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Indigenous Religion in Secular Australia

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Research Paper
No. 11 1999–2000

Indigenous Religion in Secular Australia

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Major Issues

In recent decades, Australian law has evolved various mechanisms for recognising aspects of Indigenous tradition which relate to the preservation of cultural heritage, the establishment of land claims and the recognition of Native Title. This paper deals with attempts to accommodate those aspects of Indigenous tradition which are variously referred to as 'spiritual' or 'sacred'.

Part One argues that **Australian law is characterised by a deep-seated secularism**. This secularism derives both from theoretical commitment and cultural predisposition.

A system marked by such secularism, the paper suggests, is likely to have significant difficulty recognising Indigenous rights which are claimed on the basis of connections to land and tradition which their proponents see as 'spiritual' or 'sacred'.

Australian secularism's most formal expression is in s. 116 of the Constitution, which prevents the Commonwealth establishing any religion, preventing the free exercise of any religion or imposing any religious test for office. **The Constitution makes no provision for the protection of minority religions or active encouragement of toleration**; and in the few cases in which the High Court has discussed s. 116, the interpretation has generally inclined towards protecting majority interests at the expense of minorities.

The paper suggests that there are at least four ways in which a deeply secularised culture, with little to sensitise it to the needs of religious minorities, is likely to react to Indigenous communities' religiously-based claims. It may:

- **ignore** the religious elements of a tradition, subsuming them under a category such as 'culture' or 'custom'
- **cherish** unfamiliar religious forms for their perceived strangeness
- **decry** unfamiliar religious forms for their perceived irrationality
- **interpret** unfamiliar religious forms through the framework of possibly inappropriate familiar forms.

Regardless of the response, a further feature of a highly secularised society is likely to be **unease and imprecision in the use of terms which refer to the religious elements of a tradition**. The tendency in both legislation and commentary referring to Indigenous

heritage has been to use the terms 'the spiritual' (or, occasionally, 'spirituality'), 'the sacred', 'custom', 'culture' and 'tradition' somewhat interchangeably. Such imprecision goes hand in hand with a reluctance to define 'spiritual' or 'sacred'. Yet the meanings which are implicitly ascribed to these concepts may have substantial consequences for the ways in which claims are resolved. In particular, the common usage of 'spiritual' inappropriately implies, for Anglo-Australian readers, a realm opposed to, and superior to, the 'material'.

In Part Two of the paper, case studies illustrate how, with respect to heritage protection:

- ignoring the specifically religious elements of a tradition may mean the tradition is seriously misrepresented
- emphasising the apparent strangeness of an unfamiliar tradition may foster an attitude of voyeurism on the part of the dominant culture
- criticising the apparent irrationality of an unfamiliar tradition judges religious content on criteria alien to the nature of religion
- interpreting the unfamiliar by means of the familiar may disadvantage members of a religious community because of their tradition's failure to match an assumed frame of reference.

The paper suggests that resolving controversies of the kind which have arisen particularly under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* requires a better understanding on the part of the Australian legal and political system of specifically religious elements of Indigenous tradition. In addition, the Australian legal and political system needs to develop a better understanding of the assumptions which underpin its own secularism. The comparative study of religion offers resources which could cast fresh light on the problems reviewed here.

Part One: Religion, secularism and the state in Australia

Religious freedom in Australia

Commonwealth

Section 116 of the Constitution provides that:

the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.¹

One of the proposals put to the people in the failed 1988 Referendum was to extend these prohibitions to the States and Territories.

Section 116 offers only a 'negative' protection against state interference—it states what a government cannot do. At various times it has been suggested that more comprehensive protection might come from extensions of the meaning of Section 116. However, the High Court has not proved eager to extend interpretations of Section 116 in this way. Writing in the wake of the *State Aid* case, Michael Hogan surveys the three cases in which, by that time, the High Court had closely considered Section 116.² He concludes that:

All the indications are that Section 116 imposes scarcely any restraint on a determined Commonwealth government and offers virtually no guarantee of religious freedom or equality to the churches.³

Hogan goes on:

Religious freedom has value in the Commonwealth Constitution only in so far as the practice of such freedom does not offend against the accustomed community rights of other Australians. That this is the exact opposite of what could be expected from a provision guaranteeing religious freedom against the 'tyranny of the majority' has not concerned the High Court.⁴

Stephen McLeish considers the same three cases, plus one subsequent case⁵, to argue that interpretation of Section 116 needs to be made more 'coherent', in particular by developing a reading which pays greater attention to human rights rather than just to limiting legislative power.⁶

At various times, there have been suggestions that the negative protections in the Constitution should be supplemented by legislation for greater positive protection such as active encouragement of toleration or explicit protection of religious minorities from

discrimination or disadvantage. In 1998, the Human Rights and Equal Opportunity Commission issued a report comparing current Australian protection of religious freedom with Article 18 of the International Covenant of Civil and Political Rights.⁷ It recommends, inter alia, a federal Religious Freedom Act to protect freedom of 'religion and belief'.

States

Victoria, Queensland, Northern Territory, ACT and Western Australia have ordinary statutes prohibiting discrimination on the basis of religion. Tasmania's Constitution prohibits religious discrimination and protects religious freedom, but this does not appear to have been the subject of judicial decision. In *Grace Bible Church v Reedman*⁸ the Supreme Court of South Australia found no protection from curtailment of religious freedom by South Australia's parliament or government.

Where there is a strong association between religion and ethnic identity, religious discrimination or vilification may be associated with racial discrimination or vilification. Some State racial discrimination and racial vilification laws explicitly cover discrimination against or vilification of people on the basis of religion where there is likely to be an association between religion and ethnicity. This protection may provide no recourse for people whose religious adherence is not associated with ethnicity.

