

1. Towards an Ethnography of Anthropology's Encounter with Modern Law

Introduction

The bodies of anthropologists, bruised from their encounter with native title, are to be found recuperating all around Australia. Some, still wounded from humiliating cross-examination, swear, yet again, never to be involved in another native title claim. While they lament their lack of influence, others warn of native title completely engulfing anthropology and ruining it (see, for example, Morris 2004). One Aboriginal leader has made the opposite claim—that anthropology has engulfed native title law—blaming anthropology for the High Court's poor legal conceptualisation of native title.¹ After almost two decades of the native title era,² it is time to put these contradictory assessments to the test by a close examination of what happens to anthropologists and anthropology in some actual cases.

While the encounter between Australianist anthropology and modern law is not new in Australia, native title represents a distinct second phase following the era of land rights claims in the Northern Territory.³ The central place of anthropology in land rights claims seems secure. The definition of 'traditional owner' appeared to be based on anthropological concepts, and anthropologists were given responsibility for compiling the key document outlining the case: the claim book. There were internal critics of the dual role that anthropologists played in the land claim process but there were also converts from an initial scepticism (Rose 1996). The new phase is characterised by a more marginal role for anthropologists in the formulation of cases, more vague legal doctrines, and a more direct exposure to formal legal proceedings. Thus, what is needed more than anything for a fresh examination of anthropology's engagement with modern law is for due emphasis to be given to the relative autonomy of the juridical field within the constitutional state.

1 Noel Pearson in *The Age*, 28 August 2002.

2 In this book, the phrase 'native title era' refers to the period following the High Court's judgment in *Mabo* in 1992 (*Mabo v Queensland (No. 2)* (1992) 175 CLR 1).

3 In this book, the phrase 'land rights era' refers to the period between the commencement of the *Aboriginal Land Rights (Northern Territory) Act 1975* (Cwlth) (the *Land Rights Act*) and the commencement of the native title era in 1992. This is a simplification made for ease of presentation. In reality, *Land Rights Act* claims continue up to the present in parallel with native title claims, although it is also true to say that the bulk of the *Land Rights Act* claims were heard prior to 1992.

The engagement of Australianist anthropologists with legal processes for land rights has a relatively long history, commencing with the appearance of Berndt and Stanner as expert witnesses in the *Gove* case in 1970.⁴ Notwithstanding this relatively long engagement, the existing anthropological literature that attempts to explain it has yet to take advantage of the reservoir of literature on jurisprudence and the sociology of law.⁵ In order to move to a more comprehensive, sociologically informed account of the current second phase of anthropology's encounter with modern law, I believe it is necessary to do two things. The first is to adopt a position of critical distance from the professional practice of both law and anthropology—that is, to describe them as social fields so that their internal workings can be exposed. The second is to examine the interaction of these fields, not just from the point of view of different practices, knowledge claims and power relations, but also through the medium of the interaction of the key actors: individual anthropologists, lawyers and judges.

Some have characterised the two fields at a very general level, such as Niblett's (1992) use of the concept of an 'interpretive community'. Others have emphasised particular features of the field of anthropology: Williams (1986:212) referred to 'swings in the pendulum of scholarly opinion'; Merlan (1998:173–4) referred to the 'theoretical revision' of the significance of the clan during the 1980s; and Gumbert (1984) made an opposite assertion of resistance to paradigm change in the preceding decade. In most of the previous literature, however, the social field of Australianist anthropology has been an implicit background that structures topics, methodology, references and orientation towards the intended audience. Thus one of the aims of this book is to thematise the implicit academic background and to give a more comprehensive account of its features. While histories of anthropological theory and institutional histories of anthropology might be relevant, they will not be the primary focus.⁶

4 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 160. Also see Berndt (1981); and Williams (2008).

5 Instead, in Australia, it tends to focus on the effect of participation in land claim processes on the anthropologists' informants—for example, the regimentation of customary practice (Merlan 1995), the objectification of tradition (Glaskin 2002; Merlan 1989), and the emotional trauma of those found lacking in tradition (Povinelli 2002). This demonstrates that judicial formulations of Aboriginal traditions do not match ethnographic reality—for example, Williams' *The Yolngu and Their Land* (1986) and Glaskin's (2003) analysis of the Ward decision. The literature also focuses on developing broad contextualisations in terms of a general political economy of Australia (Peterson 1985), state mimesis of Aboriginal tradition (Merlan 1998) or the pernicious limitations on the liberal state's recognition of Indigenous difference (Povinelli 2002); a narrower applied perspective that seeks to maximise anthropology's effectiveness in its allocated role by: a) asserting the need for the rigorous independence of expert witnesses, rather than advocacy (Kolig 1982; Maddock 1980a, 1998a, 1998b, 1999); b) addressing problems anthropologists have in responding to legal frameworks; and, more positively, by c) demonstrating that anthropology has the answers to the legal questions (Rumsey 1996; Sutton 2003); or collections of conference papers incorporating a number of these orientations and contributions to the ethnography of traditional land tenure (Hiatt 1984; Peterson and Langton 1983; Smith and Morphy 2007; Toussaint 2004; Weiner and Glaskin 2007). There is a similar body of literature arising out of the land claim experience in North America: see Cove (1996); Cruickshank (1992); Culhane (1992, 1994, 1998); Fisher (1992); Fiske (2000); Jones (1956); Kandel (1992); Lurie (1955, 1956); Manners (1956); Miller (1992); Mills (1994, 1996); Paine (1985, 1996); Ridgton (1992); Rigby (1995, 1997); Rosen (1977); Stewart (1968, 1977); and Stewart (1966).

6 See Harris (1972); McCall (1982); Peterson (1990); and Stocking (1983, 1996).

The other part of the project is to overcome what could be called the anthropological cringe from sustained inquiry into modern law—that is, to find some position outside the framework of legal doctrine and legal procedures from which to develop a critical understanding of law. Williams' belated account of the *Gove* case continues to demonstrate difficulties in anthropological accounting for judicial practice. It is true that Williams effectively undermined some of the pretensions of judicial fact-finding through her ability to understand Yolngu concepts prior to their use by Yolngu witnesses, and to trace oversimplifying English translations and their eventual garbled reception by the judge. When it came to analysing the rule-finding work of the judge, however, Williams' approach tended to remain one of comparing legal doctrine with factual reality. But to say that the law does not reflect historical reality is a very preliminary stage of the analysis of law. It begs the question of the nature of judicial reasoning within the wider framework of the legal system.

Two significant works in the native title era—Mantziaris and Martin's *Native Title Corporations* (2000) and Peter Sutton's *Native Title in Australia: An Ethnographic Perspective* (2003)—appear to cover some of the ground of this book but they do not aim to provide a sociological account of the encounter of law and anthropology. The focus of this book will be the process by which knowledge, views, arguments and opinions that originate in the academically orientated field of anthropology are reordered into legal categories in the very different social field of law. I will commence with an account of Australianist and Torres Strait Islander anthropology as social fields, move on to the juridical field, then move to theorising the interaction between the fields of anthropology and the juridical field.

The social fields of the Australianist and Torres Strait Islander anthropology⁷

The word 'field' is used to evoke a Bourdieuan approach, which attempts to synthesise the analysis of structures and agency using such concepts as position

⁷ The distinct regional specialisations relevant to the case studies of this book require a distinction to be made between Australianist anthropology (the *Rubibi* and *De Rose Hill* case studies) and anthropologists specialising in Torres Strait Islander studies (the *Mabo* case study). In international anthropology, the term 'Australianist' is used to describe those anthropologists specialising in Aboriginal Australia. This usage does not recognise the culturally distinct Torres Strait Islanders within the borders of Australia and probably also reflects the low profile of Torres Strait Islander studies as a regional specialisation. One solution would have been to use the term 'Aboriginalist' instead of 'Australianist', but this would not reflect contemporary usage within anthropology. So when I use the term 'Australianist' I am referring only to those anthropologists specialising in Aboriginal Australia and not including Torres Strait Islander specialists. It should be acknowledged, however, that the term 'Australianist' might now be somewhat outdated and problematic since many anthropologists who specialise in Aboriginal Australia also investigate non-Aboriginal aspects of Australian society.

within a field, competition and habitus, which can be glossed as the ingrained dispositions and learnt, unwritten rules that facilitate interaction within the field with a degree of unconscious proficiency.⁸ In Bourdieu's study of the Kabyle of Algeria, the field was one of small-scale, face-to-face interaction. The field of the academy does have some similarities, especially at the level of small regional specialisations in anthropology, such as Australianist anthropology and those specialising in Torres Strait Islander studies. In these specialisations, most of the participants would be known to each other, through physical collocation, conferences or virtual interaction through published works.

In approaching his broadest description of the field of the French academy in *Homo Academicus* (1988), Bourdieu took as his inspiration the distinction made by Kant in *The Conflict of the Faculties* between the higher faculties, which the government wanted to control because of their influence on the general populace (theology, law and medicine), and the lower faculties (everything else), where there was much more freedom of expression. Bourdieu comes to a similar conclusion, although he derived his hierarchy of the academic field from general indicators of social stratification of the professors in different disciplines. These indicators included such things as inherited social capital (status of father's profession), prestige of educational institutions attended, level achieved in the formal hierarchy of the university, general indications of status such as appearance in *Who's Who*, and indicators of intellectual celebrity such as invitations to contribute to mass-circulation newspapers or appear on television. His social hierarchy of the faculties in descending order is: medicine, law, arts (humanities and social sciences) and science (Bourdieu 1988:ch. 2). This structure also generally describes the characteristics of the dominant class since the 'field of power' and the university field reproduce each other. This reproduction is achieved by the success of the dominant class in the various induction processes such as competitive exams and professorial selection processes so that their inherited advantages are converted into 'earned' advantages.

