

3. Beckett in *Mabo*

Also called for the plaintiffs was a senior anthropologist, Dr Jeremy Beckett. (Keon-Cohen 2000:926)

Involvement of anthropologists in pre-trial preparation

In order to understand the significance of Beckett's testimony in the hearing of the facts in the *Mabo* case, it is necessary to briefly outline how the claim to the Murray Islands was framed and what Justice Moynihan's role was within the High Court's adjudication of the case.¹

The two key documents formulating the claim were the *Statement of Claim As Amended June 1989*² and the proposed statement of facts that the plaintiffs wanted Justice Moynihan to adopt. A statement of claim becomes the cardinal point of reference in any civil litigation. Around its assertions are marshalled evidence, counterevidence and conflicting final submissions. The *Mabo* Statement of Claim could be paraphrased as follows.

1. Since time immemorial, the Murray Islands have been continuously inhabited and exclusively possessed by people called the Meriam people who speak a distinct language.
2. The plaintiffs are members of the Meriam people and Eddie Mabo is a descendant of the traditional leaders known as 'Aiets'. They make their claim on their own behalf and on behalf of the members of their various family groups.
3. The Meriam people lived in permanent, settled communities under their own social and political organisation with community leaders and institutions that governed their affairs and included a system of laws. They had laws, customs, traditions and practices of their own for determining questions concerning the ordering of community life including the ownership of, and dealings with, land, seas, seabeds and reefs.
4. The particulars of the laws, customs, traditions and practices relating to land, seas, seabeds and reefs are

1 It would be superfluous to reiterate an account of the various events leading to the commencement of the *Mabo* case litigation as they have been covered in detail elsewhere (see Keon-Cohen 2000; Sharp 1996).

2 It is reproduced as Annexure A in Volume 3 of the *Determination by the Supreme Court of Queensland of the Remitter from the High Court of Australia dated 27th February, 1986*.

- numerous areas are separately owned by particular family groups; the members of the family groups have rights and duties in relation to their respective family group areas—for example, the head of the family has the right and duty to allocate portions of the family land to be used by individual members of the respective family groups
- some areas of land are individually owned but may be disposed of only to other members of their family group
- some areas have been granted collectively to the Meriam people and some areas have been acquired by the State of Queensland.

The plaintiffs continue to own and have rights in particular areas of land, and so on, according to the laws, customs, traditions and practices, and so on.

And the plaintiffs' claim

A. A declaration that the plaintiffs are

(a) owners by custom

(b) holders of traditional native title

(c) holders of usufructuary rights

with respect to their respective lands.

Eddie Mabo's personal influence on the drafting of the Statement of Claim can be seen in the unusual identification of him among the plaintiffs as 'a descendant of the traditional leaders known as the Aiets'. This identification proved to be a fateful decision. Making this claim in an unqualified way could be seen as laying the foundations for undermining his credibility before Justice Moynihan in the Queensland Supreme Court—an undermining to which Beckett's evidence was to contribute.

The Statement of Claim had been filed in the High Court, which remitted the determination of the facts of the case to Justice Moynihan of the Supreme Court of Queensland.³ Generally speaking, the Statement of Facts proposed by the plaintiffs before Justice Moynihan followed the Statement of Claim, but there

³ In this instance, the remittal means the transfer of the fact-finding part of the case, which was started in the High Court, to the Supreme Court of Queensland. Section 44 of the *Judiciary Act 1903* (Cwlth) allows the High Court to remit a matter commenced in the High Court, or part of a matter, to other Federal, State or Territory courts. In *Mabo*, this allowed the High Court to avoid the time-consuming hearing of evidence. According to Eddie Mabo's lawyer, Bryan Keon-Cohen, commencing the legal proceedings in the High Court was a considered strategy to ensure High Court supervision over the fact-finding process.

were some significant changes. One change was that the decisions of the Island Court relating to land became the example *par excellence* of the existence of customary laws⁴—an idea strongly contested by the Queensland Government.

The hearing before Justice Moynihan proceeded in much the same way as a trial. The plaintiffs called witnesses and presented documentary evidence in support of their claims, and the State of Queensland cross-examined witnesses and adduced their own evidence. Instead of making a final judgment, however, Justice Moynihan would present his findings of fact to the High Court for its ultimate decision on the law.

It would have been difficult for the plaintiffs' lawyers not to call Beckett. His book *Torres Strait Islanders: Custom and Colonialism* (Beckett 1987) was published two years earlier and it would have been obvious that, in terms of length of fieldwork on the Murray Islands, the number of publications and academic seniority, he was the best qualified to be the expert anthropological witness. If they had not called him, he could have been subpoenaed by the Queensland Government. But there were risks for the claimants. To oversimplify, Beckett had documented change but they needed his evidence to help prove continuity. How he negotiated his way through these expectations is one of the themes of the analysis of his performance as an expert witness.

Kitaoji was going to be called, but the lawyers changed their mind at the last minute.⁵ It is apparent from the transcript of the hearing that the plaintiffs' lawyers had, at one stage, intended to call Nonie Sharp as an expert witness (T. 184).⁶ Why this did not eventuate remains a little unclear. When I interviewed him in 2003, Keon-Cohen could not remember a specific reason. He thought that it was a tactical decision, possibly applying the same rationale as they did to Kitaoji: to avoid opening up variable accounts that would detract from the integrity of each.⁷ In Nonie Sharp's recollection, the reason was her vulnerability to cross-examination on her radical politics.⁸ Beckett shared her interpretation.⁹

4 Thus, proposed finding of fact 78J reads:

78. The Meriam People, including the Plaintiffs and their predecessors in title, have in the past and continue to...

(j) Make and administer a system of customary laws including laws, customs, traditions and practices concerning rights in and dealings with the land of the Islands. Examples of such laws, practices and dealings are set out in Annexure D. [Annexure D being the Island Court records relating to the resolution of land disputes.]

5 See Keon-Cohen (2000:926, footnote 244).

6 'T' is the shorthand reference to the official transcript of the hearing of the facts before Justice Moynihan in the Supreme Court of Queensland in the *Mabo* case.