Australian Secularism

A secular culture

Sociologists of religion sometimes distinguish *secularisation* from *secularism*. Particularly since the work of Max Weber, *secularisation* today refers to the general cultural trend in which religious institutions and persons lose their social clout, while the world becomes increasingly rationalised and, in Weber's evocative word, 'disenchanted'.⁹ In a society marked by secularisation, once strong religious institutions lose their public influence, attendance at religious ceremonies drops, religious symbols lose their efficacy and are recognised by fewer and fewer of the society's members. Religious specialists (such as clergy) lose their public standing or retain it only as a quaint vestige. These are all features of Australia's recent history, so much so that Australia is sometimes said to be 'the world's most secular society'.¹⁰

Secularism has two meanings which both contrast with this meaning of *secularisation*. *Secularism* may refer to a world-view which stands in opposition to a religious or spiritual orientation. In political theory, it refers to the principle of separating the institutions of

politics from the institutions of religion. The latter sense is particularly relevant to a discussion of how the law deals with religious tradition. Secularism in this sense has been conventionally interpreted as meaning that mechanisms of the state must stand aloof from religious debates or support for particular religious traditions. For example, the state would not levy church taxes, give financial support to religious specialists, or erect religious qualifications for access to such areas as university entry or public office. The Australian expression of this convention is found in Section 116 of the Constitution (discussed below).

South Australia's origins as a colonial 'Paradise of Dissent'¹¹ reflect its planners' embrace of the secular ideal. More generally, however, Australian secularism owes less to theory than to culture. It emerges in our foundation myths of frontier self-reliance and working-class larrikinism and in our modern self-image of cosmopolitan hedonism. Where other nations have often developed secular constitutions while retaining vibrantly religious cultures,¹² Australian cultural *secularisation* was arguably well-advanced before Federation opened the agenda in which the issue of constitutional *secularism* became relevant.

Consequently, Australia faces a distinctive set of problems in realising the concept of a secular state. The absence of much public discourse about religion means that the society may have only limited conceptual resources for addressing dilemmas about the proper relation between state and religion. The lack is felt regardless of which religious tradition is concerned.¹³ However, for certain kinds of religious traditions, the dilemmas may be particularly acute. The case studies which form Part Two of this paper illustrate four dimensions of the encounter between secular state and Indigenous religion.¹⁴

Discussing religion in the secular public square

The highly secularised cultural context in which Australian debate about religion takes place can have various consequences. One is that the religious elements in a tradition are simply ignored, subsumed under some other heading such as 'culture' or 'custom'. In Part Two of this paper, the *Mabo* case is examined as a case study of this tendency.

An alternative consequence is that citizens of a highly secular society may come to see religion generally as exotic, irrational or eccentric. Encountering an unfamiliar tradition, people may tend to look for elements which seem to fit those descriptions. Having found them, people may cherish them (as exotic) or decry them (as irrational). The former tendency is sometimes said to be a condition for successful landrights and heritage protection negotiations. Part Two of the paper explores the Alice Springs dam decision as a case study. The latter tendency is suggested by some of the deliberations of South Australia's Hindmarsh Island Royal Commission, which forms the third case study.

A further possible consequence is that, grasping for ways to understand the unfamiliar, people may impose on all religion frames of reference which are really specific to some kinds of religion. Even in a secularised society such as Australia, a significant proportion of the population has residual connections to the religion of their forebears. In Australia, although its symbols may be losing potency, Christianity remains the dominant tradition. Its continuing influence is felt, for example, in public holidays marking its major festivals. Although increasing numbers of Australians do not identify with any of its denominations,¹⁵ yet when Australians think about religion at all, Christian traditions are the ones most likely to form the first reference points for the vast majority. So, when thinking about Indigenous religion, there may be a tendency to impose Christian frames of reference.

Ronald Berndt points out that 'Most of us have ideas about what constitutes religion, or *a* religion'. Faced with a confusing mass of information about unfamiliar traditions, 'we might take the line of least resistance and read into what we hear about Aboriginal religion what we already know about our own or others'.¹⁶ Taking Berndt's argument further, in a highly secular society even 'what we already know about our own' religion is likely to be residual rather than the result of active involvement. In these circumstances, a Christian framework may be imposed largely unconsciously. This, the final case study suggests, is what happened in Justice Jane Mathews's inquiry into the traditions surrounding Hindmarsh Island.

Religious and civil interests—a classic liberal distinction

Ideas of the separation between state and religion in Western political theory can be traced to the aftermath of religious conflicts in Reformation Europe.¹⁷ According to the mainstream of liberal political theory, religion is a matter for private deliberation. The state, by contrast, is concerned with material arrangements. In John Locke's classical expression:

The commonwealth seems to me to be a society of men constituted ... for the procuring, preserving, and advancing their own civil interests. Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.¹⁸

Free practice of religion must entail 'no injury to any man, either in life or estate'.¹⁹

Later liberals have agreed:

What, then, is the primary meaning of religious liberty? Externally, I take it to include the liberties of thought and expression, and to add to these the right of worship in any form which does not inflict injury on others or involve a breach of public order ...

It is open to a man to preach the principles of Torquemada or the religion of Mahomet. It is not open to men to practise such of their precepts as would violate the rights of others or cause a breach of the peace. Expression is free, and worship is free as far as it is the expression of personal devotion. So far as they infringe the freedom, or, more generally, the rights of others, the practices inculcated by a religion cannot enjoy unqualified freedom.²⁰

Importantly, the separation of 'religious' and 'civil' interests rests on assigning religion firmly to the realm of private belief. Locke builds his case on fear of religious persecution. When there is a risk that some will 'persecute, torment, destroy and kill other men upon pretence of religion',²¹ the most pressing need is to persuade them not to; and the most urgent step is to remove the means of force from the hands of those in ecclesial authority. Locke therefore opens the *Letter Concerning Toleration* with the case that 'I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other'.²²

'Religious' and 'civil' interests in Indigenous traditions

Early missionary and anthropological observers often dismissed Indigenous religion as superstition. Emile Durkheim built his monumental 1911 study of religion on the conviction that 'the crude cults of the Australian tribes'²³ represented 'the most primitive and simple religion which is actually known'.²⁴ Subsequent non-Indigenous commentators proved remarkably reluctant to recognise Australian Indigenous tradition as bona-fide religion. As late as 1976, W. E. H. Stanner felt obliged to open a public lecture on Aboriginal religion by countering the long-standing belief that there was no such thing.²⁵ Few would need Stanner's caution today; but discussions of Indigenous tradition often retain a tendency to avoid the term 'religion' in favour of 'the sacred' or 'the spiritual' or, more generally, 'custom'.²⁶

Both law and commentary relating to Indigenous traditions tend to use terms like 'spiritual' and 'sacred' without definition. This can lead to serious confusion. In conventional English usage, these terms imply sharp distinctions: body is opposed to soul, the material is opposed to the sacred, matter wars against spirit. Moreover, the second term in each pair is superior. Religious leaders and popular philosophers decry 'materialism', urging a return, instead, to 'spiritual' values.