Within this stratified field, Bourdieu distinguishes two kinds of symbolic capital: one based on 'scientific' competence and another based on social competence. These competencies acquire different kinds of power in the field: scientific power or academic power. Scientific competence relates to the mastery of a body of knowledge, the successful conduct of research, publication in prestigious journals and so on. Social competence relates to maintaining a privileged position in the general social field. In the academy, achieving academic power involves taking on administrative chores that go with senior positions, networking and

8 In truth, Bourdieu uses the idea of a 'field' in a number of different ways—for example, 'the field of power'. But it is 'field' in the sense of a relatively coherent shared habitus and competitive interaction that is relevant to the following analysis.

eventually securing positions that control the reproduction of the professional body and the cultural capital that can be acquired within the university. These would be positions that set entry requirements and exams, design curriculum and appoint staff. Broadly, the highest degree of social competence is to be found in medicine and the highest degree of scientific competence is to be found in the sciences. The science–social cleavage is, however, reproduced within faculties so that, for example, the professor of medicine might not do medical research personally, but will secure funding and arrange for the research to be done. In all faculties there will be people with meagre 'scientific' capital who nevertheless hold influential positions in the academic hierarchy through their clever playing of the game.

The position of the social sciences in the academic field so constructed is one of hybridity that represents the features of the whole field. The social sciences are drawn in the direction of science, where, in Bourdieu's—perhaps idealised—view, the logic of research sets the agenda and success in research provides a basis for hierarchy. They are also drawn in the opposite direction of the reproduction of the existing temporal order as in the role of some humanities disciplines in the transmission of legitimate culture through the consecration and conservation of a canon that, in effect, controls what is taught in secondary schools.

The other part of Bourdieu's account is the academic habitus and how it is reproduced. Here we encounter one of his central metaphors: the game. Those who have the necessary basic disposition—the desire for knowledge, for example—enter the game of the university. The price of entry is 'the visceral form of recognition of everything which constitutes the existence of the group, its identity, its truth, and which the group must reproduce in order to reproduce itself' (Bourdieu 1988:56).

Thus, although there is competition for 'scientific' capital, the competition is within limits that rarely challenge the fundamentals of the discipline. The social hierarchy is within the university field and internalised as ideal career paths. Pursuing a career involves entering into relations of dependency and domination with superiors—a kind of infantilising during which the professor can make the assistant lecturer wait. In the meantime the expectation of advancement requires reverence to the professor, citation of his work and public support of him. As with all games, the rules become so familiar through use that they become unconscious dispositions, a practical logic of automatically knowing what to do in a given situation.

To summarise, in Bourdieu's explanation, academic order is maintained by linking academic advancement to institutional control through co-option, and this linkage has somewhat stultifying effects.

While directed towards explaining the student protests in Paris in 1968, Bourdieu's description of the academic field and habitus is still suggestive of some of the general structures and tendencies in the academy of today, outside France (see Robbins 2004). In Australia, however, creeping managerialism and funding based on throughput of students and the resulting competition between universities must have had some transforming effect. A likely scenario is the strengthening of the hierarchy of prestigious universities and the weakening of the power of the master to direct the student and to demand the allegiance of the student. A more complex picture emerges in considering the discipline of anthropology within the general field of the academy.

The discipline of anthropology

In order to enable some assessment of how one acquires academic and 'scientific' capital within the complex contemporary situation of anthropology, it is necessary to give an account of some of the basic structures of the discipline. Three such structures are regional specialisation, an ethnography–theory divide, and a pure–applied divide.

Regional specialisation has been inevitable since the acceptance of long-term fieldwork as an essential part of professionalised anthropology.⁹ As Fardon points out in *Localising Strategies* (1990), however, the development of each specialist literature has been far from predictable.

Fardon's contribution to the critique of the conditions of the production of ethnography was in part a response to the more high-profile critiques of ethnography as a form of colonial domination (Said's *Orientalism* [1978]; Asad's *Anthropology and the Colonial Encounter* [1973]) and the textually constructed authority of the ethnographer (Clifford and Marcus 1986; Marcus and Cushman 1982). His claim is that the textual critiques in particular have—for the purposes of deconstruction—essentialised the practice of ethnographic writing, imposing on it a homogeneity that does not reflect the way in which regional ethnographic literatures have developed. Fardon emphasises a dialectical process, usually commencing with an exemplary ethnography in a previously unstudied area. The initial exemplary ethnography associates that area with a theoretical problem, such as the problem of order in an acephalous society. Subsequent ethnographers then position themselves in relation to it,

⁹ In this book, I use the phrase 'professionalised anthropology' to refer to the period commencing roughly in the early twentieth century when anthropology was beginning to find a base in the universities and university qualifications were seen as a prerequisite for conducting fieldwork—that is, professional as opposed to previous amateur efforts by those without university degrees. The potential need for clarification arises since the phrase 'professionalised anthropology' is occasionally used in contemporary critiques of anthropological associations becoming too much like the professional organisations of lawyers and doctors, with 'applied' agendas overtaking those with an academic orientation (see, for example, Morris 2004).

by modification, contrast or filling in the gaps. In this way, a cross-referencing specialist literature is built up: 'Region, problem and descriptive values are established intertextually' (Fardon 1990:22).

The long-running debate about Aboriginal local organisation is a prime example of the growth of a cross-referencing literature within the Australianist specialisation. That debate provides one way of positioning particular anthropological works within the specialisation as a whole.¹⁰ While the question of order and dispute resolution has been a fairly consistent feature of the Australianist specialisation, the inquiry into the law-like features of tribal societies has generally been associated with other regional specialisations. Early groundbreaking work in so-called primitive law tended to be located in regions with fairly specialised arbitral institutions, as in Africa (Bohannan 1957; Gluckman 1955), or among exceptional groups that had deliberative councils, as among some of the Plains Indians of North America (Llewellyn and Hoebel 1941). Melanesia and Polynesia also have their early ethnographies with a legal bent (Hogbin and Malinowski 1934; Malinowski 1926; Pospisil 1956). The debates that eventually emerged about the applicability of law as a universal category of cross-cultural comparison occurred outside the Australianist specialisation and, consequently, there was no ready-made Australianist literature on the ways in which Aboriginal relations to land could be encompassed by 'traditional laws and customs' when it re-emerged as a critical issue after the 1992 *Mabo* decision (see below).

Regional specialisation is sometimes enabling of an ongoing research program and at other times restrictive, as in the difficulty of moving away from what has become the established consensus of the key group of influential specialists about what is of interest in the region. National traditions of ethnographic writing—French, British or American—might coincide with anthropologically defined regions, but not always.

The existence of regional specialisations raises the question of how they relate to one another—what is the lingua franca; how do they distinguish themselves from other kinds of area studies? The answer is what Appadurai (1986) calls metropolitan theorising—that is, the attempt to transcend the local through generalisation, comparison and the framing of local data in terms of wider academic debates. Fardon himself notes that, in writing an ethnography, the

10 When I use the term 'local organisation debate' in this book, I am referring to the long-running debate over the most appropriate way to generalise, on an Australia-wide basis, about Aboriginal group relations to land in the pre-contact era. It is typified by Hiatt's 1962 critique of Radcliffe-Brown's generalisations and Stanner's 1965 defence and modification of Radcliffe-Brown's generalisations (Hiatt 1962; Stanner 1965). The debate has quite a long history and is ongoing. I did not have the heart to clutter this book with yet another rehearsal of the various positions taken in the debate; there are already many such accounts (see, for example, Hiatt 1996:13–35; Keen 1988:102–4; Maddock 1980b; Peterson and Long 1986:1–25; Sutton 2003:38–53, 68–70, 98–110, 140–58).

anthropologist has to weigh up the claims of the audience of fellow specialists and the interests of a more general audience of anthropologists. The relationship with the more general audience is not straightforward because it is mediated by simplified, and usually outmoded, metonymic linkages—for example, India = hierarchy; Mediterranean = honour and shame; China = filial piety; Australia = marriage systems. In order to be heard beyond the limited specialisation, the ethnographer must use the language of the metropolitan theorising and sometimes struggle to transform it.

The ethnography–theory divide

Thus far I have been using ‘theory’ in a relatively unspecified way, which implies a worldwide mapping of cultural particularity that fits into a rather general scheme for explaining the human condition in all its cultural variety. ‘Theory’ also has a different sense, which is reflected in the accounts of the long history of anthropological reflection, in abstract terms, about what inspires and guides the questions that anthropologists seek to answer. Sherry Ortner’s article ‘Theory in Anthropology since the Sixties’ (1984) is illustrative of both the language of these accounts and the underlying anxieties about being left behind in the metropolitan theoretical debates.¹¹ She identifies various constellations of ideas and personalities as ‘schools’: ‘symbolic anthropology’, ‘cultural ecology’, ‘structuralism’, ‘structural Marxism’, ‘political economy’, ‘practice theory’, and ‘symbolic interactionism’. The chief metaphor of her account is one of succession: the different schools capture the imagination of anthropologists at a certain point, are imitated and tested, and, either because of their inherent weaknesses or because something more interesting comes along, they slide from prominence. Assumed progress is a related theme as successive theories are presented as an answer to the defects in previous ones.

One of the unexplored assumptions of Ortner’s paper—taken up in one direction by Appadurai (1986)—is the location of this drama of the rise and fall of theoretical schools. Although her topic is theory, it is also a piece of participant observation. It describes the metropolis of the field of anthropology: the United States of America. In simple demographic terms, the United States, with its thousands of anthropologists and hundreds of university anthropology departments, is the centre (see *American Anthropological Association Directory*; and Jolly and Jamieson 2002:69). From this perspective, it could be argued that the Australianists and those specialising in Torres Strait Islander studies—most of whom are located in universities in Australia—are doubly peripheralised: first of all, because of the relatively small number of academics in the Australian regional specialisations; and, second, because of its geographic and social

11 Also see Ortner (2006).

distance from the current centre of anthropology.¹² The internationalisation of ideas through publication should enable a democratising of chances to participate in metropolitan theory from any global location in anthropology, but the sense of periphery continues (see Beckett 2002:128) and not only in Australia (see Ribeiro and Escobar 2006).

