code. Further, non-Indigenous peoples can draw on the social relation. What is interesting is that within the logic of native title and the law, this has been understood as a more difficult place from which to be heard. To return to Ellemor's (2003:244) discussion of the Yorta Yorta claim, where she suggested that non-Indigenous respondents had presented themselves as having white skin but 'black hearts', when respondents did this, they sought to deepen the credence of their claim through social relations. When these non-Indigenous people claimed a special relationship to the land, they took on a form of knowledge usually drawn on by Indigenous people. For a non-Indigenous respondent, this meant claiming that in owning the land, you also consider it as your 'country'. We argue that the non-Indigenous claimants did so in order to legitimise their positions as the 'right' sort of

knowers. There was a new form of legitimacy that they could access by switching between a knowledge code and knower code. As set out above, this switching is not always so useful for Indigenous claimants.

As the example above suggests, different forms of knowledge have legitimacy in different moments in native title hearings and so code clashes can occur. A code clash is the situation where a dominant code is met by another code. It emerges because, as discussed earlier, not all codes are made explicit. There will inevitably be participants who do not realise this and who struggle on with the publicly acknowledged code (Lamont and Maton 2010:67). One example of this may be the different attitudes to Indigenous people having learned about or deepened their knowledge about their culture by reading academic texts. A witness may understand that academic knowledge is generally esteemed by the court and so presume that their engagement with it would be understood as legitimating their already significant knowledge claim. However, as Palmer and Groves (2000) note, in some cases the unacknowledged expectation of Indigenous witnesses is that they draw on social relations and knower codes.

The discussions that have emerged about the efficacy or reliability of Indigenous witnesses can be understood in terms of code clashes. Indigenous witnesses are able to get some traction in native title cases through the power attached to their status as legitimate 'knowers' of their own culture, law and spirituality that draws on social relations and knower codes. Justice Olney makes this point: 'The oral evidence of many of the applicants' witnesses was in some respects both credible and compelling. This was particularly so with the more senior members of the applicant group' (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 21). Further, there is slowly increasing credence attached to 'Indigenous knowledge' as an epistemology and so reflecting an epistemic relation. However, code clashes often occur because there is a superficial commitment in native title tribunals to the legitimacy of Indigenous knowers, especially those who are understood as traditional — an example of the operation of the social relation in knowledge practice. Yet the techniques they draw on to demonstrate their knowledge (shared answers, conditional responses) are under valued (Walsh 2008, referencing Ritter and Flanagan 2001).

Sometimes what unsettles a case, or witnesses in a case, is a code shift. In the Yorta Yorta case a code shift was noticeable in Justice Olney's response to the younger Indigenous witnesses. Though he praised the evidence of some of the senior members of the Yorta Yorta community, he said of the younger ones:

> The testimony of some of the younger members of the claimant group was less impressive than their senior colleagues. Evidence based upon oral tradition passed down from generation to generation does not gain in strength or credit through embellishment by the recipients of the tradition and for this reason much of the testimony of several of the more articulate younger witnesses has not assisted the applicants' case. (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 23)

The articulate nature of these members of the community — something that is usually valued in a courtroom — was pejoratively conflated with 'embellishment' and this was seen as weakening the evidence they presented rather than being part of the knowledge practice in these social relations.

As the native title field has developed, it has required the deployment of different codes in new contexts. The differing expectations placed upon different types of participants with native title claims (such as testimony from 'experts', Indigenous claimants and special interest groups) require that legal representatives must be able to recognise the demands placed upon their different witnesses, or the 'shifts' in the applicable codes. Moreover, they must also be able to train individuals within these groups to present their evidence in the ways best received by those who will make the judgment. This requires recognition of a clash or a shift, and the ability to acquire the new code and implement its techniques (Lamont and Maton 2010:67). Although lawyers working within native title claims may have developed this ability, not all participants (i.e. those not as well acquainted with the legal system and its processes) are equally placed to recognise and respond to these often-subtle changes.

Legitimating Indigenous knowledge

As has been demonstrated above, the LCT model enables an analysis of the Yorta Yorta case in terms of who has access to the right type of knowledge. However, it does not explicitly develop a way to interpret the agency deployed by different knowers in the face of clashes and shifts that disadvantage them. To this end we now draw on Homi Bhabha and his notion of mimicry. In doing so we acknowledge that in native title claims there is a radical departure from the contexts explored by LCT practitioners such as Maton (2000a, 2000b) and Bernstein (1990). Native title claims are affected by the complex socio-historical issues of colonisation, racial discrimination and domination that are often featured in Indigenous/non-Indigenous relations within Australia. However, this — entwined with the fact that within native title two different systems of knowledge (Indigenous and Western) have developed and evolved separately across tens of thousands of years — means that additional work needs to be done to understand the effects of these different clashes.