By contrast, Indigenous traditions see matter as infused with spirit. Neither the land nor its inhabitants can be slotted into a dichotomy between matter and spirit. Deborah Bird Rose

cautions, 'Were I able to find a better term, I would avoid 'spirit' altogether, but as it is, I must state emphatically that spirit is immanent in body and even death does not wholly disrupt this immediacy'.²⁷ Nor do 'matter' and 'spirit' divide clearly into 'bad' and 'good'. The 'spiritual', like the 'material', may include both good and bad.²⁸

The interpenetration of 'material' and 'spiritual' in Indigenous traditions confounds liberal philosophy's differentiation between religious and civil interests. Indigenous traditions are likely to see much less distinction between religious and other dimensions of existence. Ritual practice and spiritual traditions help to define and produce economic and social relations, for example. As Berndt notes:

Traditional Aboriginal societies were examples of what have been called sacred societies. That is to say, religion was all-pervasive ... Aboriginal religion in its mytho-ritual expression was intimately associated with everyday social living, with relations between the sexes, with the natural environment, and with food collecting and hunting.²⁹

To borrow Locke's terms, 'life, liberty, health, ... and the possession of outward things such as ... lands' for Indigenous communities are intimately related to what is variously called 'the spiritual' or 'the sacred'. The health and even survival of individuals and communities may depend, in part, on preservation of sites or objects of spiritual significance. Liberty, too, may have a 'spiritual' dimension: as the Royal Commission into Aboriginal Deaths in Custody has found, disruption to a person's pattern of spiritual obligations and separation from their land may be among the most debilitating effects of imprisonment. Land rights law accepts that Indigenous people's 'possession of outward things such as lands' is explained in terms of the claimants' relationship to the relevant Dreamings.

A secular legal and political system like Australia's, assuming the liberal distinction between 'civil interests' and religious belief, may encounter difficulties in dealing with traditions where that distinction does not readily apply.

One difficulty arises because 'spiritual', in non-Indigenous usage, is often held to be the opposite of 'material'. Consequently, its use can imply to non-Indigenous ears that those things designated 'spiritual' have no relationship to material concerns. But this distinction, characteristic of systems born of a liberal political lineage, is alien to Indigenous tradition. A second ramification is that the use of the terms 'spiritual', 'sacred', 'tradition' or 'custom' to the exclusion of 'religion' may obscure the nature of the matter being discussed. Failure to recognise something as religious may mean that it is interpreted in ways which are inappropriate to its nature. The following case studies explore various ways in which such conceptions can be played out.

Part Two: Case studies

'Not a religious or spiritual relationship'—Mabo v. Queensland

The High Court's 1992 Mabo decision³⁰ gave a new level of formal recognition to the relationship between Australia's Indigenous peoples and their land. It established that the Australian legal system can recognise Indigenous law relating to land ownership. Further, it established that native title persists where that law is maintained through a continuing tradition and where there has been no explicit extinguishment of native title. Consequently, demonstrating continuity of tradition is a crucial issue for claimants. As discussed in the previous section, one significant element of land ownership is the religious traditions which explain relationships between people and particular sites or regions. Claims to land are likely to be expressed in terms of stories about the ancestral creative beings. Given the interpenetration of religious, economic and social life, native title procedures might be seen as giving increased recognition to Indigenous religion. Native title claims may be strengthened by evidence of continuing religious practice. Their failure may be attributed in part—as in the Yorta Yorta claim—to its disruption. Moreover, non-Indigenous people with interest in native title negotiations, whether directly as involved parties or as observers, have found themselves needing to learn about the traditions which confer land ownership. Given the stakes, Mabo arguably created a climate in which some of the non-Indigenous dismissal of Indigenous religion which has characterised relations into the late twentieth century might be overcome.

Surprisingly, then, a reading of the Mabo case finds little reference to religion. Mabo refers instead to 'custom'. While the Mabo decision's legacy has included an intensified public focus on Indigenous religion, the Meriam people's own system of land tenure has often been read more as a set of secular principles than an example of the interpenetration of the religious, social and economic worlds.

However, this is not the only possible reading. Nonie Sharp contends, on the basis of her own fieldwork in the Murray Islands, that the Meriam people's self-understanding, including their relationship with their land, is profoundly structured by the religion of the ancestral being Malo. She contends that this religious element was marginalised in the court's interpretation of Meriam culture. Moreover, she sees the Mabo finding as in part the result of that marginalisation.³¹

Sharp identifies the ground for the Mabo judgment as laid out by Justice Moynihan's determination of matters of fact for the High Court,³² in which he concluded that the Meriam people's relationship to their land 'was not and is not a religious or spiritual relationship'.³³ Sharp's analysis of the 67 days of evidence found that witnesses repeatedly referred to their religious traditions, explaining the connections which they drew between traditional belief and the Christianity now well-established in their community. However, the picture which Justice Moynihan drew was of a 'rough and ready "primitive

secularism".³⁴ Sharp's readers might conclude that a key element of the claim's success was the way in which aspects of Meriam culture could be made to seem familiar to the secular legal system. The Meriam people's system of land tenure, Sharp reports, appeared 'recognisably private "property-ish" to an English court',³⁵ while the laws handed down by Malo 'are embedded in religious legitimations which are manifest outwardly in ways which may appear prosaic and profane'.³⁶