There is a countervailing tendency in describing the contemporary multiplication of possible theoretical approaches and it was also present in Ortner's review. This tendency is to evaluate what each new school or proposed theoretical paradigm can and cannot do. Behind such analyses lies the question of what is an adequate anthropological explanation. Pursuing that question leads off into the realms of the philosophy of social sciences, into which anthropologists rarely venture. Analogous to the evaluative approach are survey courses—such as 'Anthropological Approaches to the Study of Social Life'—which perhaps represent the current *modus vivendi* between the insistence on a canon of great anthropological theorists and a more complete epistemological egalitarianism implied in some postmodern critiques. One way of presenting the new *modus vivendi* in a positive way is as the ever-expanding theoretical tool kit of anthropology. This captures some of the flavour of the egalitarianism and hides the underlying anxiety; there is still a high price to be paid for appearing to be out of date in one's theoretical inspirations. As June Nash (1997) complained, "'-isms" quickly become "-wasms"'.

The pure–applied divide

In America, the pure–applied divide has become institutionalised in a number of ways: applied anthropologists have become involved in a wide variety of jobs, have long had their own separate professional organisation (now under the umbrella of the American Anthropological Association) and have their own journals.¹³ In Australia, the small number of anthropologists means that a separate association for applied anthropologists would be unsustainable, and tensions

12 As a result of several brainstorming sessions with colleagues at The Australian National University and Internet searches, I estimate that there are approximately 80 Australianists and 10 specialists in Torres Strait Islanders in anthropology in the academy worldwide. This compares with 550 listed in the *American Anthropological Association Directory* as members of the Society for the Anthropology of Europe, 375 members of the Society for the Anthropology of North America, 300 members of the Association for Africanist Anthropology and 745 members of the Society for Latin American Anthropology.

13 Some of the history of applied anthropology in America is set out in Chapter 2 of John van Willigen's *Applied Anthropology: An Introduction* (1993). The Society for Applied Anthropology was established in 1941 as a separate organisation from the American Anthropological Association (AAA) and had its own journal, *Human Organisation*. It ultimately rejoined the AAA umbrella in 1971 (see Spicer 1976). There is now a parallel organisation called the National Association for the Practice of Anthropology, with its own journal, *Practicing Anthropology*. For a recent collection of papers on applied anthropology in Australia, see Toussaint and Taylor (1999). For reflections on anthropologists in policy development/evaluation roles, see Palmer (2001); Finlayson (2001); and Altman (2001). For an independent overview of similar work undertaken by the Centre for Aboriginal Economic Policy Research, see Rowse (2002).

between the different orientations tend to be played out within the Australian Anthropology Society around proposals for greater professionalisation of the association (Martin 2004). At a superficial level, the tensions could be seen as simply a difference in employment orientations: the pure orientation is towards the academy—the pursuit of knowledge for its own sake; the applied orientation is towards the practical problem to be resolved by the employing agency. There are also hybrid bodies such as the Centre for Aboriginal Economic Policy Research (CAEPR) at The Australian National University. This centre has a largely applied focus—mostly the evaluation of government programs and policies towards Aboriginal people—from within an academic setting and via original research (see Rowse 2002).

But the differences between the two orientations run deeper. Many applied anthropologists must acquire new analytical skills and methods outside the usual canon of anthropological theory in order to complete their tasks successfully. The subject matter and findings of applied research tend to be of a practical nature, and, in Bennett's words, might be 'considered thin or trite by scholars' (Bennett 1996:S28). Both these factors tend to distance applied anthropologists from academic anthropological discourse.

There is no logical reason why the applied–pure divide should coincide with the ethnography–theory divide. It is, however, plausible that those who predominantly work outside the academy would not have an interest in valorising metropolitan theory and could therefore conveniently align themselves with the position that ethnography is independent of theory.

While these tendencies could be seen simply as different specialisations within anthropology (academic and applied), hierarchies develop that make it difficult for an applied anthropologist to engage in occasional work in the academy, but allow the academic to take on consultancy work during the semester break. The sense of relegation is in evidence in the sharp response of applied anthropologists to suggestions from their academic colleagues that applied work is ultimately dependent on long-term participant-observation fieldwork (pure research).¹⁴ It can also be seen in the doubts about whether ethnographic information collected in the course of applied work adds significantly to anthropological knowledge (see, for example, Morphy and Morphy 1984:46). The response typically asserts that the applied researchers are in fact at the cutting edge—for example, of 'change theory', in Bennett's response (Bennet 1996:S30; also see van Willigen 1993:x).

14 See anthropologist Rod Hagan's letter to the editor in *The Australian* (17 January 1996:10), and the reply to Professor Weiner entitled "'The Devil take Hindmarsh': a reply to Professor Weiner", which was signed by Julie Finlayson, David Martin and Diane Smith—all anthropologists at the Centre for Aboriginal Economic Policy Research at The Australian National University at the time. Unpublished, copy in possession of the author.

For the moment, it should be noted that, unlike much applied work, being an expert witness in a traditional land claim brings applied anthropologists and academic anthropologists directly into competition over the same canon of anthropological theory and the same ethnographic archive, focused on the claimants and their claim area. This is because one of the constituting issues of the Australianist specialisation within anthropology—well before land rights and native title—has been local organisation and traditional land tenure.

Intermediate reflection on 'scientific' capital

From these basic elements of anthropology—regional specialisation, increasingly complex and self-referential metropolitan theorising and the pure-applied divide—it is possible to begin to build up a picture of how 'scientific' capital is accumulated in contemporary anthropology. One way is to find some anthropological 'green fields' that reveal some new cultural variation and enable an exemplary ethnography of a new region to be written. More likely is the ethnography of an existing region that fills in a gap, by choosing either a new location within the region or a new topic within the region, especially if that topic is a recognised specialisation within anthropology (gender, art, music, and so on). Such ethnography should demonstrate knowledge of the existing specialist literature and position its own new contribution within the literature. More risky and rewarding is to challenge or attempt to overturn the previously accepted wisdom of the specialist literature. Hypothetically, being able to demonstrate specialist skill—the accurate deployment of the extensive, specialist literature and an original contribution to it—in more than one established region should increase 'scientific' capital.¹⁵

As Appadurai implies, the other method of accumulation is by linking a regional specialisation to contemporary issues in metropolitan theorising—for example, by demonstrating how a particular field situation allows a new twist on a theoretical question. Bourdieu's own career could be seen as the ultimate form of the strategy: a particular ethnographic location and historical juncture inspiring a new general theory of society that can be seen as addressing shortcomings in previous theorising—in his case, Lévi-Straussian structuralism.

If theory, variously defined, is a key element of anthropology then the logic of competition would indicate that specialising in theory would be another way to gain 'scientific' capital in anthropology—and the more complex, the better (see Bourdieu 2000:36). Because of the difficulties of establishing 'scientific' capital

¹⁵ What I have called a strategy for acquiring scientific capital bears many similarities to Basil Sansom's 'lodge rules' for choosing a field site (Sansom 1985).

from applied research, it would generally have to be avoided by those ambitious for advancement in the field of anthropology unless it was undertaken from a secure position within the academy.

Because of the nature of the case studies to follow, I have so far emphasised the individual within the regional specialisation as the locus of the accumulation of 'scientific' capital and its conversion into academic capital. But it has to be acknowledged that the department, containing an assortment of different regional specialists, is the more typical unit of day-to-day socialisation within the anthropological field. This is where the tensions between teaching, research and departmental administration are played out. Departments also exist in a hierarchical field of status as evidenced by the occasional claims of elitism within anthropology.¹⁶ Thus, as well as individual social capital there is institutional capital that gives an automatic advantage to the individual faculty members in prestigious departments. Similar pervasive prestige hierarchies apply to the academic anthropological journals.

The field of anthropology within the broader social field

Australianist anthropology has a low public profile and uncertain public support. From the high point of the establishment of the Australian Institute for Aboriginal Studies in 1964–65 and the invitation to W. E. H. Stanner to deliver the nationally broadcast Boyer Lectures in 1968, the situation has become more fraught (cf. Hamilton 2003; Hinkson and Beckett 2008). The Hindmarsh Island affair—however unfairly—probably created a negative public perception of anthropology: the naive anthropologist accepting the existence of restricted traditional knowledge, which had been fabricated by Aboriginal people for their own ends.¹⁷ Moreover, there has been the rise of what could be summarised as the anti-colonial (sometimes 'post-colonial') critique of anthropology coming from internal critics (Asad 1973), from disciplines in competition with anthropology (Attwood and Arnold 1992; Hodge and Mishra 1990; Muecke 1992; Wolfe 1999) and from Indigenous people themselves. Thus, the task of gaining legitimacy and public support has become more complex. Arguably, the most successful contemporary strategy has been anthropology's repositioning as curator, decipherer, historian and commentator on contemporary Indigenous

16 See, for example, the various papers from a panel on 'Elitism and Discrimination within Anthropology' held at the 1993 Society for Applied Anthropology (Baer 1995; Cassell 1995; Harrison 1995; Johnston 1995; Nader 1995; Paredes 1995; Singer 1995; Smith 1995; Tashima and Crain 1995).