7 Brian Keon-Cohen, Interview, 7 November 2003, Tape 1, Side B.

8 Nonie Sharp, Interview transcript, 11 November 2003, pp. 8–9.

9 Jeremy Beckett, Interview transcript, 2003, p. 10.

Although Beckett had been involved in the preparation of the case, he was adamant that he had not been consulted on the drafting of the Statement of Claim.¹⁰ If he had been consulted, he could have offered a radically different perspective on Eddie Mabo's claim to be a hereditary, traditional leader—an 'Aiet'. He recalled being startled by the way in which all Eddie Mabo's claims had been incorporated into the Statement of Claim.¹¹ Fortuitously, the Statement of Claim identified 'the family' as the social grouping relevant to land matters, rather than 'the clan' or 'the tribe'. This identification coincided with Beckett's view. It did not, however, make any reference to individual choice of owners in the disposition of their land.

Beckett had two jobs in the preparation of the case that involved him interviewing Murray Islanders who were living in Townsville. The first job was to produce a statement of his views, as an anthropologist, about the continuity of traditional land tenure on Murray Island. The second job involved directing potential Islander witnesses to the lawyers. Both jobs left Beckett somewhat estranged from the legal team. He eventually produced his statement, entitled 'Meriam Land Tenure', but received little feedback from the lawyers, except from Brian Keon-Cohen, who thought that it should have been more detailed. In Beckett's recollection, the areas that needed more detail were never specified. He thought that the statement had been dispensed with. He was surprised when it re-emerged, years later, to be tendered as part of his evidence. In relation to the search for potential Islander witnesses, Beckett had sent a very knowledgeable Islander friend of his to the lawyers. In response, he received complaints from the lawyers that his friend's evidence would have been extremely detrimental to the case as it was then framed.

The hearing

The plaintiffs' evidence

Given the overlap between Sharp's narrators and the claimants, much of the plaintiffs' evidence followed what could have been expected from the *Stars of Tagai* (Sharp 1993). This is largely true of all the evidence led by the plaintiffs' own lawyers. For example, Eddie Mabo emphasised the importance of the village of Las for the Malo–Bomai cult (reinforced by stories of the burial of the key ceremonial mask near Las [T. 129–30, 350]); the secret continuation of induction into the Malo cult during the period of the London Missionary Society (LMS), and extending, in modified form, into the period of the Anglican takeover, at

10 Jeremy Beckett 2003, Interview transcript, pp. 3–6, 31–2.

11 Jeremy Beckett 2003, Interview transcript, pp. 25–6.

least to the 1940s (T. 249–52, 800); the eight tribes of Mer with distinct tribal areas; the hereditary office of the Aiets, the Aiet being the leading law-maker and dispute resolver among the *zogo le* of the Malo–Bomai cult; Malo’s gardening lore and law against property theft (T. 346–7); and the continuing significance of land previously occupied by shrines at Dam (T. 290) and Tomog (T. 352). What finds no counterpart in Sharp is Eddie Mabo’s specific claims to particular plots of land. Nor does her book prepare us for Mabo’s most extravagant claims in his written statement, tendered in evidence. Queensland Government lawyers made much of such passages as: ‘My arrival on the Island rejuvenates hope amongst the people. I am their leader to be compared to the elected chairman. I am the leader in the people’s memory according to tradition’ (quoted at T. 1113).

In cross-examination, a more complex picture emerged that revealed the limitations of Sharp’s account. Eddie Mabo had to admit that it was only his ‘clan’ that had the understanding that the word ‘Aiet’ refers to a hereditary title, as opposed to being simply a personal name. He attributed the lack of widespread recognition of the hereditary title to the ‘petty jealousy’ of other groups (T. 812). Similarly, he was forced to retreat from claims that his succession to the position of Aiet had been acknowledged in various ways by the Murray Island Council and, more fundamentally, he was forced to admit that it was no longer possible to become an Aiet, in the traditional sense of the term, given that no *zogo le* had been initiated into that position since 1925 (T. 823–7). Thus, the strong assertions made in the Statement of Claim and in his own written statement had to be pared back from an ‘is’ to a rather feeble ‘would have been’ but for the intervention of the LMS and subsequent colonial history.

Moreover, what might be called the politics of Eddie Mabo’s assertion of traditionalism became increasingly transparent with the unfolding of the evidence. He had suffered under the power of the Island Council for many years. He had received the harsh sentence of banishment for one year for being caught drinking alcohol on Murray Island in 1956. Adding an intriguing note of complexity to Sharp’s account of the exemplary Islanders, it was revealed that the Island Court that had sentenced Mabo was constituted by three other exemplary Islanders: Marou, Sam Passi and George Mye (T. 780). In addition, it was the Island Council—whether pressured by the Queensland administration or not—that had refused Eddie Mabo’s formal requests for entry to Murray Island during the 1960s and 1970s. Following the cross-examination of Mabo’s expansive assertions of his own executive decision-making power in matters of custom, Justice Moynihan summarised the obvious divergence of the bases for decision-making authority on Murray Island as a power struggle between the elected council leaders and those wanting the restoration of tribal authority.

Eddie Mabo's naive agreement with the Judge's summary—one of a number of moments of dangerous honesty—probably contributed to the negative impression being formed of his credibility. There was, however, an abundance of material on which Justice Moynihan could base such a negative impression of Eddie Mabo: the very large number of portions of land claimed on various bases; his insistence on recalling exact conversations with his grandfather when Eddie Mabo was only six years old; his insistence that only those adopted from close kin could base their claims to inheritance on adoption (thus conveniently disposing of a counterclaim to one of his claimed portions by another adopted Islander); and, generally, his defensive and on occasion hot-tempered, argumentative responses to cross-examination. Overall, the extraordinarily long and gruelling examination and cross-examination of Eddie Mabo exposed his claims to minute scrutiny, which was made possible by the mobilisation of the resources of the State of Queensland. Every government document relevant to the cross-examination was found, analysed and deployed, and other Islanders, who disputed some of Mabo's claims, were interviewed and presented as witnesses. Through this process, a much more complex and flawed character emerged. The Eddie Mabo of *Stars of Tagai* was revealed as an idealised portrait: Mabo before cross-examination.

Sam Passi, another of Sharp's stars, had experienced a serious decline in his health since the period of Sharp's fieldwork. He did give evidence and told the court some of the same things he had told Sharp, such as, 'If you want to be a real Murray Islander you follow Malo's Law' (T. 1115). His frailty, however, meant that the authoritative clarity of his narrative in *Stars of Tagai* was not apparent in his evidence.