It is ironic that the case which helped put Indigenous religion on non-Indigenous Australians' conceptual map itself relied on the marginalisation of religion. Sharp's account of the religious background to the Mabo decision suggests that one way in which a secular state can deal with Indigenous religion is by reframing it to fit a secular framework. However, Sharp declares, to reframe the tradition in this way:

is to rob the Meriam of the fundamental truth about their culture and the way they see themselves. To deny their spiritual or religious relationship and attitudes to land is to divest them of their 'natural inheritance', of that 'body of patent truth about the universe', to use Professor Stanner's words.³⁷

Although in this case the result was success for the claimants, such substantial reframing might not always have such rewards. Moreover, one might ask whether such reframing was really essential to the case's success, and, if so, whether a choice between doing violence to one's culture and losing one's claim is the best that Australian law can offer. Even if the court's secular reframing of religious evidence is not seen as a *necessary* condition of the claimants' success in Mabo, Sharp's account suggests that the secular legal system still has some distance to go in appreciating the ways in which Indigenous religion may bear on its processes.

'Knowing they are genuinely held'—Junction Waterhole

In 1992, Hal Wootten QC was appointed to report to Aboriginal Affairs Minister Robert Tickner on a claim for protection of a sacred site under Section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The area in question was the site of a proposed flood mitigation dam in the Todd River, north of Alice Springs. The claimants held that the dam's construction would desecrate a sacred site, Junction Waterhole. Following Wootten's inquiry, the Minister used his powers under Section 10 to stop the dam being built. The ban remains in force.

Wootten's account of the factors that contributed to his report invokes at least three separate dynamics in the encounter between a highly secularised culture and a deeply religious one. All three aspects of Wootten's comments have to do with the tendency for secular Australia to regard religion as exotic. This tendency may have positive or negative effects as regards the preservation of religious freedom.

At one level, Wootten suggests, a certain kind of Australian secularism may be a threat to religious tolerance. Lacking understanding of religion, people may pry where scrutiny is inappropriate, or ridicule things which should be taken seriously:

I have deliberately not tried to describe the relevant beliefs in any detail, much less to explain them ... I feel a personal obligation to respect the confidentiality of the information given to me. Moreover, I would not wish my report to be the vehicle for the public trivialisation and ridicule of Aboriginal beliefs in the media by uncomprehending people, a situation which was such a shocking feature of the debate over Coronation Hill.³⁸

In further deflecting insensitive inquiry, Wootten points to a second dynamic in the encounter between secular and religious world views. If a secularism which views religion as exotic can lead to 'trivialisation and ridicule', it can also lead to an equally destructive voyeurism. Outsiders may look in an unfamiliar tradition for something which challenges, reinforces or in some other way relates to their own society's worldview. But, Wootten cautions, they will not find it:

I can assure the curious that the confidentiality of Aboriginal knowledge of the site is not because the information would be found titillating, shocking or even particularly interesting by Western standards. It simply lacks significance in Western culture, and I could not claim to appreciate its significance to Aborigines.³⁹

The idea that something can be too strange, from the point of view of the dominant culture, even to be interesting stresses the distance between secular and religious world views. The beliefs related to Junction Waterhole are not presented, for example, as putative components of a hypothetical interfaith dialogue. The reason is not simply that non-members of the Indigenous group are not allowed to know the contents of the beliefs. Even if you were allowed to know them, Wootten tells 'the curious', you wouldn't want to: they are just too different.

Such difference, however, is in itself a ground for protecting unfamiliar traditions. The argument which explains this stance draws attention to the third dynamic in encounters between religious and secular world views. The point in heritage protection claims, Wootten argues:

should not be whether, judged by the norms and values of our secular culture or our religions, the sites are important, but whether they are important to Aborigines in terms of the norms and values of their traditional culture and beliefs. In other words, the issue is not whether we can understand and share the Aboriginal beliefs, but whether, knowing they are genuinely held, we can therefore respect them.⁴⁰

Wootten's plea for respect, lodged against those whose secularism might lead them to either ridicule or voyeurism, can be understood as itself a product of a certain kind of secular world view. This third kind of secularism rejects any sense that the religion of the majority (or the religion which was once typical of the majority) has any universal validity

or exclusive claim. Secularism in this sense of a world view which rejects religious exclusivism is not necessarily incompatible with religious commitment. Universalist claims are not a necessary feature of religion. Some religions are remarkably adept at accommodating other belief systems. Moreover, even those traditions, like Christianity, which in some times and places have been exceptionally prone to universalistic and exclusivist interpretations, also contain more accommodating strands. These strands are likely to come to the fore in periods of cross-cultural communication and cultural secularisation.

'Not supported by any form of logic'—religion in the Hindmarsh Island Royal Commission

The Hindmarsh Island Royal Commission was announced on 8 June 1995 by South Australian Premier Dean Brown.⁴¹ Its terms of reference were built around challenges to so-called 'secret women's business' and required it to inquire into:

Whether the 'women's business' or any aspect of the 'women's business' was a fabrication and if so:

- (a) the circumstances relating to such a fabrication;
- (b) the extent of such fabrication; and
- (c) the purpose of such fabrication.⁴²

'Secret women's business' refers to a tradition whose content the Royal Commission did not know and could not be told. Some of its processes and eventual findings reflect the secular tendency to view religious conviction as requiring empirical verification.