17 See Bell (1998); Brunton (1996); Clarke (1996); Fergie (1996); Hemming (1996, 1997); Kenny (1996); Lucas (1996); Simons (2003); Tonkinson (1997); Weiner (1995, 1999, 2001, 2002). Later accounts by some of the key Aboriginal participants indicate that there was probably a diversity of honestly held Aboriginal views about the disputed area, rather than a simple fabrication by one group (see Rowse 2006).

art, particularly the internationally recognised Western Desert art movement. From the legitimacy/public support perspective, land rights and native title would seem to play a critical role. They provide the highest-profile work that most anthropologists will undertake. They might also align anthropology with Indigenous interests, at least superficially, and could therefore be seen as a partial answer to the anti-colonial critique. This context no doubt puts pressure on anthropologists to become advocates for the Indigenous claimants—a role antithetical to the expectations of independent experts in the juridical field. The degree to which anthropology has succumbed to this pressure has become one of the major fault lines in internal debates about applied anthropology both in the land rights and native title eras.¹⁸

Anthropologists who specialise in Torres Strait Islander studies face similar issues, some of which will be canvassed in the first case study on the *Mabo* hearing.

The juridical field

When anthropologists enter the witness box, they know they are at the heart of the very different social field of law; a boundary has been crossed. Even before agreeing to undertake research for a native title claim, there must be a reorientation towards a strange world where the mastery of academic social situations or the consulting practice is suddenly discounted. Practical mastery of the seminar, the academic conference, the corridor discussion, departmental administration, or, alternatively, in the consultancy practice, and practical mastery of dealing with clients and helping them solve their practical problems, all count for very little. What counts is the mastery of the rules of evidence and the legal doctrine of native title, and these are part of the professional repertoire of judges and lawyers.

The juridical field and the constitutional state

The juridical field is part of the larger apparatus of the constitutional state and modern law. The foundational sociological theorists of modernity tend to put modern law at the end of a long social-evolutionary process, at the opposite end of the spectrum to small-scale, tribal societies.¹⁹ They point to the positivity of modern law—that is, its objectified, contingent and explicitly conventional

18 See, for example, Kolig (1982); Maddock (1998b, 1999); and Sutton (1995b).

19 Here I am principally thinking of Weber in Chapter VIII, 'Economy and law (the sociology of law)', in *Economy and Society* (Weber 1925), but the same assumption can be found in Durkheim's proposal of a direct link between forms of law and forms of solidarity (mechanical and organic) (see Cotterrell 1999; Durkheim 1893).

nature, as opposed to charismatic revelation through law prophets. They also point to the formulation of rights in terms of citizenship within the state rather than rights attaching to group membership, law's reliance on a legitimate political order, its systematisation into complete codes, its use of relatively rational methods of fact-finding, its administration by trained specialists (the legal profession) and separate enforcement institutions (police).

The designated role of the judiciary, within the constitutional state, is one of the interpretation of the constitution and the independent adjudication of disputes by the application of legal doctrines to factual situations. Notwithstanding the constitutional distinction between law interpreters (the judiciary) and law-makers (the legislature), and the longstanding reluctance of the courts to admit their law-making role, judges do share law-making responsibilities with the legislature, particularly in formulating common law doctrines, interpreting the constitution and interpreting vague legislative provisions. The legal doctrine of native title demonstrates some of the complexity of this shared responsibility.

This doctrine sprang into being belatedly, in 1992, with the High Court decision in *Mabo*.²⁰ That decision contains a number of slightly different formulations of native title, although two other judges supported Justice Brennan's judgment. Brennan stated that traditional laws and customs, which give a clan or group an entitlement to land, may be recognised by the common law of Australia, provided that the traditional laws continue to be acknowledged and traditional customs observed as far as is practicable. Some change in traditional laws and customs was allowable provided that the general nature of the traditional connection to the land had been maintained. Brennan conceived of native title as a communal title. Despite inconsistent terminology in his judgment, he seemed to be pitching the legally relevant group—the native title-holders—at the intermediate level of the 'clan or group' (sometimes 'community, clan or group'). Membership of such a group was envisaged as depending on biological descent, mutual recognition and a system of traditional authority. Above the intermediate level was 'a people' who shared the same traditional laws and customs, and lower than the intermediate level were individuals (sometimes 'individuals and subgroups'), who exercised rights under the group's communal native title.

More recently, in the *Yorta Yorta* case in 2002, the terminology of 'normative system' and 'society' was introduced.²¹ 'Normative system' appears to be a way of emphasising the need to demonstrate the obligatory nature of the relevant traditional laws and customs. The requirement to demonstrate a continuous 'society', out of which the relevant native-title groups and their traditional laws

20 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

21 *Yorta Yorta v Victoria* 214 CLR 422.

arose, is a little more confusing. On the one hand it seems to be a restatement of Brennan's formulation, but on the other, it seems to cut across his distinction between his intermediate group and the higher level of 'a people' (Burke 2010). In any event, the effect of the *Native Title Act 1993* (Cwlth) (the *Native Title Act*) was to give back to the courts the problem of specifying the nature and extent of native title rights in Australia, case by case, in the usual adversary system of civil litigation—in other words, in the juridical field.

The core of the juridical field comprises judges, lawyers and, at lower levels, witnesses, performing their roles in a court case. This activity has a formal aspect recorded in court documents, transcripts and reasons for decision, and a less accessible informal dimension. The informal aspect would include the judge's private thought processes, corridor discussions with court staff, other judges and counsel appearing for the parties, discussions among the parties and their lawyers about the strategy of their case, the proofing of witnesses and what knowledge the lawyers might have gleaned about the idiosyncrasies of the judge, gossip, scuttlebutt and unflattering nicknames. Bourdieu includes legal academics in his description of the French juridical field, where he defines the field in terms of competition between judges, lawyers and legal academics over the creation of authoritative legal propositions.

But the judge really does not have to compete. The judge is in a position to pick and choose which propositions from academic commentary to accept. In Australia, especially after *Mabo*, judges have been relatively impervious to academic commentary about native title. New elaborations of native title doctrine tend to arise more directly from the professional competition of the adversarial process, in which new arguments can largely be understood as attempts by claimants to enlarge and strengthen the doctrine of native title and attempts by respondents to restrict it, and impose procedural orthodoxy via strict application of the rules of evidence. In this structured competition it is easy to see how the opposing sides could see 'normative system' and 'society' as simply a restatement of *Mabo* or, alternatively, as the addition of stricter requirements of proof.

At the higher levels of the juridical field—particularly the High Court and the Full Federal Court—the influence of decisions spreads outwards to related activities and fields, in a ripple effect, influencing the way in which lawyers advise their clients about native title, how governments formulate administrative guidelines for so-called 'connection reports' in lieu of contested hearings and how all parties make calculations in mediation and settlement negotiations—in short, what happens in the juridical field spreads to the legal shadow lands. At lower levels of the juridical field decisions about the application of native title doctrine tend to remain within the bubble of the particular case and its direct

participants, although decisions about procedural issues might have a ripple effect too, through being carefully collected by legal practitioners as resources for procedural tussles in future cases.

Law-finding

Essentialist descriptions of the juridical field have long been made under the rubric of 'juristic thought and legal values'. Campbell (1974), for example, drew on Weber and others, to define juristic thought as

- an attitude of acceptance of the law as it is—in other words, limiting itself to the question of whether a proposition is a law or not (sometimes referred to as legal science)
- the use of abstract propositions conceived of as constituting part of a complete system
- a mode of persuasion that is rational but not conclusive in a logical sense
- a practical orientation towards making a decision and giving reasons
- particularistic, as opposed to the search for general rules—a process of matching complex factual situations with existing laws
- retrospective in orientation.

Another attempt to uncover the workings of the juridical field was through the close logical analysis of appellate decisions. This approach dates back to a remarkable intellectual movement in jurisprudence known as American Realism, which was sceptical of the denial of judicial creativity in legal doctrine and revealed widespread leeway and choices made by appellate judges (see Twining 1973). These so-called 'rule-sceptics' demonstrated a quite different aspect of law to Weber's broad-brush identification of modern law with occidental rationality (see Weber 1925:vol. 2, ch. 8).

While the focus of this book will be on fact-finding at the trial level, the way in which the legal doctrine of native title has been formulated impinges directly on that task. For the trial judge must adopt an attitude of acceptance of the doctrine and of the obligation to bring a case to a reasoned conclusion in the face of three major areas of indeterminacy: the precise nature of the group that holds the communal native title and the 'society' out of which that group arose; which practices and beliefs relating to land can be called 'traditional laws and customs'; and what degree of change of tradition is acceptable.²²

In the field of the academy, there are ongoing debates in the sub-specialisation of 'primitive law' and its successors, 'legal anthropology', 'comparative law'

22 For an analysis of the indeterminacy of similar concepts in Canadian jurisprudence see Connolly (2006).

and 'legal pluralism' about whether law is a useful category for cross-cultural analysis. From the perspective of the academy, the High Court's native title doctrine takes a strong stand on one side of the academic debate. By judicial fiat it proclaimed an end to the discussion in the juridical field by institutionalising legal pluralism/primitive law in the doctrine of native title. Henceforth, for the trial judge, it became a question of finding those laws and customs in the facts of a case, not whether it was a feasible intellectual project.

It would be theoretically possible for the judge—either privately or in the course of the hearing—to seek in the philosophy of law, jurisprudence, sociology or anthropology some further specification of the indeterminate native title concepts. Tamanaha (1995), for example, refers to the anthropological literature that could be utilised to make a coherent distinction between 'laws' and 'customs'. 'Laws' could be confined to institutionalised norms—that is, those that have become objectified and named by the people of the society, and involve predictable procedures and enforcement. 'Customs' would then be the implicit norms that have no folk objectification but might become objectified in ethnography.