David Passi, one of the plaintiffs, gave evidence about the Passi claims in terms that were also largely supportive of Eddie Mabo's claims. Consistent with Sharp's portrayal of him in *Stars of Tagai*, David Passi's evidence presented his project of synthesising Christianity and the Malo–Bomai traditions. Counsel for Queensland complained that his statement read more like a sermon (T. 1887), but generally his evidence seems to have been well received by the judge. His calm, reflective and direct approach to giving his evidence provided a direct contrast with Eddie Mabo's performance. It also led to some unguarded statements about the enforcement of property rights in the pre-colonial era: 'our understanding of the law was the club. The Gabba Gabba [club] was the justice' (T. 2007).

Beckett certainly thought that by the time he was called to give evidence—towards the end of the plaintiffs' case—the lawyers' initial breezy confidence in their case had been somewhat shaken. Not only had the judge made frequent criticism of the way in which evidence was being led, but cross-examination had successfully undermined some of their key witnesses and there had been evidence of the negative reaction of other Islanders to some of the specific claims made by the plaintiffs.

Beckett's examination-in-chief

Because of his task of writing his statement on Meriam land tenure, Beckett had been confronted at an early stage with the question of what general approach he should take to his evidence. As he explained to me in 2003, he thought that he had to chart a new course between the unrealistic traditionalism of the Statement of Claim and what he now saw as the excessive presentism in his own published work:

[W]hen I was invited to become a witness I had to consider first the kind of framework in which my work had been done...My emphasis was on the present, recognising all the changes that have happened and that was the way I wrote my thesis. It stressed, perhaps excessively, the here and now, the post-contact...when I was in the witness box I realised the way in which the statement of claim had been made was very much in traditional mode...I thought firstly that it could not be assumed that either counsel or the judge had not read my material...that for me to simply present the warm inner glow of history...and to assert that nothing of significance had changed would simply go down...My strategy really was to anticipate all these objections and to say why I thought, nevertheless, the land tenure system was essentially the same.¹²

His recollection was also that in order to establish his own status as an expert witness, with his primary responsibility being to the court, he could not appear to be the mouthpiece of the plaintiffs' lawyers. From this perspective, his lack of involvement in formulating the Statement of Claim and his frustrating interaction with the lawyers might have assisted him. In any event, Beckett was duly called to Brisbane to meet with the plaintiffs' lawyers and prepare for his appearance as their expert witness.

In any model strategy for the successful conduct of litigation, the examination-in-chief is an opportunity to present the witness's evidence in the most advantageous way and to pre-emptively explain any obvious weaknesses or contradictions, so that they do not gain the credence of being concessions made during cross-examination. It allows for close cooperation between barrister and witness in the presentation of a methodically choreographed performance. Of course, historical contingencies tend to defeat such ideal strategies.

During his few days of preparation, Beckett read the transcript of proceedings up to that point and had productive preparatory meetings with Ron Castan QC, the plaintiffs' senior counsel. Beckett recalled that, on the day he entered the witness box, to his surprise, Brian Keon-Cohen, another of the plaintiffs'

¹² Jeremy Beckett 2003, Interview transcript, pp. 14–15.

barristers, stood up to lead him through his evidence. Beckett remains baffled by this change of plan. He recalled that Keon-Cohen had a cold and that at various points Beckett could not quite follow where he was being led and what answer was expected. Having lost the thread of the questions, Beckett gave some answers that did not seem to respond to the apparent expectation of the questioner.

The transcript also reveals that Keon-Cohen's flow of questioning was interrupted fairly early by objections to the form of some questions. There was a certain sharpness and irritation on the part of the judge in dealing with the objections, as if he saw Keon-Cohen as a recalcitrant rule bender, surreptitiously trying to adduce evidence through Beckett that should have come from other witnesses. In the course of his research, Beckett had come across information supportive of Eddie Mabo's critical claim to adoption, and counsel for the plaintiffs could not resist trying to lead this evidence, provoking objection.

HIS HONOUR: [Y]ou are not leading it as anthropological evidence. You are leading it as evidence probative of the fact that Eddie Mabo was adopted; that's got nothing to do with anthropology. (T. 2204)

This statement is revealing in the quality of its obscurity. In the background, there are legal doctrines about expert evidence that are not explicitly identified in the summary nature of the objection, the judge's ruling and the acquiescence of the plaintiffs' lawyer. That acquiescence could have been based on agreement that a legal doctrine had been transgressed or a pragmatic choice not to challenge this particular incorrect ruling. Why one may have an expert anthropological opinion about general principles of inheritance, including via adoption, but not about whether an individual was adopted according to island custom, seems to raise many arguable legal issues.¹³ The judge's comment is also revealing of his conceptualisation of anthropology as a whole. Although somewhat elusive, the judge seemed to be expressing a preference for the anthropology of high-level, encapsulating generalisation, rather than the anthropology of intimate description or exemplary case study.

At the risk of smoothing over the disjointed unfolding of Beckett's evidence, the elements of his argument could be summarised as follows.

- Although the main focus of his fieldwork on Mer in 1959–61 was local politics, change and engagement with the wider world, he did carry out some research on land tenure. It was never published, but he felt the need

13 For example, in the Blue Mud Bay Native Title Claim (*Gumana v Northern Territory* [2005] FCA 50 (7 February 2005)), Justice Selway decided that, because of the long association of the anthropologist with the claimants in that case, he would accept his evidence both as expert evidence *and* as primary evidence (see paras 167–78).

to do it 'because the question of descent and inheritance was an important problem in anthropology at that time' (T. 2212).

- Continuity of land tenure can be seen at the level of 'principles' that operate against a background of the pervasiveness of the idea of ownership in Meriam culture that applied to ownership songs, dances and myths, as well as land (Exhibit 214, p. 2). Critically, Beckett stated: 'I would expect change of various kinds, but that doesn't necessarily mean that the basic principles... [of] the system of inheritance had been changed' (T. 2216–17).
- The principles can be stated as follows
 - current owners of land have the right to dispose of their land to whomever they wish
 - this freedom is, however, constrained by the legitimate expectation that the land will be disposed of to close kin, particularly descendants (including adopted children)
 - there is a legitimate expectation that males have stronger entitlements than females and that, if the inheritance is to be divided among brothers, the entitlement of the oldest brother is the greater. (Exhibit 214, T. 2218, 2223)
- The survival of the traditional land-tenure principles—albeit in a slightly modified form—is due partly to the particular colonial history of the Murray Islands, which focused on evangelisation, education and general governance for law and order, rather than a deliberate attempt at wholesale reorganisation of garden or village land. Thus, decision making about land could be seen to operate within a 'Murray Island domain' (T. 2221, 2236, 2334).
- On analysis, the Island Court, although a colonial institution, broadly supported traditional principles that operated largely outside the court system. It did this by resolving disputes at the margins, typically about boundaries, adoption and the real intentions of previous owners, and by not introducing any radical innovations (T. 2233, 2238, 2296).
- The advent of written wills was an innovation only in a 'technical sense' because most wills gave effect to the traditional principles as described (T. 2238).