Homi Bhabha's (1984) ideas help develop an understanding of Indigenous native title claimants as aware, strategising agents within the field. So, though they may appear at times to be behind in the game in terms of code clashes and code changes, it is also possible to argue that they are enacting a different way of interacting with other knowers — especially colonial modes of knowledge. Bhabha (1984) argued that Indigenous people were not simply passive recipients of colonisation but engaged in complex relations to resist the structures of domination that were set between themselves and the coloniser. Mimicry, according to Bhabha (1984:86), is 'the sign of a double articulation: a complex strategy of reform, regulation and discipline, which "appropriates" the Other as it visualizes power'. Mimicry involves the adoption and, most importantly, the interpretation of the culture — practices and habits — of the coloniser by the colonised. However, this results in an unsettling experience for the colonisers as they are relegated to positions of objects and otherness (Bhabha 1984). It is possible to read Justice Olney's discomfort with the 'articulate' younger witnesses in these terms. The threat of mimicry lies within 'its double vision, which in disclosing the ambivalence of colonial discourse also disrupts its authority' (Bhabha 1984:88). It is possible to interpret Section 17 of his judgment, where Justice Olney writes (*Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at 17) —

> the Court will have regard only to evidence that is relevant, probative and cogent. In particular, pure speculation, of which there has been much, must be disregarded. Nor is there any warrant within the *Native Title Act 1912* for the Court to play the role of social engineer, righting the wrongs of past centuries and dispensing justice according to contemporary notions of political correctness rather than according to law

— as Justice Olney reasserting his authority over the types of knowledge that he would 'hear'.

The modes of engagement used by some witnesses — group statements, 'non-linear' responses and so on — can be read not as a failure to understand the rules but as a refusal to play by the rules. This may be seen as something more than a cultural misunderstanding. It can also be read as a challenge to the dominance of non-Indigenous epistemologies. That Justice Olney had to repeatedly and explicitly claim the legitimacy of Western written knowledge over oral history suggests an acknowledgment of the (albeit unsuccessful) challenge that Indigenous ways of knowing presented in the Yorta Yorta claim. It suggests that within the field Indigenous knowledge often makes sense and so has to be marginalised or put back into its place through the production of new rules.

From this perspective, the situation of native title claims can be understood as one where Indigenous people are aware not only of themselves and their own culture, history and spirituality, but also of the demands and expectations of the court system. The younger witnesses in this case might have been adopting these types of techniques. They might have expected their articulate responses to be better received and perhaps, when they were not, their use of 'outbursts of…righteous indignation' may not have been a cry for the court to 'dispens[e] justice according to contemporary notions of political correctness' (*Members*

of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606 at 23) but a response to a code clash and shift. The outburst might have been a response that said 'if the court does not recognise me and my knowledge, then perhaps it will hear this other sort of knowledge'.

Reading Edward Curr's recollections

The last section of this paper applies LCT and the Bhabha insights to the widely discussed and debated analyses of the use of Edward Curr's (1883) book in the Yorta Yorta case. We further demonstrate the efficacy of this postcolonial knowledge model. *Recollections of squatting in Victoria, then called the Port Phillip District (from 1841 to 1851)* is a text penned by a squatter who in the mid-nineteenth century occupied the land claimed in the Yorta Yorta native title case. Although much of the research undertaken on the role of *Recollections of squatting* have highlighted Justice Olney's preference for Eurocentric historiography and historical materials (see Curthoys 2008; Furphy 2010; Golder 2004; Kerruish and Perrin 1999 for some examples), it is possible to read this preference in terms beyond a clash between Indigenous and Western knowledge and historiographical practices.

When a native title claim such as the Yorta Yorta case is considered within its context as a claim to legitimate knowledge over the culture, spirituality, law and history of a group of Indigenous people, it becomes clear that a sociological approach to the relation between these claims of knowledge can assist in our understanding of the final decision. This becomes particularly salient when considering cases in which establishing the continuity of a particular Indigenous community becomes central to a claim, as occurred in the Yorta Yorta case. *Recollections of squatting* was one of a series of conflicting knowledge claims made about Bangerang culture during the hearing. Justice Olney establishes, and then defends his conclusion, that the Curr text will be understood as very reliable (*Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [2002] HCA 58). What is happening when he does this is that the specific 'rules of the game' — that is, which claims will have credence and on what basis — are being established. When he makes the explicit statement that *Recollections of squatting* fits 'the types of historical evidence that courts are familiar with', that are afforded more weight or legitimacy in his judgment, and that these 'largely consist of historical documents' (as cited in Kerruish and Perrin 1999:5), Justice Olney is establishing the implicit rules of the game. Edward Curr's (non-academic) writing was taken to be a pure 'record of his own observations' (Olney J as cited in Kerruish and Perrin 1999:4), akin to a primary source of the time. This claim was made even though the book was written several decades after Curr's time in Victoria (Furphy 2010). Although Curr's work may have been based largely on memory, and also proffered a culturally biased interpretation for the entertainment of the colonial reader, this is not the way in which it is understood by Justice Olney (Furphy 2010). The accuracy of Justice Olney's assumptions of the veracity of the Curr writings is not the key issue here. What is important is that he establishes that within his court the *epistemic relation* rules. Curr's work is viewed as having greater legitimacy than the oral testimony of the Yorta Yorta claimants. Their knowledge claims emerging from social relations are argued to be purely 'observations' of the object of study in question — the Bangerang people.