Similarly, it would be theoretically possible for the judge to draw upon the debates in legal anthropology to give a further specification to the combined phrase 'traditional laws and customs'. That phrase itself seems to arise out of a particular colonial and academic project associated with indirect rule in Africa and the attempt to integrate native courts into newly independent African states and hence the need to describe the traditional laws and customs that would be integrated (Roberts 1979:192–6). While this particular project might not have led to much reflection on the nature of law, the sub-discipline as a whole was involved in trying to craft a definition of law that would be applicable to all societies, including hunter-gatherer societies, and these efforts would seem to be particularly apposite to native title. For example, Hoebel in *The Law of Primitive Man* (1954:28) suggested that 'a social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognised privilege for so acting'.

Adopting this kind of definition would lead to inquiries about social norms, enforcement of norms and authority.

In judgment writing, however, any explicit attempt to further define native title legal doctrine by reference to other bodies of knowledge would offend against the fundamental rule that legal doctrine must be sourced in legislation and the pronouncements of superior courts. Violation of this fundamental rule would risk a successful appeal on the basis that the judge misdirected himself or herself on the law of native title. This is why judgments in native title

hearings typically commence with a formulation of the legal doctrine of native title drawn exclusively from the *Native Title Act* and the pronouncements of the High Court, then move directly to dealing with the typically voluminous transcript of the evidence of the claimants and experts and documentary evidence. It is also why the opportunity to clarify the phrase 'traditional laws and customs', by distinguishing law from custom, has not been taken up and remains, paradoxically, a unitary concept, at least in formal legal doctrine. This is not to say that there can never be an explicit engagement with other formal bodies of knowledge in the juridical field. But, like someone going into the library of another discipline and taking a book off the shelf at random, there will likely be a lack of comprehensive engagement (cf. Cotterrell 1986).

Fact-finding

The work of the judge at the trial level has long been conceived of as the application of law to facts. The formal institutions of forensic fact-finding could be summarised as follows

- pre-trial refinement of issues through the particulars of the statement of claim/application, the filing of defences by respondents and procedures for requiring further and better particulars (the pleadings)
- the hearing of witness testimony under threat of prosecution for lying
- rules of evidence aimed at adducing the most reliable evidence by excluding hearsay and opinions
- procedures for testing witness testimony in cross-examination.

When considering the fact-finding work of the judge, the legal doctrine of the fundamental distinction between fact and law must be acknowledged, but not taken at face value. The legal conception of a 'fact' tends to bypass the issues of the linguistically mediated nature of most evidence (see Jackson 1988:73) and the perennial philosophical difficulties with such a concept (see, for example, Hacking 1999:80–4). Instead, there is an unarticulated assumption or commonsense stance of the accessibility of the reality-in-itself of the fact.

The sceptical critique of appellate rule finding in American Realism was accompanied by a parallel scepticism about fact-finding, particularly in Jerome Frank's classic *Courts on Trial* (1949). What gives that book a lasting influence, aside from its debunking exuberance, is the fact that Frank himself was a senior judge. That fact cloaks the whole book with a confessional authenticity.

For Frank, the explanation of judicial process as the application of law to facts is nothing but a myth. Like the historian, the judge reconstructs the past from second-hand reports—the fallible sensory data of witnesses. Facts are guesses

on which basic legal rights depend. He draws on the account of magic in Malinowski and Benedict to argue that the judicial process is nothing more than modern legal magic demonstrated by

- its pretensions to be able to see into the mind of another person
- its obfuscation of reality and projection of the mystique of the legal process by using ideal images of the judicial process in explaining itself to the public
- its denial of the extent of judicial discretion and social pressures operating unconsciously on the judge.

Frank's account is one of strategic judicial behaviour that is difficult to access because of the judge's mastery of the legal doctrines about admissible evidence and the giving of reasons that insulate a decision against successful appeal.²³

Frank also drew on the language of Gestalt psychology to explain how frequently judges form an overall impression about a witness or a 'hunch' about the best result in a particular case. The judge's attention to the facts is then organised around supporting this overall impression or hunch. Although in Frank's experience this 'hunching' is ubiquitous, it is also contrary to the established norms of avoiding prejudgment of the facts, avoiding bias and contrary to the expectation of a methodical and even-handed approach to the resolution of disputed facts. Thus, there is a resistance to translate the Gestalt view about the preferred result into written reasons for decision. Instead, with the professional knowledge of the norms of judicial fact-finding and, with an eye to the appeal court, the judge formulates the written reasons in accordance with those norms, sometimes referring to an assessment of the demeanour of witnesses, which is obviously unavailable to the appeal court (Frank 1949:165–85).²⁴

23 To support this proposition, he gives rare anecdotal evidence of explanations that judges have subsequently made to him about cases in which he was involved. For example:

I will never forget one of my experiences as a young lawyer. I participated in a lawsuit, lasting a week, tried by an able trial judge without a jury. During the course of the trial, on every doubtful question concerning the admission or exclusion of evidence, the judge, to my great indignation, ruled in favour of the other side. To my surprise, a few weeks after the trial ended, the judge decided the case in my client's favor, with strong findings of fact. A year later I met the judge who referred to the case, saying: 'You see, on the first day of the trial, I made up my mind that the defendant, your client, was a fine, hard-working woman who oughtn't to lose all her property to the plaintiff, who had plenty of money. The plaintiff was urging a legal rule which you thought was wrong. I thought it was legally right, but very unjust, and I didn't want to apply it. So I made up my mind to lick the plaintiff on the facts. And by giving him every break on procedural points during the trial, and by using in my opinion the legal rule he urged, I made it impossible for him to reverse me on appeal, because, as the testimony was oral and in conflict, I knew the upper court would never upset my findings of fact.' That judicial conduct was not commendable. But the judge's story did open my eyes to the way in which the power of a trial judge to find the facts can make his decision final, even if, had he correctly stated his honest notion of the facts, his decision would have been reversed for error in applying the wrong legal rule. (Frank 1949:168–9)

24 For a realist critique of the evaluation of evidence using the demeanour of the witness, see Wellborn (1990–91).

Apart from Frank's challenge to the pretensions of forensic fact-finding, it is also clear from the examination of typical judicial processes that facts are moulded by legal doctrine and the trial process. For example, the legal doctrine of native title—particularly such concepts as 'communal title', 'traditional laws and customs', 'normative system', 'society' and 'continuing traditional connection'—guide the formulation and organisation of all the potential evidence that could be adduced, as does the list of rights in the proposed determination of native title.

Law and scientific expertise

In legal doctrine, expert evidence is characterised as exceptional because of its privileged exemption from the general rule restricting witnesses' evidence to what they saw or heard, rather than their opinions. The doctrine depends on the court's acceptance that the witness has specialised knowledge based on training, study or experience and that the opinions are based on that knowledge.²⁵ This wide Australian formulation allows for a variety of experts, although, in practice, expertise broadly overlaps with academic disciplines or professions based on the sciences or scientific methodology. This fundamental reliance on the institutions of science is reflected in the US law that refers to 'scientific, technical, or other specialised knowledge'.²⁶ Thus, judicial anxieties, pronouncements and guidelines, as well as academic commentary, tend to address the scientific expert and the interaction of science and law.

The general judicial anxiety is that experts tend to favour the parties who call them, especially if they have been requested to conduct new research specifically designed to resolve an issue in the case—disparagingly called 'research for litigation'.²⁷ In the United States of America, this anxiety was expressed by legal commentators as a concern to keep 'junk science' out of the courtroom and led to a readjustment of American legal doctrine about experts by the US Supreme Court in *Daubert v Merrell Dow* in 1993.²⁸ The judge was thereafter required to perform a gatekeeping role, evaluating the reliability of the scientific evidence using some factors that scientists themselves might use in evaluating their

25 See s. 79, *Evidence Act 1995* (Cwlth).

26 The relevant part of the US Federal Rules of Evidence states: 'If scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or by education may testify thereto in the form of an opinion or otherwise' (Rule 702).

27 The pervasive concerns about the bias of experts were recently confirmed by questionnaire research with Australian magistrates and judges (see Freckelton et al. 1999, 2001).

28 For the 'junk science' debate, see Huber's *Galileo's Revenge: Junk Science in the Courtroom* (1991); Bernstein's 'Junk Science in the United States and the Commonwealth' (1996); Black et al.'s 'Science and law in the wake of *Daubert*: a new search for scientific knowledge' (1994); Edmond and Mercer's 'Keeping "junk" history, philosophy and sociology of science out of the courtroom' (1997); and other references cited by Edmond and Mercer (1997:49–50).

colleagues' work, such as testability (falsifiability), peer review and publication, and the known or potential error rate. It was this move towards a more 'internal' scientific perspective that its critics saw as a discredited and naive attempt to formulate ideals or norms of scientific practice.

The most trenchant critics drew on the social-constructionist critique of the pretensions of science to demonstrate the enormous gap between the ideal criteria adopted by the US Supreme Court and the reality of scientific practice with its diversity, personal interests in research outcomes, secrecy, entrenched social networks and more circumspect claims about the benefits of peer review (Edmond and Mercer 1997).²⁹ Moreover, they argued that the prominence given to falsifiability as a key indicator of science—taken directly from the Popperian philosophy of science—ignores debates within that discipline that pose serious and widely accepted challenges to the centrality of falsifiability.

The unmasking of the pretensions of science becomes the unmasking of the authority of the judge. The judge who puts his faith in ideal images of science has no clothes. This, it is implied, allows a re-examination of what the judge is really doing. Jasanoff (1995:214), for example, sees the law's uncritical ideas of science as a concealment of its own jealous guarding of the power of courts to declare what counts as science for the purposes of law. As heirs to the realist tradition, she and others tend to see the wide leeway given to the judge by legal doctrine that is formulated with a high degree of generality or which contains contradictory elements. Contradictory elements allow different judges to emphasise different aspects of the doctrine to arrive at the desired result. Thus the *Daubert* formulation is not seen as absolutely determinative of a new approach to judicial decision making about scientific evidence, but more as a resource that a judge could deploy to justify a particular exclusion or inclusion of evidence.