What might not be apparent from this summary is a subtle shift in emphasis towards more anthropologically orthodox kinship explanations. As was noted in the previous chapter, although Beckett explored kinship in his original fieldwork, he specifically rejected it as an explanation of the political cleavages that seemed to dominate the island during his period of fieldwork. In his attempt to recover the world of the Meriam domain, however, kinship returned to prominence: 'kinship also organised in a general sense the peoples' understanding about how land could be legitimately occupied' (T. 2220).

This renewed prominence would not have come as a complete surprise to readers of his Torres Strait work, for he had always referred to the continuing relevance of kinship to matters of private concern, even if it was only in passing on to what he considered to be more pressing issues.

It should be noted that, in Beckett's conceptualisation of the system of land tenure, coherence is established at the fairly abstract level of 'principles', but at a lower level of generality than 'Malo's Law'. The level of 'principles' coincided well with the particulars of the laws and customs asserted in the Statement of Claim, but not necessarily with the claimants' insistence on the centrality of Malo's Law. Thus, Beckett's view of Malo's Law was potentially quite significant:

DR BECKETT: I read Malo's Law or rule as a general precept rather than a statement of law in our sense of the term. (T. 2232)

In my view, his stance on Malo's Law became quite important in projecting his independence and connecting with the judge. It is also worth noting that Beckett's use of the opaque phrase 'law in our sense of the term' matched Justice Moynihan's comprehensive avoidance of defining his use of the critical word 'law' in his *Determination of Facts* (discussed below).

One of the notable features of Beckett's evidence is the eagerness of the judge to engage directly with Beckett, sometimes completely interrupting the flow of Keon-Cohen's questions. Many of the judge's interventions sought confirmation from Beckett of the judge's own questions and partially formed interpretations—in a sense performing a similar function to the Aboriginal Land Commissioner's anthropology in land claim inquiries. For example:

HIS HONOUR: Do you think that there is a risk, if that's the right word, that a redefinition under the sort of cultural forces that are operating on Meriam society now can be selective, the parts that are emphasised or even remembered are the ones that are most comfortable with the competing culture and which—?

DR BECKETT: Yes, I think one of the things that happens, as I understand it, in cultural change, is a new situation arises, people have to devise new ways of saying things and doing things and what they do is to draw on the cultural resources which they have which may result in a new set of emphases, a bringing together of principles which haven't been brought together before. So, it is a kind of reworking of a culture...I think what we have now is that in what one might almost call a Murray Island nationalism—perhaps overstating it a little bit—the memories of the Malo-Bomai cult have been drawn on to articulate a new set of ideas for a new kind of audience. (T. 2248–50)

This interaction raises many of the issues considered in the course of this chapter. Is Beckett's historical contextualising of contemporary claims destructive of the success of those claims in this legal forum because it can too easily be assimilated to commonplace notions of inauthenticity? Did Beckett fall into Justice Moynihan's trap? Or does such contextualisation also have the effect of bolstering the appearance of independence and critical distance of the expert witness?

The judge also wondered about the shallow genealogical depth in the Haddon genealogies (T. 2250), the origin of the elaborate fish traps made of stone (T. 2265), how the traditional system would cope with land being unused for long periods (T. 2290), how 'tribe' related to 'clan' (T. 2309) and about enforcement of traditional rules prior to the existence of the Island Court (T. 2321). He proposed that the attitude of the Murray Island Council to land claims by long-absent Islanders might be a function of the perceived disruptiveness of the claims. Beckett diplomatically said that it could well be a consideration (T. 2302). The judge suggested that Europeans might have introduced the interest in genealogical depth beyond one or two generations. Beckett agreed (T. 2309). The judge wondered if the commitment of the Passi family not to divide their lands disproved the assertions that there is a system of individual ownership. Beckett said that he saw their commitment as an example of the rhetoric of the Passis about family solidarity (T. 2310). The frequency of such interventions gives the impression of the judge, at last, finding someone whom he could ask about matters that might have been troubling him. Generally speaking, Beckett was fulsome in his confirmation of most of the judge's ideas, Beckett's frequent response being 'Exactly so'.

Some of the judge's questioning of Beckett provided the most detailed evidence of the judge's thought processes at that point in the trial. They reveal a mind so preoccupied with his fact-finding task that it cannot admit to any interpretative indeterminacy:

HIS HONOUR: This may be an inapposite way of thinking of it, but what in your understanding of Murray Island comes first; is it the garden or the land? In other words, is it the gardening which is important, and without sufficient land to garden, you're of little or no consequence, therefore you've got to have some sort of system to control access to gardening land, or is it rather that there's the land, you've got to do something with it and what you do with it is gardening. Do you understand the distinction? (T. 2235)

Beckett's answer was in terms of avoiding such a ranking. He mentioned fallow land as indicative of the value of land apart from immediate use value and land as a marker of one's prestige within the total social field (T. 2235–6).

Beckett's cross-examination

As part of her preparation, Mrs White, Counsel for Queensland, requested a private meeting with Beckett to discuss his evidence. As the legal maxim says, there is no property in a witness, so the plaintiffs' lawyers could not object.¹⁴ The meeting occurred before her cross-examination of Beckett and was held in her chambers. In what appears to have been a pre-emptive attempt to find out how Beckett would respond to various questions, she covered a wide variety of issues. When her cross-examination in court commenced, she made full use of her familiarity with the plaintiffs' evidence as it had emerged in the weeks prior to Beckett's appearance. That familiarity precipitated moments of dramatic irony in which the barristers and the judge, but probably not Beckett, would have known the significance of a particular line of questioning and the probable use of his answers in final submissions. At the very beginning of the cross-examination, Beckett was asked seemingly innocuous questions about fieldwork methodology and oral history, particularly the tendency of informants to shape reminiscences to present purposes. Given the severe cross-examination of Eddie Mabo about his near-perfect recollection of childhood conversations with his grandfather, it would have been obvious, however, that this was the unstated reference in the questions (see T. 2316).