At another moment in the hearing Justice Olney dismisses the expert evidence of anthropologists in support of the claim of the Yorta Yorta peoples. Justice Olney chooses to disregard this knowledge (which emerges from epistemic relations of the academy) on the basis of potential 'partisanship'. The logic he employs is that the scholarly experts have become too involved on a personal or social level, therefore their knowledge and status as experts is discredited and de-legitimated. Justice Olney is imagining a social relation between the experts and the Indigenous claimants, one that he understands as having been built through prolonged engagement with the Yorta Yorta people. As a result their expert claims are diminished — they are not seen as drawing on the legitimated epistemic relations. In another context the knowledge of these anthropologists could be interpreted differently, but Justice Olney is setting the terms here. This reading of the expert testimony as being 'tainted' and the subsequent dismissal of their claims in favour of Edward Curr's writing shows that, within this

particular claim, Justice Olney placed far more value on claims that he saw to be reliant upon the epistemic relation and discounted those that he believed were based too much upon a social relation. This emphasis upon the epistemic relation, over the social relation, suggests that within the context of Justice Olney's courtroom it was the knowledge code that reigned supreme.

When one considers Justice Olney's assessment of the oral evidence provided to support the Yorta Yorta people, it also becomes clear how little worth is attributed to knowledge claims viewed to be based largely upon the *social relation*, embodying a *knower code*. As noted earlier, Justice Olney explicitly states that, as oral history, this knowledge loses its 'strength or credit through embellishment by the recipients of the tradition' as it is passed through generations of individuals (as cited in Kerruish and Perrin 1999:5). Justice Olney's relation to the epistemic device means that he can draw on an implicit code: oral testimony is less credible within the court system as it is viewed to be highly influenced by the whims of the individuals telling it. As a result, in this legal process Indigenous people are situated (to their detriment) as particular types of 'knowers', ones that can be discounted due to their position within the field. By way of contrast, Curr is elevated beyond his 'historical and biographical context' (Furphy 2010:15) to have his 'records' placed within the realms of the epistemic relation. It is extremely likely that only through his status as a white male was Curr able to be lifted beyond his 'social' context to be seen as a 'reliable' provider of factual evidence. Justice Olney's statements also make it clear that relying upon one's social background to establish one's position as a knower is a risk to credibility within knowledge claims.

Conclusion

Native title is a process within which longstanding racial and colonial relations of power are played out. Stereotypical assumptions of what Indigenous culture, spirituality and law 'should' be (Furphy 2010; McNeil 2004; Povinelli 1998), as well as further assumptions of the superiority of European knowledge systems and evidence (Golder 2004), provide some clear evidence that this is true. However, in this paper we have demonstrated that knowledge structures and legitimacy are equally as influential in the final outcomes of native title claims. Drawing upon the work of Bernstein (1990), Legitimation Code Theory (Maton 2000a) and Bhabha (1984), we have argued that it is possible to decode the ways in which Indigenous voices and knowledge gain or lose legitimacy within this field.

This approach provides a new lens through which we can better understand how such relations work. Through applying such an approach, we are not only able to understand the 'rules' of native title court processes, but also Indigenous claimants (and other members in this context) as self-aware, strategic agents who are working within a context that places very specific demands and burdens of proof upon them. By building a better understanding of the knowledges drawn on by different actors within native title claims, it becomes possible to see how knowledge sharing and transference may be hindered between groups.

Drawing on the Yorta Yorta example, we have begun to demonstrate how and where the sub-discipline of the sociology of knowledge can expand our understanding of the processes of native title claims. It is an area that must be explored far more thoroughly in order to fully grasp the usefulness of this approach to understanding the conflicts that have already been well documented and discussed. Our main purpose in undertaking the analysis presented in this paper has been to explore a framework or approach to the study of knowledge that may disclose the hidden assessment criteria that exist within native title claims and make them transparent to all parties. By doing so, it is anticipated that we can develop an approach to native title claims processes that contributes to 'levelling the playing field' for all those involved.

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