What does this mean for the reception of anthropological evidence in Australia? Although legal doctrine in Australia about experts has not yet followed the American lead, it might be moving in that direction (Edmond and Mercer 1997). The Australian legal formulations of identifying areas of expertise have emphasised general acceptance by the scientific community but have also used the terminology of 'reliable body of knowledge'. More intrusive, *Daubert*-like criteria might enter Australian jurisprudence in the general rubric of reliability (see Freckleton and Selby 2009:ch. 4). More to the point, though, is that, in the juridical field, all expertise, including anthropological expertise, is likely to be viewed through the lens of ideal images of science. Compared with the specialist

²⁹ In referring to the social-constructionist critique of the pretensions of science (see, for example, Latour and Woolgar 1979; Woolgar 1988), I am not necessarily aligning myself with it. There is also a valid critique of the pretensions of social constructionism: see Bohman (1991:ch. 3); and Hacking (1999:63–99).

jurisdiction of the Aboriginal Land Commissioner under the *Land Rights Act*, where virtually all experts were anthropologists, in the native title era, the anthropologist is just one kind of expert appearing before Federal Court judges. While addressing all experts, the rules and guidelines for expert witnesses tend to assume the scientific expert as a paradigmatic case (see Cooper 1997–98; Edmond 2004).

There is no in-principle decision in legal doctrine about whether anthropology should be regarded as a science. Accordingly, a question for this book is whether, in native title, the ideal of anthropological expertise will be modelled directly on ideals of scientific expertise or whether new ideal images will emerge to take account of anthropology's non-experimental methodology. In other words, will anthropological research for claims be rejected as 'junk anthropology'?

It might be possible to refine this question further because there has already been some harsh criticism of evidence given by anthropologists who have not done fieldwork with the claimant group. It could be hypothesised that, instead of ideal images of science, judges will utilise ideal images of anthropological methodology, perhaps forming around long-term fieldwork and all that it implies—intimate and extensive knowledge based on immersion in the society—as an evaluative criterion. This hypothesis is all the more likely as such methodology is not necessarily at odds with empirical ideals, even though it can never emulate the specifics of experimental methodology in the physical sciences. The question to be considered in the case studies, then, is what images of ideal anthropological research can be constructed from the judicial praise and criticism of the evidence of anthropologists and how those images relate to the idealised images of scientific expertise.

Legal habitus

To conclude this account of the juridical field, it is necessary to balance the sceptical critiques of fact-finding and ideal images of science with some of the constraints on judges. The sceptical critiques emphasise the wide leeway that judges have in formulating facts and in deploying vague or conflicting legal doctrines. These critiques tend to overemphasise the free agency of the judge and assume that all judges take a strong view of the most desirable outcome. It is equally plausible that the fortunes of the claimants' case rise and fall as the evidence unfolds—rising when the claimants' evidence is first presented, then falling when it is undermined by cross-examination or by the contradictory evidence of other witnesses. There are also the constraints of what Bourdieu (1987:833) calls the legal habitus 'shaped through legal studies and the practice of the legal profession on the basis of a kind of common familial experience'. Legal habitus incorporates Llewellyn's (1960) idea of steadying factors, such as an

influential period style of judgment writing, which provides some predictability amid wide judicial discretion. Others have referred to it as the influence of the 'legal interpretive community' (Fish 1980; Niblett 1992). These shared values and experience tend to fill in the gaps left by formal legal doctrines, such as the actual standards of procedural fairness and courtesy in a hearing and the degree of reflexiveness expected in judgment writing, especially when justifying critical findings of fact.

Theorising the interaction of the social fields

Conceiving of anthropological expert testimony as an aspect of the interaction of specialised social fields enables a move beyond the centrality of Maddock's tension between independence and advocacy to a more complex explanation (see Maddock 1980a, 1998c, 1999)—for there are many ways of theorising this interaction.

Forming gestalt views of the other field

Frank's theorising about judicial fact-finding involving gestalts, in the sense of global assessments or hunches about witnesses and desirable outcomes, is suggestive of each field forming totalising assessments about the other. One particular example of this kind of assessment would be the decision facing the court in the first assertion of anthropological expertise in the juridical field in Australia in the *Gove Land Rights Case* in 1972.³⁰

While in legal doctrine such decisions must be made afresh in each case, there is a sense in which the first acceptance of expertise in the field of anthropology makes it less contentious in subsequent cases. More generally, I have extrapolated from the science–law literature to predict the formation of ideal images of the anthropologist by judges. The corollary of this prediction is the adoption of ideal images of law and legal procedures in the field of anthropology.

30 The predicament of the trial judge in assessing expertise was captured by Justice Blackburn in the *Gove Land Rights Case*:

In such a matter, it seems to me, there can be no precise rules. The court is expected to rule on qualifications of an expert witness, relying partly on what the expert himself explains, and partly on what is assumed, though seldom expressed, namely that there exists a general framework of discourse in which it is possible for the court, the expert and all men according to the degree of education, to understand each other. Ex hypothesi this does not extend to the interior scope of the subject which the expert professes. But it is assumed that the judge can sufficiently grasp the nature of the expert's field of knowledge, and thus decide whether the expert has sufficient experience of a particular matter to make his evidence admissible. The process involves an exercise of personal judgment on the part of the judge, for which authority proves little help. (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 160)

Swallowing

Luhmann's theory of law as an autopoietic system offers another model of interaction (Luhmann 1985:ch. 2; Teubner 1988, 1993). The autonomous, self-reproducing system of law recognises anthropology as part of its environment. When the law interacts with anthropology, however, it is not in a dialogue, but an act of digestion, in which law converts anthropology into what it needs for its own functioning. Thus anthropological knowledge is converted into a legal fact that sits alongside other facts, which are assembled by the judge into findings of fact, eventually reproducing law's unique binary code: native title/not native title. Free anthropology becomes enslaved and transformed into law's anthropology. The same conclusion could also be derived from the general asymmetries of power and status between the two fields and the relative inaccessibility of technical legal discourse.

Collusion and sharing responsibility

Bourdieu's passing reference to expert witnesses in 'The force of law' (1987) is suggestive of another way of looking at the interaction: collusion. In that article, it was the collusion of the professionals involved in dispute resolution who, through neutralising language, produce a misrecognition of the arbitrary and constructed nature of its pronouncements as autonomous and impartial. The science-law literature is also suggestive here, although the word 'collusion' is not used. It is more that judges look to science to share the burden of responsibility for difficult decisions, such as a costly finding of negligence against a powerful corporation. A finding that native title exists is similarly a costly finding against the interests of the state. Accordingly, in cases of positive findings, judges might accentuate the independence, professionalism and scientific nature of the expert anthropological testimony.

Competition

In *The System of Professions: An Essay on the Division of Expert Labour* (1988), Abbott argues that the chief organising principle among different professions is competition over the 'ownership' of a particular social problem. This proposition is suggestive of competition between anthropologists and legal experts, for example, over who is best able to discover and describe traditional laws and customs. Such competition typically emerges between anthropologists and lawyers about the best way to formulate the claim, particularly the key indeterminate concepts. In the juridical field of native title—more so than under the *Land Rights Act*—anthropology is structurally on the losing side of this competition.

The competition between archaeologists, historians and linguists, on the one hand, and anthropologists, on the other, is more amenable to Abbott's principal idea. In practice, under the *Land Rights Act*, the anthropologist was responsible for synthesising archaeological, historical, linguistic and anthropological knowledge into a claim book. In the native title era, aided by stricter policing of the legal doctrines restricting experts to their own field of expertise, archaeologists, historians and linguists have been able to carve out their fields from the synthesising dominance of anthropology.³¹ This restriction suggests another possible aspect of collusion: anthropology enlisting law against its rivals to maintain its dominant position among the social sciences relevant to native title.

Notwithstanding these incursions, the scope of anthropology makes it the only discipline that can assert an overlap with all the issues facing the native title judge. This competitive overlap between expert and judge was originally subject to the conceptually confused legal doctrine requiring experts to somehow avoid addressing 'the ultimate issue' that is rightfully the sole prerogative of the judge. The doctrine, which was still applicable at the time of the *Mabo* hearing, has since been abolished in all federal matters including native title but seems to linger on in the legal habitus of some barristers who continue to object on this ground in native title matters.³²

Hysteresis

In *Pascalian Meditations*, Bourdieu claimed that he had been misinterpreted by his critics and stated that he never intended habitus to be an inflexible concept based on a principle of repetition and conservation. Rather it should be seen as constantly changing and subject to mismatches, discordance and misfiring, especially when new situations are confronted (Bourdieu 2000:159–63). The constant mismatch of habitus and circumstance is the fate of the *parvenu* and the *déclassé*. In a similar way it could be anticipated that the academic habitus is subject to misfiring or hysteresis in the juridical field. An example of this, suggested by Professor Nicolas Peterson,³³ is the neophyte anthropological

31 For the claims of history, see Paul and Gray (2003); linguistics, Henderson and Nash (2002); and archaeology, Lilley (2000). Also see McCalman and McGrath (2003).

32 See Freckelton and Selby (2009:ch. 7).

33 Personal communication, 2004. Peterson is currently a Professor of Anthropology at the School of Archaeology and Anthropology at The Australian National University and has had a long career in Australianist anthropology. He has been a key figure in debates about traditional Aboriginal land tenure and an influential applied practitioner including involvement in the Woodward inquiry into land rights in the Northern Territory and involvement in numerous land claims in the Northern Territory and in native title claims (see, for example, Peterson 1976, 1983, 1985; Peterson and Long 1986).

expert witness, who, as if defending his/her conclusions at an academic seminar, steadfastly refuses to make any, even minor, concessions during cross-examination, thus giving the impression of inflexibility and bias.