This interaction could be a metonym for the predicament of the expert witness in cross-examination. Should the witness concentrate on giving an answer to the immediate question? Should the witness think ahead to the ultimate issues in the case, so that the framing of the answer is made with sufficient qualifications, protecting it from misuse at a later date? Even if such complex thought processes are possible in the split second between question and answer, will too much second-guessing the ulterior purposes of questions detract from the appearance of frankness and honesty of direct answers?

Beckett had additional distractions:

[The courtroom] was imposing and [had] a gallery at the back and I remember Eddie [Mabo] was there. I remember because during that question about Polynesia, Eddie caught my eye. One of the things we both liked was dancing from the island of Rotuma which was practised on Murray Island and he made a sort of dance gesture and I had to stop myself from cracking up.¹⁵

One technique of cross-examination is to lead the witness down a corridor, closing each escape door as they go, eventually leading to the last and only door that opens to a proposition that qualifies, undermines or contradicts

¹⁴ See Freckelton and Selby (2009:238).

¹⁵ Jeremy Beckett, Interview transcript, 2003, p. 8.

the witness's evidence-in-chief. Witnesses have to spontaneously create their own escape door or agree to the proposition and hope for some redress in re-examination.¹⁶

Mrs White attempted to lead Beckett down three such corridors. The first ended with the proposition that the principles of inheritance as described by Wilkin, and now by Beckett, are so flexible as not to amount to a system at all. This corridor commenced with gaining Beckett's assent to the proposition that Wilkin's description of inheritance principles—with its emphasis on the individual choice of the oldest male owner of land, including the possibility of alienation to non-family members (T. 2337)—was extremely flexible (T. 2318). Similarly, he had to agree that the widespread residence on land belonging to other families reflected a high degree of flexibility (T. 2340). There was also the story of one of the Passis' ancestors obtaining land on Mer through his supposed adoption, late in his life, by the unrelated owners of the land (T. 2346–7). Beckett's response was that one has to balance the assertions of individual choice with actual practice, which revealed much less flexibility—that is, overwhelmingly inheritance by immediate kin (T. 2318).

The second, related corridor led to the proposition that the rules of the traditional land tenure system did not act as any constraint on behaviour in relation to land. Instead, it was argued, such behaviour could be adequately explained in terms of shared concepts of looking after kin, shame, power relationships and strategic action. White pursued this proposition by asserting a distinction between 'social constraints' (such as shame) and 'system constraints' (presumably such as rules). Beckett responded, in effect, by rejecting the applicability of such a distinction 'in a community of this kind' (T. 2320).

In pursuing her second theme of land arrangements merely reflecting particular social interactions, Mrs White canvassed some indisputable material. This included Wilkin's chapter in Volume VI of the *Reports*, which describes the strategic action of particular 'land grabbers' asserting oral dispositions of land to them by deceased owners (T. 2321, 2345); a close analysis of the land cases reported by Rivers in the same volume of the *Reports*, which demonstrated the manipulation of the traditional rules of inheritance (T. 2342–4); reports of caretakers of land eventually becoming the owners (T. 2347); and the contemporary

16 I do not have the space in this book to review the extensive literature on techniques and strategies for cross-examining the expert witness. Freckelton and Selby's legal textbook on expert evidence provides an overview of such techniques and strategies (see Freckelton and Selby 2009:ch. 24) and there are whole books and academic careers devoted to the topic (see, for example, Imwinkelried 1997). Most of this literature addresses the scientific expert as the paradigmatic case. Had time and space permitted, it would have been interesting to systematically assess whether the established techniques for cross-examining scientists were used on anthropologists and how successful they were.

existence of Murray Islanders who had reputations as land grabbers (T. 2345). She then brought together the first two propositions and the inherent uncertainty of oral dispositions of land (T. 2345) in the following interaction:

MRS WHITE: Would that cupidity, combined with a quite flexible system of inheritance, lead to instability in your opinion?

DR BECKETT: A degree of instability, yes, I'm sure. (T. 2344)

The third proposition that Mrs White wanted to lead Beckett to was that the idea of an autonomous 'Meriam domain', in which traditional land tenure principles flourished, is unsustainable given the degree of change that occurred over the period of colonisation. The corridor leading to this proposition was quite long, since there is so much indisputable material—a great deal of it supplied by Beckett—indicative of historical transformation. The material she chose included

- early reports of interference to traditional gardening practices—for example, Wilkin's report of a competitive tendering process for the selection of gardeners at a public meeting (T. 2326) and the early intervention of colonial authorities to encourage the continuation of gardening through the organisation of competitions with cash rewards (T. 2333)
- Rivers' report of Mr Bruce imposing his commonsense and his understanding of custom in court decisions to do with land (T. 2328–9)
- the early building of a road around the island (T. 2332)
- changes to house design, dress and dance introduced by the South Sea Islanders (T. 2334)
- Beckett's own writing on the early abandonment of custom in favour of Christianity, the introduction of new dances, the outlawing of warfare and revenge killings, the rise of caretaking arrangements, the airstrip issue, and so on (T. 2354–67).

There are other aspects of Beckett's work that could have been used to similar effect but were not included. The prime example would be his many assertions of the pervasiveness of Christianity. In his paper 'Rivalry, competition and conflict among Christian Melanesians' (Beckett 1971), he speaks of Christianity not only structuring the Islanders' relationship with the dominant Europeans, but also as restructuring their relations with one another, so that their assessment of the behaviour of other Islanders is in terms of Christian norms. In *Custom and Colonialism*, he extended this idea by identifying underlying moral judgments as the basis for the rather naive political discourse that was pervasive during his period of fieldwork (Beckett 1987: especially ch. IV). This kind of pervasiveness is at odds with the maintenance of a traditional domain.

Thus, Mrs White asked:

With all these things, which strike at the very fabric of one's community life, the kind of house you live in, the clothes that you wear, the dances that you perform, religion that you practice, how can one say that one's attitude to land holding remains the same?