As the South Australian public would be told repeatedly over the coming months, this was to be an inquiry into 'whether the beliefs exist'. However, many critics of the Royal Commission took the view that it was going to inquire into the content and validity of Ngarrindjeri women's beliefs. For example, on 20 June, the Uniting Church issued a press release which said:

In our tradition there have been times when political leaders have sought to wield control over spiritual belief ... We will stand against any government of any persuasion which seeks to do so. We believe that this State Government has stepped beyond its powers in calling a Royal Commission into Ngarrindjeri beliefs'.⁴³

The South Australian Council of Churches accused the Royal Commission of being an inquiry 'into Aboriginal Women's beliefs, past and present'.⁴⁴ Adelaide's Roman Catholic Diocesan Justice and Peace Commission maintained that such an investigation 'cannot

hope to fulfil its terms of reference ... without setting itself up as the judge of the spiritual beliefs of the Ngarrindjeri people'.⁴⁵

In response, on 20 June, Liberal MLC Robert Lawson wrote on behalf of the South Australian Government to Uniting Church Moderator Rev. Dean Brookes, and two days later to Archbishop Faulkner. He argued that each church's statement was 'unfair and misguided'. Lawson wrote:

The criticism might be valid *if* the Royal Commission was required to examine the *validity* of the spiritual beliefs of the Ngarrindjeri or any other people. I agree it is not a function of government to be an arbiter of religious beliefs. However, the terms of reference of the Royal Commission do not require it to examine the underlying truth or validity of the spiritual beliefs. The Commission is required to examine whether those beliefs were a fabrication, ie whether they were devised or concocted for a particular purpose.⁴⁶

Can one inquire into the existence of a belief without inquiring into its content and validity? On the face of it, the difference seems obvious. Yet despite the wishes of the Premier and his colleagues, the Royal Commission appeared to find that distinction extraordinarily difficult to maintain in practice. The following extracts suggest that, if such a separation can be made at all, it would at least require a considerably more sophisticated understanding of religious belief than the Royal Commission had at its disposal.

The Royal Commission's Counsel assisting, David Smith, went so far as to contend that academic inquirers into religion, such as anthropologists, must concern themselves with the content and validity of beliefs. He made the suggestion in the context of questioning Dr Deane Fergie, the anthropologist who had first reported on the existence of secret women's sacred traditions surrounding Hindmarsh Island. Smith asked, 'Do you accept the proposition that you must reach a stage, as an anthropologist, of asking yourself whether the position taken in connection with a belief is so unacceptable, inconsistent and illogical, that it is not credible?'. Fergie replied that anthropologists' understanding of belief does not lead them to evaluate the 'credibility' of beliefs.⁴⁷

Smith's difficulties with the Government's demarcations appeared to be shared by the Commission generally. A particularly striking instance is the Report's interest in the system of barrages which regulates the flow of water behind the Murray Mouth. Discussion of the barrages takes up an entire section of the Report. They are described in detail, from the dates of their construction to the number of timber piles (4470 in the Goolwa barrage), to the dimensions (in metres) of each of the building components. Readers are told the construction materials (timber piles, steel sheet piling, concrete piers and reinforced concrete floor), what powers the gantry crane (diesel) and the mechanics of water level control. There is even given a scale drawing of a cross-section through the Goolwa barrage's sluices.

Readers might wonder as to the purpose of this elaboration. The relevance is explained: 'Work commenced on construction of the barrage system in 1935 and was complete in 1940. Aboriginal people worked on construction without apparent harm'. The Commissioner reports that there was no 'consequent injury to the reproductive capabilities of Ngarrindjeri people, and to the fertility of the cosmos generally, following the permanent link to the mainland effected by the barrage system'.⁴⁸

The Commissioner's intention here is apparently to try empirically to disprove the (alleged) content of the beliefs which in any case—the inquiry found—do not exist. There are two possible interpretations of the significance which the empirical argument might have for the Royal Commission. The Commission might be suggesting that a belief whose content is not empirically verifiable *could* not exist; that is, nobody would believe in something which was not confirmed by empirical verification. Alternatively, the Commission might be trying to suggest such a tradition *should* not exist—that is, if anybody does believe such things, they ought not.

Each of these possibilities is problematic. The Royal Commission's examination of Fergie and its treatment of the barrages illustrate the difficulty, in practice, of inquiring into 'whether ... beliefs were a fabrication, i.e. whether they were devised or concocted for a particular purpose', without slipping into an examination of 'the *validity* of the spiritual beliefs of the Ngarrindjeri ... people'.⁴⁹ In each case, the Royal Commission appears to have assumed that genuineness and validity are related in that if a belief is not 'valid' then it cannot be genuine.

Further, it seems to imply that the 'validity' of a belief is found in its empirical or logical demonstrability. In the chapter headed 'Defining the Women's Business and its Place in the Literature', the Report concludes that:

The beliefs said to constitute the 'women's business' and Dr Fergie's elaboration of it ... are not supported by any form of logic ...⁵⁰

It is hard to know how to greet such a statement. Typically, religious beliefs have their own, internal logic which connects them together into a system of thought; but, viewed from outside their own internal system, they do not gain 'support' from 'any form of logic', and they cannot be 'logically' explained. Religious beliefs are not noticeably related to empirical proof or disproof. People do not flock to the springs of Lourdes or seek inspiration at Medjugore because they can demonstrate, by statistics or by logic, that they are more likely to receive healing or truth there than anywhere else. Christians do not take bread and wine, nor Jews avoid pork, because they can prove or disprove that such practices translate into material outcomes. Yet these material objects and physical practices are crucially important parts of religious belief, and of the day-to-day world view, or system of meaning, of which those beliefs form a part. Such beliefs do not start out as being true or false. They become true in the lives of the people who adhere to them and who live them into meaning. They become false when those who live them do so in

bad faith, or when the surrounding systems of meaning in which they derived their significance collapse.

The Federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and related State legislation enable areas of cultural or spiritual significance to Aboriginal people to be protected. In other words, one must be prepared to deal with spiritual significance, with theological meaning, or else stay out of the game. One must be prepared, therefore, to accept religious world views as analysable in their own terms, or the Act does not make any sense at all.

None of this is to say that the authenticity of particular claimed elements of those traditions can never be open to question. Rather, aspects of the Hindmarsh Island Royal Commission illustrate the particular tendency latent within some strands of secularism to equate authenticity with empirical verifiability. Given that religious meaning systems do not stand or fall by their empirical verifiability, this tendency can appear to be a challenge to the inherent rationality of religious belief per se.