A Bourdieuan perspective, or any simple class perspective, would also predict that those experts who occupy a similar social position to the judge—either because of their inherited social capital or because of their high academic and 'scientific' capital—would perform better because of their social 'ease'. Such experts might also receive a better hearing as the judge recognises 'one of his own'. Similarly, 'learning the game' of the juridical field through repeated appearances should reduce the hysteresis effect through the modification of the habitus.

Another implication of Bourdieu's insistence on the fundamental relevance of the relative positioning of law and the social sciences in the field of the university and in the wider social field is a possible underlying resentment in the courtroom confrontation. Law's position in the university field depends largely on its relevance to the reproduction of the temporal order, whereas, in Bourdieu's exposition, sociology must rely on its own limitless ambition to be able to explain all aspects of society, including law. Therefore, the appearance as an expert witness might for some involve a frustrating subservience, even if for a short time, to a discipline of inferior intellectual ambition.

Conclusion on theorising the interaction of fields

To what extent do these conflicting possibilities have to be resolved before proceeding? A partial resolution is to acknowledge the pervasiveness of asymmetrical power between the fields; anthropology has to submit to law, anthropology's ideal images of law do not matter and hysteresis effects are predominately of the anthropologist in the foreign juridical field. Yet, collusion and the sharing of responsibility also seem plausible. Moreover, both fields exist within broader societal entanglements exemplified in the ongoing need for legitimacy and public support.

I have come to the conclusion that it is not necessary at this stage to finally resolve the contradictory aspects of the preceding characterisations. They can be seen simply as alternative framing devices through which to consider the particular case studies. The question of which framing devices provide the most adequate explanation will be considered in the concluding chapter.

Judge and anthropologist as knowledgeable, reflexive actors

As human actors form the medium of the interaction of anthropology and law in native title, the question arises of how to conceptualise and describe the relationship between individual actors and both legal and anthropological corpora that the judge and expert witness are expected to draw on in performing their roles in the highly structured legal context of a court case. The challenge is to find a way through an encounter thick with rules and expectations that can adequately represent individual choices—one that does not fall into a naive voluntarism or a total subservience to structure.

Bourdieu's theory of practice has been an obvious place to start because of its self-conscious attempt to overcome the structure–agency dichotomy. He characterised his theory of practice as a middle course between the extreme of Lévi-Straussian structuralism and the extreme of agency represented by Sartre's existentialism. Bourdieu's resolution tends to be in terms of a variable but very limited scope for strategic action, within external constraints, and zero scope in certain instances, when dispositions are completely reducible to those external constraints (Bourdieu 1990:50). In the Bourdieuan social universe, this is frequently the case as people's expectations and desires are continually adjusted to their capacity to satisfy them, given the objective chances of a particular social positioning (see Bourdieu 2000:216–18).

The macro-structural constraints of social and economic class are brought into the face-to-face social situation via the habitus of learned dispositions. The most effective and controlling dispositions are those assumptions that are so widely accepted that they become part of a background commonsense. In this way, the arbitrary is misrecognised as natural—a process Bourdieu describes as symbolic violence because of the role it plays in domination. Interactions in a social field are also governed by different degrees of social competence and one's position in the social field, which is variable according to levels of accumulated material and symbolic capital. Instead of leaving structures at the abstract level of universal structures of the mind, symbolic structures are conceived of as embedded at the level of unconscious dispositions, which tends to structure interactions and thereby reproduce those very dispositions.

Another way Bourdieu avoids voluntarism is by emphasising the quick reactions to the field that depend on an implicit practical mastery, as opposed to the plodding, explicit nature of academic knowledge. Practical mastery—having a feel for the game of a particular social field—entails the exclusion of detachment and reflection. The logic of practice is the ability to organise all thoughts and perceptions by means of a few generative principles. In the immediate world

of practical mastery, rigour is always sacrificed for simplicity, since a fuzzy generality is always easier to master. Theorising makes explicit the workings of thought, whereas practice excludes all formal concerns and understands only in order to act.

Bourdieu's emphasis on struggle, competition and the implicit rules of practical mastery has led some to suggest that his theory of practice speaks more to small-scale societies such as the Kabyle than to our own (see, for example, Bohman 1999:159–63). It is more likely that his work was a deliberate corrective to what he saw as the inadequacies of the dominant structuralist theoretical approaches of the day. While Bourdieu's ideas have been useful in describing the two fields under consideration in this book, they downplay the mediation of social interaction by language. The properties of language and the social aspects of speech acts have long been the concern of symbolic interactionism (see Mead 1934), ethno-methodology (Garfinkle 1967) and in Habermas's elaborate *The Theory of Communicative Action* (1984, 1987). What can be taken from these works is that it is the ability to imagine another person's position or the implicit validity claims in another's proposition, and to confirm it through objectifying language, that enables the development of an inter-subjectively shared life-world, with its stocks of objectified knowledge and the possibility of coordinated action.³⁴

What we are dealing with in expert anthropological witnesses is an orientation towards a stock of objectified knowledge that has come into being through institutionalised reflexivity in the academy. In the courtroom drama of the presentation and reception of expert evidence, while the informal rules of the game remain in the background, the formal rules can easily be made explicit—for example, through challenges to the form of testimony based on legal doctrines of evidence. The judge's reasons for decision also require a high level of reflexivity about the formalities of what counts as a fact and what counts as law.

34 In making this move from practice theory to reflective social actors, I am aware that I am placing side by side strongly repelling theoretical perspectives—like holding together magnets of opposite polarity. Bourdieu was scornful of the possibilities of action orientated solely towards mutual understanding—the centrepiece of Habermas's magnum opus, *The Theory of Communicative Action* (1984, 1987)—as if it was an attempt to pretend that one could escape and stand outside the social world (Bourdieu 2000:65–7). But it is not necessary to read Habermas that way. All subjectivity is constructed in society and is relational in character. To focus on individual reflective actors is not to deny inter-subjectivity, only to momentarily bracket it. In native title claims there are a variety of reflexive moments arising out of quite different circumstances: the anthropologist's report, the anthropologist's answers to questions in cross-examination, the judge's written reasons for decision, reflections of the participants after the case, and so on. The different circumstances allow for varying degrees of critical distance. Having said that, a practice theory perspective is a salutary reminder of an implicit hierarchy in which academic research is assumed to be the apex of critical distance rather than the culturally positioned interaction of habitus and academic social field.

The medium of language and the possibility of reflexivity do not automatically overcome habitus or class position.³⁵ But it does mean that, to varying degrees, anthropologists are able to acquire some understanding of the legal doctrines involved in native title and the way in which the judge is likely to approach the task of fact-finding. It would then be possible for the anthropologist to compare the very different circumstances of the production of academic knowledge about the claimants. Finally, it would be possible for the anthropologist to conceive of the task of the anthropological expert witness as involving a deconstruction of the anthropological archive and its reassembly in terms that are relevant to the judge's task—that is, without for the moment overlaying it with the strong strategic action of the advocate.

An idealised model

This deconstruction/reconstruction process is also suggestive of a fundamental triangulation of the task of the expert anthropologist in native title (Figure 1.1).

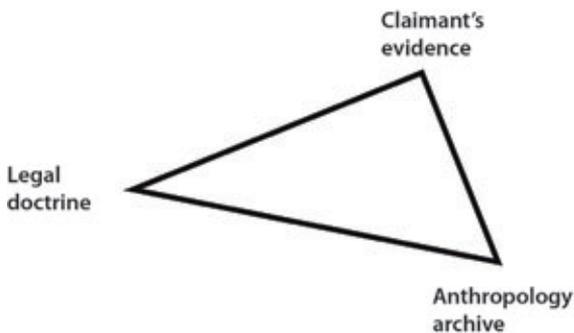


Figure 1.1 Idealised model of anthropological agency

It should be noted that this triangulation also describes the task of the claimants' lawyer—an indication that competition between the claimants' lawyer and the anthropologist will be an ongoing structural problem.³⁶ The triangle does not so adequately represent the judge's task, which, to oversimplify, is the resolution

35 Indeed, Bourdieu would probably see it the other way around—that is, that language incorporates and reproduces habitus and position within the social field (see Bourdieu 1991).

36 In a commentary on the US Indian Claims Commission process, Dobyns outlined two contrasting styles of lawyers:

1. Litigation directors who relegate the expert anthropologist to a service position of filling evidentiary gaps in the lawyer's theory of the case.
2. Team-leaders, who actively engage with the expert, explaining the legal requirements and seeking their advice on all aspects of the case. (Dobyns 1978)

One theory of the transition from land rights to native title would be of anthropologists having to cope with the change in their relationship with lawyers from the team-leader approach (land rights) to the litigation-director approach (native title).

of the two poles: legal doctrines and facts. In reality, the trial judge must also keep an eye to the appeal court and to public acceptance of the legitimacy of the judgment.

The anthropologist must manage this triangulation in a way that achieves maximum compatibility between the three elements, while projecting expert independence. One way of achieving this, without compromising the increasing theoretical complexity in the field of the academy, would be to confront interpretative indeterminacy directly, as in Bohman's approach to the philosophy of the social sciences (Bohman 1991).