DR BECKETT: I think to try and make sense of this kind of puzzle, and that clearly in my writing I have made quite a lot of emphasis on the extent to which Murray Island did change in various areas of activity, I don't think we need to assume that all sectors change at equal speed or in equal degree, or that everything is so tightly integrated with everything else that so to speak, all aspects of life must change together. (T. 2334)

At the very end of the cross-examination, Beckett was asked questions about Aiets. This time he seemed well aware that his answer had implications for Eddie Mabo's credibility. Beckett could not help Eddie Mabo, and his answer—that he had seen the name 'Aiet' only in genealogies (T. 2368)—was all the more damning since Beckett had demonstrated over the course of the previous two days in the witness box that he had extensive knowledge of the Murray Islanders.

The account of Beckett's performance in the witness box has, thus far, focused on the content of his answers and how they relate to the relevant anthropological literature and its diverse theoretical inspirations. A more comprehensive account, though, must also examine all the ways in which his answers respond to the legal system's expectations of the independence and professionalism of an expert witness. Some of the most influential factors in meeting such expectations cannot necessarily be linked to the performance in the witness box. Here I have in mind the fact that his major period of research and many of his resultant publications had been completed before the case was contemplated, thus eliminating any grounds for suspicion of 'research for litigation'. This would not have been the case with Sharp's work. Similarly, although Beckett was presented as a witness for the plaintiffs, he seems to have had minimal involvement in the formulation of the claim and the proofing of witnesses.

Beckett reinforced this notional independence in his performance in a number of ways. The most important was his willingness to state views that were not necessarily in accordance with the plaintiffs' case, and even undermining of their case. Thus, he tended to put much less emphasis on the decisions of the Island Court, as demonstrating the traditional land tenure system, than did the lawyers representing the plaintiffs. He gave 'Malo's Law' a more diffuse position than the Islander witnesses. He demonstrated this independence by making appropriate concessions during cross-examination, such as admitting to a degree of instability in the traditional land tenure system. Similarly, Beckett

admitted to being puzzled and unable to explain some contradictory facts, such as how a particular caretaker of land at Zomared had later become its owner (T. 2347) and the greater genealogical depth reported by Haddon in the Western Island of Mabuag compared with Murray (T. 2330).

Moreover, Beckett projected circumspection about his interpretative claims. He was willing to say that there is insufficient material on which to base an opinion. This was the justification for his refusal to offer a definitive view on the relationship between the pre-contact Malo–Bomai cult and traditional land tenure (T. 2234). When he was willing to offer an opinion on meagre data, he was careful to identify it specifically as speculation.

Beckett was also more circumspect about the description of the Malo–Bomai performances, which he was previously content to describe as 're-enactments' and 'entertainment' in *Custom and Colonialism*:

DR BECKETT: [T]he Islanders were also allowed to present dances from the Malo–Bomai cult as an entertainment, that was the way, at least, I think the church understood it. Now, the songs clearly survived, I recorded them myself in 1960, and they were recorded also by Haddon in 1898...So, these dances were revived from time to time. They could be presented as an entertainment. They were taken to Thursday Island I think in 1959 and performed for money. But one, nevertheless, has to say they were taken extremely seriously and there was some tension about the rights of certain individuals to play particular roles in the dances. (T. 2231)

Another possible way to demonstrate professional circumspection would be in identifying the limits of the field of anthropology as opposed to other academic disciplines. Beckett did this in minor, self-deprecating ways—for example, by not wanting to compare the accuracy of his measurements in his land survey with the accuracy of a professional surveyor, and in deferring to the specialisation of linguistics before offering a view on a language issue (T. 2353). There was, however, no such deferral to the expertise of historians when he presented a great deal of evidence about the period between the Cambridge expedition and his own fieldwork—nor was any objection or comment made about this.

Final submissions

Whatever might have been the lawyers' initial hesitation about Beckett's involvement in the claim, his evidence became central to the plaintiffs' final submission:

It is respectfully submitted that the Court should find that a traditional land system exists. In identifying that system, in determining its nature, and the way in which the interests claimed by the respective Plaintiffs fit within it, the evidence of Dr Jeremy Beckett provides a coherent, sensible and pragmatic framework which, it is submitted, should be accepted by the Court.¹⁷

The lawyers specifically adopted Beckett's formulation of continuity at the level of principles and adopted his description of those principles as providing 'a coherent and compelling account of the survival and adaptation of a traditional or customary system of land tenure'.¹⁸ On Beckett's view of his early marginalisation in the conduct of the case, the final submissions could be seen as a belated rehabilitation.

The Queensland Government's final submission also gave prominence to Beckett's evidence in the parts of their submission dealing with the pre-contact system of law and the survival of that system.¹⁹ It argued, in relation to the pre-contact land-tenure system, that there was insufficient evidence to support Beckett's opinions. Consistent with its approach to Beckett's cross-examination, the Queensland Government argued that the degree of flexibility in the system was insufficient for it to be regarded as a regular or predictable system (p. 2), that Beckett's criteria for the survival of the system were too general and that there had been too much change for any traditional system to have survived (pp. 3–13).

Justice Moynihan's findings of fact

In the struggle for credibility, Justice Moynihan's *Determination of Facts* revealed Beckett to be one of the big winners and Eddie Mabo to be one of the big losers. The judge was scathing about Eddie Mabo, particularly his claims to be the hereditary Aiet: 'The claims are largely without foundation and Eddie Mabo must have known it' (*Determination*, pp. 71–2). It would seem that his negative assessment of Eddie Mabo coloured his whole view of the Islander witnesses, for the *Determination* reveals fairly deep suspicion of their evidence. In a chapter entitled 'Considerations bearing on the evaluation of the evidence of witnesses...', the judge made a sustained case against the possibility of a pure, Meriam oral tradition, uncorrupted by European written works, such as Haddon's *Reports* and the novels of Ion Idriess. In support, he drew on parts of Beckett's book and his evidence about the circulation of stories from Idriess

¹⁷ *Plaintiffs' Final Submission*, Ch. 8, p. 1.

¹⁸ *Plaintiffs' Final Submission*, Ch. 8, p. 22.