'The connection has not been made'—religion in the Mathews Inquiry

Justice Jane Mathews was appointed in January 1996, to report on matters which might be relevant to a declaration under Section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act* protecting an area around Hindmarsh Island from threatened desecration. Unlike the Royal Commission, the Mathews Inquiry concluded that there was a genuine and archaic tradition which prescribed that 'nothing must come between the waters around Hindmarsh Island and the sky'.⁵¹ However, Mathews found that this tradition's existence was insufficient grounds for a ban. Her reasons for reaching this conclusion suggest that her interpretation of Indigenous religion was profoundly shaped by Christian assumptions. This paper, as suggested, reflects the tendency of a deeply secular society to resort uncritically to a remembered frame of reference when entering unfamiliar religious territory.

Mathews found:

The proposition that nothing must come between the waters and the sky is not a part of the tradition but a rule deriving from it. The question still remains as to why it is that nothing must come between the waters and the sky. The answer is that we do not know. The connection has not been made. Nor has a connection been made between the rule (nothing can come between the waters and the sky) and the claimed consequence, namely that Ngarrindjeri women will get sick.⁵²

Mathews's requirement for a connection between 'tradition' and 'rule' reflects a peculiarly Western and Protestant view of the nature and structure of religious systems. Mathews's interpretation of the Federal *Aboriginal and Torres Strait Islander Heritage Protection Act*

makes assumptions about the nature of authentic tradition which are unlikely to hold true for religious traditions other than Western Christianity.

Ninian Smart, exploring *The Religious Experience of Mankind*,⁵³ names six 'dimensions' of religious experience, of which the mythical (in the sense of foundational stories, whether historical or not) and doctrinal (that is, theoretical explication of the myth) are two. The others dimensions are the ritual, ethical, social and experiential. Not all traditions have each of these 'dimensions' in the same intensity, he finds. Doctrine, the level of systematic and theoretical elaboration, he identifies as the strand most highly-prized by the so-called 'historical' religions—those with written rather than exclusively oral traditions.

Wilfred Cantwell Smith goes further than Smart in distinguishing doctrine, or what he calls 'believing', from other kinds of religious activity. While many religious traditions through history have had doctrinal dimensions of more or less centrality to their overall orientation, Christian tradition has stressed 'belief' as no other. People have been burned at the stake for what they did or did not believe, quizzed before church tribunals and charged with heresy because of the intellectual positions which they do or do not hold. Through the ages, Christians have expressed their faith in a series of formulae beginning 'I believe ...'.⁵⁴ Believing, understood as 'an activity of the mind', has come to be regarded by those influenced by Christian cultures 'as what religious people primarily do'.⁵⁵

Propelled from the distant past by their Greek heritage, and, nearer, by the Enlightenment's emphasis on reason, those whose backgrounds lie in the Protestant tradition are particularly prone to this assumption, Smith contends. Their heritage inclines them:

to go around asking about ... religious communities, 'What do they believe?'—as though this were a basic, or at least a legitimate, question ... Since they themselves believed something religiously, they presumed that others would too.⁵⁶

By contrast, some religious traditions have no doctrinal dimension at all. Smith uses the example of Shinto priests and their followers, who did not 'construct formal theories about what they were doing, or seek to order their exuberant myths into rational coherence'.⁵⁷ While myths are certainly an element of 'belief' in a broad sense, myth and doctrine are distinct elements in a religious system. While doctrine relies on myth to provide the matter which it interprets, myth can be present independently of doctrine. As Smart cautions:

It is often not easy to draw a clear line between the mythological and the doctrinal dimensions of religion, but the former is typically more colourful, symbolic, picturesque and story-like. Myths are stories, and they bring out something concerning the invisible world.⁵⁸

Doctrine is the more systematic and theoretical elaboration of that 'something', in which questions of 'believing' something (in the intellectualist sense which I have developed here, of 'believing that' such-and-such a thing is true) are more likely to become significant.

Other examples could be drawn, but the point is sufficiently clear: the highly systematic light in which Westerners, especially of Protestant extraction, tend to regard the place of 'doctrine' underlies a general understanding of religion as essentially to do with (to borrow a phrase from Locke)⁵⁹ each believer's 'persuasion of the mind'. This view, however, is best understood as a peculiarity rather than a constant in the history of religions. Indigenous religion might better be said to live in the relationship between a people and their land than in the privacy of individual theological speculation.

Mathews's finding on Hindmarsh Island assumes a structural view of religion which parallels Smart's distinction between the 'mythological' and 'doctrinal' elements of religion. Mathews asserts that a particular relation between myth and doctrine must obtain in order for a Section 10 declaration to proceed; and that relation must be one of a 'connection' between the rule and its 'rationale'.

Two anthropologists are quoted at length in the Mathews report, both arguing that such connections are unlikely to be found in the religious traditions of Aboriginal communities.⁶⁰ Mathews observed, 'I am told that many Aboriginal traditions, even when revealed in full, do not provide these connections'.⁶¹ She went on to quote for a page and a half from comments made to her by Sutton. He noted that 'there appears to be no problem' with the story's 'standing as a tradition'. Responding to the objection that its 'link to the prohibition on covering the waters has not been explained', Sutton raised the pertinent question: 'If such a link could be made out, would this be a case of "content" providing "rationale" sufficient for a declaration?' He drew a distinction between rationale which would make sense to 'someone who is a member of the cultural group concerned' and 'that of an outsider interpreting that culture'. The law, in its current interpretation, depends upon the latter. The kind of knowledge available to insiders may not be the kind that the law recognises.