In effect, this approach would mean saying that there is a complex, heterogeneous world of Aboriginal people, which anthropologists have sought to investigate and, inevitably, construct according to different theoretical approaches. The resulting archive and the claimants' evidence can be reconstituted and reinterpreted in a variety of ways, including ways that are relevant to the judge's task of assembling facts relevant to native title doctrine by

- explicitly discussing the consequences of choosing the title-holding group or the relevant 'society' from among the available groupings
- outlining the ways in which the traditional practices and objectifications in relation to land are law-like and the ways in which they are not law-like
- describing how current relations to land could be seen as continuous with pre-contact traditions and the ways in which they could be seen as discontinuous.

For ease of reference, this approach will be labelled the robust academic model—'robust' because of the strong conviction required to pursue it against typical expectations that the facts will always favour one interpretation over another and that the expert's role is to authoritatively resolve indeterminacies. It is also intellectually more robust in not pretending that there is always an easy fit between ethnography and legal doctrine.

Such an expert report would have the effect of throwing the responsibility for resolving central indeterminacies back onto the court. That this logical, if confronting, solution is rarely taken up is a further indication that there are triangulation decisions constantly being made, even though such decisions are difficult to uncover. These decisions are also based, either explicitly or implicitly, on some notion of the ideal expert witness and some positive ideal of the discipline that provides the expert with cultural capital.

Methodology

The subtle agency of individual anthropologists in the highly constrained situation of preparing expert reports and giving evidence in native title claims can be revealed only by a detailed analysis of the relevant anthropological archive, how it is reconstructed and how it is received in particular cases. An original review of the relevant anthropological archive will be undertaken, guided by Bourdieu (1988) (professional collusion and the game of the academy), Fardon (1990) and others (the historical development of regional specialisations in a dialectic with metropolitan theorising), Bohman (1991) (interpretative indeterminacy, matching of analytical tools to explanatory purposes), and Clifford and Marcus (1986) (textual deconstruction of ethnographic authority). Such a review will provide a more comprehensive account of the available material on groups, 'societies', normative systems, laws and traditional continuity before the process of deconstruction–reconstruction in an expert report has commenced. It deliberately moves in an opposite direction to the simplifying pressures in native title report writing by emphasising the theoretical frameworks of particular contributions to the archive and their position with the development of the discipline.

Comparing this review with the anthropologist's report should clarify where the decisions and choices were made by the anthropologist, both in reconstructing the archive in a way that is deemed relevant to the juridical field and in the degree to which the process of deconstruction and reconstruction is incorporated into the report or submerged. This textual analysis will then be supplemented with in-depth interviewing aimed at eliciting a subjective rationale for the choices made in the report, the construction of the legal doctrine of native title and the experience of giving evidence. The transcript of the hearing and interviews with participants should also balance the textual analysis with some evidence of the performative aspects of the encounter.

The immediate judicial response to the anthropologist's evidence is not as accessible and analysis must rely on the recorded interventions made by the judge during the hearing and a textual deconstruction of the judge's reasons for decision.

The case-study method³⁷ is the most suitable methodology to investigate the questions of this book because of the complexity of the variables involved in

37 The term 'case-study method' is used in a general social sciences sense without the particular resonance it might have in social anthropology. In the early period of professionalised anthropology, a case study could refer to a study of a large tribe, a country or even a continent. Within the so-called Manchester School, the 'extended-case method' referred to the tracing of a local village dispute from its origins to the development of the social relationships of those involved during and after the adjudication and settlement of the dispute. The current project has some broad similarities to the extended-case method, but is more accurately defined in Yin's *Case Study Research: Design and Methods* (2003). He emphasised the focus on contemporary decisions in real-life contexts where the boundary between the phenomenon to be studied and the context is not clear, where there are many variables of interest, where there are multiple sources of information and where theoretical propositions are developed prior to fieldwork to guide data collection (2003:12–13).

the interaction and the indeterminacy of the key legal categories. Multiple cases enable the testing, in different contexts, of the overarching generalisations proposed as well as the robust academic model of an expert report and the various ways of theorising interaction of the two fields. As Yin (2003:32) suggests, multiple case studies are not aimed at creating a bigger sample from which to generalise, as in surveying methodologies, but at building stronger theories by subjecting them to repeated testing.

Ideally, the choice of cases should be guided by some explicit design criteria. The difficulty of obtaining access to the critical anthropologists' reports meant, however, that I had to be satisfied with what was available. Nonetheless, there are some interesting variations in the contexts of the three cases chosen. These variations can be summarised as in Table 1.1.

Table 1.1 Important variables in the case studies

Variables	1. <i>Mabo</i>	2. <i>Rubibi</i>	3. <i>De Rose Hill</i>
Long contact history	X	X	
Relatively short contact history			X
Pre-Native Title Act claim	X		
Post-Native Title Act claim		X	X
Single expert anthropologist	X		
Multiple expert anthropologists		X	X
High academic capital of claimants' principal anthropologist	X		
Low to medium academic capital of claimants' principal anthropologist		X	X
High academic capital of State Government's anthropologist		X	X
Anthropological fieldwork conducted prior to lodgement of claim	X		
Anthropological research for native title litigation		X	X
Successful outcome of hearing for claimants	X	X	
Unsuccessful outcome of hearing for claimants			X

I invoked ethnography in the title of this chapter even though it is clear that this project did not involve participant observation in the typical sense of ethnographic fieldwork. Detailed accounts of native title hearings by participant anthropologists are rare. There might be many reasons for this, including the need to wait until the case is finalised because of ongoing obligations of confidentiality, the need to maintain good future relations with lawyers and Aboriginal organisations, the desire to avoid revisiting a demoralising experience, as well as the usual run of pressing concerns and other research

interests. Moreover, it is possible for anthropologists to communicate some of their most urgent concerns publicly by obscuring the specifics of the case in which they were directly involved.

The transcripts of the court hearings do allow a virtual participation to some extent. But I also invoke ethnography in the sense of the search for knowledge through empathetic understanding. For I seek to draw on my own experiences as a lawyer in four claims under the *Land Rights Act*, as well as my experience of the field of academic and applied anthropology.³⁸ I believe that my dual background has facilitated a high degree of openness in the in-depth interviews. This was not without its ethical problems. As in all in-depth interviewing, there is the possibility of the subject misconstruing the role of the interviewer as one of collaborator or therapist (Johnson 2002; Warren 2002). Eventually, I decided to give interview subjects an ethical warning—that the interview was not a collaboration—in addition to obtaining written consent.

Outline of the book

To recap, the starting point of this book is the proposition that the formulation and reception of anthropological expert testimony depend on more than the specific roles of the interactants. It involves the complex interaction of separate social fields. While it is easy to imagine this interaction as a predatory digestion of anthropology by law, equally plausible interpretations, such as the sharing of responsibility for difficult decisions, need to be tested in actual cases. Parallels with the interaction of science and law suggest that judges will view anthropology through the lens of ideal images of scientific methodology, but a variation—ideal images of anthropology—might emerge.

In order to move beyond a simple expert–advocate dichotomy, the task of expert anthropologists might be idealised as the compelling triangulation of likely Indigenous evidence, the anthropological archive and legal doctrine. This perspective on the triangulation process involves the reformulation of expertise as an active deconstruction of the anthropological archive and its reconstruction in categories relevant to the judge's task. The question, then, is to what extent this deconstruction/reconstruction and triangulation model explains what

38 The claims were the Chilla Well Land Claim, Finke Land Claim, Western Desert Land Claim and North West Simpson Desert Land Claim during 1986–90. My experience of the field of anthropology includes my professional engagement with anthropologists on land claims, the completion of a Master of Letters in Anthropology at The Australian National University (1991–98) and doctoral research (2001–05), which is now the subject of this book; work as a consultant anthropologist researching native title claims in southern Queensland and the Pilbara region of Western Australia; and my current position as Australian Research Council-funded Research Fellow in the School of Archaeology and Anthropology at The Australian National University (2009–12).

happens in actual cases. An outline of the interaction of the two social fields indicates that, despite skilful triangulation, there will be factors outside the immediate control of the anthropologist that will be influential in the reception of expert testimony. These factors include the general social and academic capital of the anthropologist and his/her consequent ability to manage hysteresis issues, how the Indigenous evidence unfolds and the general disposition of the judge towards the case.

The first two of the case studies in this book consist of two chapters, one reviewing the relevant anthropological archive and the other covering the formulation and reception of the anthropologists' evidence. The first case study on the little-known evidential hearing in the *Mabo* case uncovers a gem of a performance by Jeremy Beckett (which has all but disappeared from public view) (Chapters 2 and 3). The second case study, on the first *Rubibi* claim to an Aboriginal reserve near Broome, introduces the element of conflicting anthropological expertise and how the judge resolved it (Chapters 4 and 5). The third case study consists of three chapters. This case study focuses on the *De Rose Hill* native title claim. It represents an extreme test for forensic anthropology, for it involves fluid traditional land tenure, multiple anthropologists with widely differing academic capital and a contentious political context (Chapters 6 and 7).

Following the completion of the main period of research for this book, the judgment in the native title compensation test case of *Jango v Northern Territory* (known generally as the *Yulara* case)³⁹ was delivered on 31 March 2006. Its treatment of a senior anthropological expert witness sent shock waves of disbelief and anger through the ranks of native title anthropologists. The problems hinted at in the *De Rose Hill* case became vividly foregrounded in the *Yulara* case—like acid on an etching. Rather than provide an account of the *Yulara* case as a postscript, I have decided to add it as a third chapter (Chapter 8) to the *De Rose Hill* case study. This will allow the reader to take full advantage of Chapter 6, the review of the anthropology of Western Desert land tenure, which fortuitously is the subject of both cases. Each case study will conclude with an intermediate reflection on how the theorising of this introductory chapter has been tested.

The conclusion of this book (Chapter 9) will explore what generalisations can be made from the case studies about interaction between the two fields and how best to characterise anthropologists' agency.

39 [2006] FCA 318 (31 March 2006).