¹⁹ *Submission on Behalf of the State of Queensland*, Vol. 2, Parts I and III.

among the Murray Islanders. Much of this critique seemed to be aimed directly at Eddie Mabo, who in his evidence continually asserted his oral sources, such as his father and grandfather, over and above the written sources with which he was familiar. An extensive archive presents a conundrum for any literate Indigenous witness and a host of opportunities for the skilful cross-examiner. In theory, if the archive is consistent with the oral history, it could found an argument for mutually reinforcing accuracy. It could also be used for the purposes of arguing contamination through the illegitimate adoption of written material.²⁰

The judge also brought various pieces of evidence together to suggest that the contemporary version of 'Malo's laws' had their immediate origins in a specific project of Marou Mimi, a significant Islander leader during World War II. In the 1940s and 1950s, Marou had been reworking Haddon's account of the Malo story (*Determination*:60–1). Finally, Justice Moynihan called on academic critiques of the reliability of oral tradition to conclude that 'When dealing with oral history it is necessary to be alert to separate "is" and "was" from "ought" or "ought to have been" and to be aware that "human memory the [sic] fluid memory is a marvellous instrument of elimination and transformation"' (*Determination*:62)

In this part of the *Determination* there was a transformation being effected by Justice Moynihan. Academic concern about accuracy was transformed through the use of such framing words as 'risk', 'extraneous sources' and 'corrupted' into a vague but pervasive question mark over the credibility of all the Islander witnesses.

The judge took his analysis even further, anticipating much later critiques by Merlan and Povinelli about the regimentation of customary practice in the land claim era:

Thus many witnesses were in my view conscious, again in varying degrees, of the desirability of presenting Meriam society in a favourable light in the context of litigation and interested in establishing its relationship with the larger and dominant Queensland and Australian societies in terms which those societies are likely if not bound to favourably accept. (*Determination*:63)

The difference, of course, is that the Merlan and Povinelli critiques were aimed at the liberal state, whereas Justice Moynihan's introduction of Indigenous agency and selective memory of traditions was aimed at assessing the credibility of individual witnesses (see Merlan 1995, 1998; Povinelli 2002).

20 It is beyond the scope of this book to give a full account of the incorporation of written material into what was previously an oral tradition only and the reception of mixed sources in the courts, but see the discussion by Graeme Neate in the Queensland Land Tribunal 1994 report *Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands*.

Given the judge's attitude towards the Islander witnesses, it can be seen that Haddon's work and Beckett's account of the contemporary situation assumed even greater importance to the outcome of the case. As might be expected from the nature of their interchanges during the hearing, Justice Moynihan's account of Beckett's published work and his evidence is a mixture of embrace and distancing, as exemplified in the general assessment of his evidence:

His work may be accepted, for the moment if not totally, as showing that Murray Island society is resilient and adaptive to change. It is however, given the focus of his concerns, less useful in founding conclusions as to the position prior to the development of the responses and transformations which are his particular concern. (*Determination*:44)

Beckett is the most frequently quoted witness in the *Determination of Facts*. The judge quoted Beckett on the effect of the arrival of the LMS in 1871 (pp. 59, 64, 101–2, 141), the Islanders' knowledge of the literature on the Murray Islands (p. 60), and generally adopted Beckett's account of the history of the Murray Islands up to his period of fieldwork (p. 104; also see p. 142).

He also quoted Beckett on the importance of Islander gardening (p. 110), the interrelationship of 'clan', 'village', 'district' and 'tribe', and the Islanders' more recent interest in genealogical depth (pp. 116–19). He adopted, with a little alteration, Beckett's characterisation of Malo's Law as general precepts for conduct (p. 137) and described Beckett's work as giving a useful insight into the relationship between the Murray Islanders and their land 'in terms of distribution or sharing life-sustaining or socially advantageous resources in a potentially volatile social environment' (p. 170). He quoted Beckett extensively on the timing and pressures for the division of traditional lands between siblings and how the relatively unusual joint holdings approach of the Passi family related to the more typical situations (pp. 210–12).

In some instances, Justice Moynihan's apparent adoption of Beckett's material includes a subtle repositioning. One example is the use of the idea of a Meriam domain to justify circumspection in evaluating the Islanders' evidence—that is, because of the possibility of their evidence being strategically self-serving. This repositioning was done by selecting a passage from *Custom and Colonialism* that emphasised the Meriam domain as a conscious and positive strategy on the part of the Islanders to manage their relationship with the wider society with a degree of autonomy. In emphasising this aspect of the Meriam domain, the judge ignores those aspects of the Meriam domain that were beyond individual agency, such as the historical accident of there being no large-scale dispossession of the Islanders from their land (p. 65). Another, not-so-subtle example of the judge's repositioning is the use of Beckett's description of the traditional land concerns of the Murray Islander diaspora in Townsville to support his attack on Eddie Mabo's credibility (p. 69).

Justice Moynihan's main criticism of Beckett revolved around the question of what could be known about the pre-contact land tenure situation from the meagre evidence available. This was also a major point of criticism of Beckett in Queensland's final submissions (p. 87). In the *Determination*, Justice Moynihan used Beckett's acknowledgment of the difficulty of knowing the pre-contact land tenure situation to highlight the particular areas in which he believed Beckett had made that fatal step too far from expert opinion into the abyss of speculation. The first was the judge's imputation that Beckett was arguing that the *Magur*, who were associated with enforcement of the Malo–Bomai cult, had something to do with enforcing land tenure arrangements (p. 164). The transcript from which the judge wished to draw this imputation does not seem to support it—a rare error on Justice Moynihan's part. The second is Beckett's apparent reliance on the earlier reports of the existence of fenced household areas as confirmation of the existence of a land-tenure system (p. 164). Again, the implication—not made explicit—seems to unfairly isolate one piece of evidence to cast doubt on Beckett's conclusions about the pre-contact land tenure system, which he made from various sources, notably Wilkin.

A more general relativising of Beckett's evidence was achieved by pointing out that his evidence was subsumed in a larger body of evidence, which had to be assessed as a whole, and by asserting the formal superiority of judicial fact-finding within the legal system. Thus, even when praising Beckett's work, the judge adds such phrases as: 'although I should say the view I have expressed is a reflection rather of the whole evidence as I appreciate it' (*Determination*:170).