Sutton went on to argue that:

there is no inherent reason why Ngarrindjeri women would have to be able to specify a logical link between the Seven Sisters and the prohibition on covering the waters, in order to make the link between the two. That is, the link may have been handed down minus its rationale.⁶²

One does not have to be an expert in Aboriginal tradition to appreciate this point. For example, the Hebrew biblical book of Leviticus gives twenty-seven chapters of obligations and prohibitions. Many of them have been 'handed down minus their rationale', a lacuna which has provided grist for generations of biblical scholars and, more recently, structural anthropologists. The point which Sutton made next has therefore an even more general application than the significance he attached to it:

In fact the holders of such traditions rarely, if ever, propose specific causal connections between the sacred details of a place and the specific taboos that surround it. When anthropologists ask for such whys and wherefores they are typically met with statements

such as 'The Old People always said that would happen', or 'I don't know—it just is that way and always has been'. This is typical of the cake of custom.⁶³

Mathews appears to have sensed the tension between Sutton's advice and her reading of the law. She mused:

In the light of all this one might well ask why should Aboriginal applicants be required to disclose the details of their traditions—particularly confidential traditions—in order to establish their entitlement to a declaration. The answer is that the law requires that those who oppose a declaration must be given an opportunity to respond to the 'case' against them. And if the case depends on 'embargoes' or 'rules' which are associated with a particular tradition, then the law says that the opponents of a declaration must be told the details of that tradition.⁶⁴

Mathews's distinction between myth and doctrine ('tradition' and the 'rule' deriving from it) enabled her to declare that both must be present before a case for a section 10 application can be held to have been satisfactorily made. Beyond privileging doctrine, she invoked a specifically Christian reification of 'belief' as a mental phenomenon which can be isolated and extracted from the other elements of a religious tradition.

Conclusions

Australian secularism is not a single cultural theme or body of thought. Instead, Australia's formally secular political and legal institutions and informally secular culture contain numerous strands which interact in various ways. When the secular state has to resolve matters related to religious significance, some strands prove more productive than others. A more careful appreciation of the consequences of different ways of understanding religion may help to avoid or minimise conflicts such as some of those which arose around Hindmarsh Island.

The processes for resolving Indigenous claims for land or for protection of sacred heritage allow for expert evidence from specialists in the relevant fields. To date, specialists in the comparative study of religion have been unlikely to feature among those called. However, the comparative study of religion offers resources which could cast fresh light on conflicts between the secular state and Indigenous religious tradition.

Successful land rights Native Title and heritage protection claims attest that Australian law has managed on many occasions to accommodate forms of knowledge in which a particular view of the 'spiritual' or 'sacred' structures the organisation of material interests. Yet such processes remain precarious. Occasional controversies illustrate the need for closer attention to the specifically religious aspects of Indigenous tradition. They also illustrate the need for a more self-conscious appreciation of the presuppositions.

Endnotes

1. Commonwealth of Australia Constitution Act, s. 116.
2. *Krygger v Williams* (1912) 15 CLR 366, *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116 and *Attorney-General (Vic) Ex rel Black v Commonwealth* (1981) 146 CLR 559.
3. Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution', *Australian Quarterly*, vol. 52, no. 2, 1981, pp. 214–228, at p. 226.
4. *ibid.*, p. 227.
5. *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* 1983 (the 'Scientology case').
6. Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for S116', *Monash University Law Review*, vol. 18, no. 2, 1992, pp. 205–236, at p. 208.
7. Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* Sydney 1998. For a comparison of Australia's protection of religious freedom with similar provisions overseas, see Kevin Boyle and Juliet Sheen, eds, *Freedom of Religion and Belief: A World Report*, Routledge, London, 1997.
8. 1984 36 SASR 376.
9. T. N. Madan, 'Secularism In its Place', *Journal of Asian Studies*, vol. 46, no. 4, 1987, pp. 747–759.
10. Muriel Porter, *Land of the Spirit?* WCC, Geneva, 1990; Peter Jensen, 'Why Australia is Pagan', *Sydney Morning Herald*, Saturday 16 February 1985, p. 39 (Saturday Review section).
11. The phrase comes from Douglas Pike's history of South Australia, *Paradise of Dissent: South Australia 1829-1857*, Longmans, Green & Co., London, 1957.
12. For example, the USA, Turkey, India.
13. For an example of a public controversy involving the question of the authenticity of an aspect of Christian doctrine, see *Scandrett v. Dowling* (1992) 27 NSWLRJ 483, in which the New South Wales Court of Appeal granted an injunction to prevent the Anglican Bishop of Canberra-Goulburn from ordaining women. The degree of public bemusement which attended this case is well captured in Muriel Porter, 'The Media and the Women's Ordination Debate', *Australian Religion Studies Review*, vol. 5, no. 2, 1992, pp. 11–18.
14. Contemporary usage with respect to capitalising 'Indigenous' appears to be in flux. At the time of writing, the most recent edition of the Commonwealth *Style Manual for Authors, Editors and Printers* is the fifth (Commonwealth of Australia, Canberra, 1994). It uses lower case (pp. 40-41 and 137-139), and refers those seeking more information to the Aboriginal and Torres Strait Islander Commission's Human Relations Section (p. 41). However, *The Little Book of Style* (Commonwealth of Australia, Canberra, 1998) describes itself as 'a bridge between the fifth and forthcoming sixth edition' of the *Style Manual* and advises readers that it 'incorporates stylistic changes that have been made since the 1994 edition' (p. x). *The Little Book of Style* specifies that "'Indigenous' carries an initial capital' (p. 49). Official

publications of the Aboriginal and Torres Strait Islander Commission, the Minister for Aboriginal and Torres Strait Islander Affairs and the Australian Institute of Aboriginal and Torres Strait Islander Studies all capitalise the term inconsistently, but with a trend towards more frequent capitalisation in more recent writings. Overall, capitalisation seems to be emerging as the preferred usage.

15. Around 30 per cent in the 1996 Census. See Philip J. Hughes, *Religion in Australia: Facts and Figures*, Christian Research Association, Kew, Vic., 1997.
16. Ronald M. Berndt, 'A Profile of Good and Bad in Australian Aboriginal Religion', in Max Charlesworth ed, *Religious Business: Essays on Australian Aboriginal Spirituality*, Cambridge University Press, Melbourne, pp. 24–45, at p.24.
17. For example, Will Kymlicka, 'Liberalism' qv in Ted Honderich, ed, *Oxford Companion to Philosophy*, Oxford University Press, 1995.
18. John Locke, *Letter Concerning Toleration* [1689] in *Of Civil Government and Toleration*, Cassell, London, 1899, p. 146.
19. *ibid.*, p. 170.
20. L. T. Hobhouse, *Liberalism*, Oxford University Press, London, 1964 [1911], pp. 20–21.
21. Locke, *op. cit.*, p. 144.
22. *ibid.*, p. 147.
23. Emile Durkheim, *The Elementary Forms of Religious Life*, George Allen and Unwin, London, 1926 [1911], p. 2.
24. *ibid.*, pp 1, 95.
25. W. E. H. Stanner, 'Some Aspects of Aboriginal Religion' in Max Charlesworth, ed, *Religious Business*, Cambridge University Press, 1998, pp. 1–23.
26. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the inquiries it generated speak variously of 'spiritual significance' and 'sacred sites'. The Mabo decision speaks of 'custom' and 'customary law', a usage which I shall discuss below. Those, and related terms such as 'culture', are often also the preferred terms of Indigenous people, although for different reasons. As Diane Bell notes with reference to the Ngarrindjeri, people who are both active Christians and active practitioners of Indigenous tradition may need a way of distinguishing the two world-views, so that 'religion' is likely to refer to Christianity, marking it out from 'culture'. See Diane Bell, *Ngarrindjeri Wurruwarrin: A World that is, was and will be*, Spinifex, North Melbourne, 1998, pp. 109–110.
27. Deborah Bird Rose, *Dingo Makes Us Human: Life and Land in an Australian Aboriginal Culture*, Cambridge University Press, Cambridge, 1992, p. 58.
28. On this point and on the general problem of using the English terms 'spirit' and 'sacred' with reference to Indigenous religion, see Bill Edwards's review of 'Rainbow Spirit Theology', *Australian Religion Studies Review*, vol.11, no.2, 1998, pp 137–146.
29. Berndt, *op. cit.*, p. 28.
30. *Mabo v. Queensland No. 2* (1992) ALJR 66.

31. Nonie Sharp, 'Malo's Law in Court' in Max Charlesworth, ed, *Religious Business: Essays on Australian Aboriginal Spirituality*, Cambridge University Press, Melbourne, 1998, pp. 176–202.
32. 'Determination pursuant to reference of 27 February 1986 by the High Court to the Supreme Court of Queensland to hear and determine all issues of fact raised by the pleadings, particulars and further particulars' in High Court action B 12 of 1982, 16 November 1990.
33. cited in Sharp, *op. cit.*, p. 178.
34. *ibid.*, p. 191.
35. *ibid.*, p. 189.
36. *ibid.*
37. *ibid.*, p. 178.
38. Hal Wootten, 'The Alice Springs Dam and Sacred Sites' in Murray Goot and Tim Rowse, eds, *Make a Better Offer: The Politics of Mabo*, Pluto Press, Leichhardt, NSW, 1994, pp. 8–21 at p. 14. This article is a condensed version of Wootten's report, highlighting those elements which are relevant to broader debates about landrights.
39. *ibid.*
40. *ibid.*
41. For background to the Hindmarsh Island enquiries, see 'Hindmarsh Island Bridge Bill 1996', *Bills Digest*, no. 50, 1996-97, Department of the Parliamentary Library, Canberra, 1996.
42. Iris Stevens, *Report of the Hindmarsh Island Bridge Royal Commission*, Hindmarsh Island Bridge Royal Commission, Adelaide, 1995, p. 3.
43. Uniting Church in Australia, "'Rescind Decision to Hold Royal Commission" Say Uniting Church Groups', *Press Release*, 20 June 1995.
44. South Australian Council of Churches Inc., 'Halt Royal Commission, Says Church Group', *News Release*, 27 June 1995.
45. Adelaide Diocesan Justice and Peace Commission, *News Release*, 19 June 1995.
46. Letters from Robert Lawson, MLC, to Rev Dean Brookes, 20 June 1995, and to Most Rev Leonard Faulkner, 22 June 1995 (original emphasis).
47. *Hindmarsh Island Bridge Royal Commission Transcript*, p. 5921.
48. Stevens, *op. cit.*, p. 246.
49. Robert Lawson, MLC, letter to Most Rev. Leonard Faulkner, 22 June 1995, pp 1–2. The question of how in any case one can determine whether a religious belief has been 'fabricated', and what such 'fabrication' might mean I take up elsewhere. See Marion Maddox, 'What is a "Fabrication"? The Political Status of Religious Belief', *Australian Religion Studies Review*, vol 11, no.1, 1998, pp. 5–17.
50. Stevens, *op. cit.*, p. 241.

51. See Jane Mathews, *Commonwealth Hindmarsh Island Report*, 27 June 1996, p. 49 and Appendix 12, reporting the forensic dating of paper used to record an account of secret Ngarrindjeri women's traditions in the 1960s or early 1970s; and her detailed rebuttal (*ibid.*, pp. 122–3, 174–183) of the Hindmarsh Island Bridge Royal Commission's conclusion that the Seven Sisters Dreaming Story, the source of the prohibition of a bridge, 'was never part of the Dreaming of the Ngarrindjeri people. It was part of Western Desert mythology and is likely to have been introduced by Doreen Kartinyeri' (Stevens, *op. cit.*, p. 278.).
52. *ibid.*, p. 203.
53. Ninian Smart, *The Religious Experience of Mankind*, Fontana, London, 1971, pp. 15–22.
54. Wilfred Cantwell Smith, *Faith and Belief*, Princeton University Press, Princeton, 1979, chapters 6 and 7.
55. *ibid.*, pp. 12, 122.
56. *ibid.*, pp. 13–14.
57. *ibid.*, p. 14.
58. Smart, *op. cit.*, p. 29.
59. Locke, *op. cit.*, pp. 148–9.
60. Mathews, *op. cit.*, pp. 203–6.
61. *ibid.*, p. 203.
62. *ibid.*, p.204.
63. *ibid.*
64. *ibid.*, p. 205.