At the beginning of the *Determination*, Justice Moynihan adopted the words of a Canadian judge:

Testimony in litigation...once admitted into evidence and interpreted by a Court, becomes fixed inter parties even though the same evidence out of the context of litigation could, as an intellectual exercise, be given a different interpretation by subsequent scholars or on other facts emerging to change the context. (Quoted in *Determination*:5)

This assertion of structural superiority also carries with it a certain anti-intellectualism, or, at least, an aversion to explicit theorising, which is often cast in opposition to fact-finding. Justice Moynihan expressed this anti-intellectualism in a number of ways. The first was in the context of his response to contradictory submissions about the general approach he should take to the evidence, which he glossed as an alternative between the 'thematic' approach and the 'historical' approach. The 'thematic' approach urged him to accept that various features of a society will change over time, whereas the 'historical' approach urged a comparison of the pre-contact society with the contemporary society. The judge's resolution is the dismissive assertion of fact-finding

pragmatism: 'I have sought to approach the evidence free of such conceptual models while acknowledging that each may, on occasion, have its uses as an aid in reaching or evaluating a conclusion without the application of either (or for that matter both) being necessarily determinative' (*Determination*:13).

Another example of the judicial suspicion of the intellectual came in the terms of his warm embrace of Margaret Lawrie's evidence and her book *Myths and Legends of the Torres Strait* (1970): 'I interpolate here that it seems to me that one of Mrs Lawrie's advantages as a witness is that she went to the Murray Islands not for a scientific purpose but to collect the stories. To do this she immersed herself in the community' (*Determination*:122–3).

Another point of comparison with Justice Moynihan's close examination of Beckett's evidence was his relatively uncritical acceptance of Haddon, Rivers and Wilkin. The *Determination* includes five pages of quotations from Rivers' chapter on social organisation in Volume VI of the *Reports* (Rivers 1908) and much of Wilkin's chapter on 'Property and inheritance' (Wilkin 1908). Haddon is also quoted extensively. Initially, Justice Moynihan had proposed a fairly strict approach to the *Reports*, noting that they were beyond the reach of cross-examination and comparison with direct evidence of witnesses (*Determination*:52). He proposed that material in the *Reports* that could be classified as direct observation or expert opinion evidence should be accepted and weighed against the totality of other evidence. In relation to opinion evidence in the *Reports*, he stated: 'it is admissible in terms of the established expertise of the person proffering the opinion and to the extent to which necessary sustaining facts are established by admissible evidence' (*Determination*:54–5).

Such an analysis of Rivers', Wilkin's and Haddon's works would have been an enormous undertaking, and there is nothing in the *Determination of Facts* to suggest that Justice Moynihan had in fact carried it out in a systematic way.

In order to understand the full significance of the use made of Beckett's evidence, it is necessary to outline the judge's aims and methodology in drafting his *Determination of Facts*, as far as they can be ascertained from the determination itself and its general legal and political context. This is not an easy task because of some of the typical characteristics of judicial writing, in which a generally high level of reflexivity and precision are combined, usually at critical points, with obscurity and obfuscation. It also becomes apparent from the form of the determination that the judge himself was torn as to what the findings should be.

The plaintiffs' lawyers had prepared 116 paragraphs of specific findings of fact that they urged Justice Moynihan to adopt as his determination of the facts in response to the remitter from the High Court. The bulk of these findings described the history of the Murray Islands and was, more or less,

uncontroversial. The critical findings, of course, were sharply contested. The plaintiffs had proposed a finding acknowledging a system of customary land law. Queensland's proposed finding was simply that no such system of customary law had been shown to exist. Instead of taking either of these positions, Justice Moynihan's formal findings (Volume 2 of the *Determination of Facts*) referred back to Chapters 8, 9 and 10 of Volume 1 of the *Determination*. These chapters resemble chapters of a book and are respectively entitled 'The people of the Murray Islands, their culture and society', 'Murray Islands society and land' and 'Claims by the plaintiffs to specific pieces of land'. They cover approximately 140 double-spaced typescript pages—in effect, circumventing the precision of the contending, alternative statements of proposed findings.

The potential confusion of the book-like approach to findings of fact was not alleviated in the text. In his discussion of the issues, the judge avoided the use of the term 'finding' when stating something that seemed positive for the plaintiffs. Instead, he used a range of words and phrases that implied different degrees of satisfaction with the evidence.²¹ When he came to the chapter on claims to specific pieces of land, he was again ambiguous about whether firm findings of an existing system had been made or whether he was just assuming the existence of a traditional system for the purposes of dealing with specific claims (*Determination*:194).

Why Justice Moynihan would want to blur the precision of his *Determination of Facts* is hinted at in the *Determination* itself:

I am conscious that much of the foregoing points of this chapter (or perhaps more of the *Determination*) are obscure and imprecise. I would like to think that this is as much a reflection of the state of the evidence as it is of any defect of mine. The point is it is the best I can do with the evidence. (*Determination*:172–3)

The conclusions he reached, which could be interpreted as positive findings, were expressed in a number of ways. For example, he stated: 'Entitlement in respect of a dwelling site within a village was and is usually regarded by [sic] inheritance from a direct male ancestor with an expectation that the person so entitled might pass the land on by the same means' (*Determination*:174).

Later, he stated:

It is difficult, to the point of impossibility, to reach any conclusions precise [sic] as to the restraints on the disposition of village (or for that matter garden) land prior to European contact...

21 The qualifying phrases include: 'so far as the evidence reveals' (p. 145), 'there is a body of evidence' (p. 166), 'there was, and it seems that there is' (p. 175), and 'it seems clear enough however that' (p. 179).

In more recent times an entitlement to dispose of land usually carried and carries a degree of expectation of disposition by descent to a blood relation by the male line, although this is now an extremely flexible concept.

Adopted children might expect to inherit land in the same way as natural children, although this seems to continue to be a potential source of quarrelling and disruption.

There was, and it seems that there is, an expectation that males have a stronger entitlement than do females and that as between brothers the position of the eldest was and is stronger. It may however yield to other considerations.

It is difficult to determine how constraining these expectations were and are. In the chapter to which I earlier referred, Wilkin records Bruce as remarking to the effect that in the past a man could dispose of his land to whomever he chose and he remarked on the freedom with which land was dealt with on Murray Island, although in the context of there apparently being some constraints. These have certainly not increased.

One is left with an impression that, as amongst themselves, it may be that the Islanders may dispose of land on whatever basis is acceptable to those directly affected and, to the extent to which a wider community may be affected, is acceptable to that community. Such acceptance is more readily attainable in terms of expectations relating to descent such as those to which I have referred. There do not, however, seem to be any qualifications on the disposition or acquisition of land which could be described as crucial. (*Determination*:175–6)

He also expressed conclusions as follows:

It seems clear enough however that garden land was primarily acquired by inheritance in the sense previously spoken of in the context of village land and that that remains the practice. Daughters were, and perhaps are, given dowries of garden land. (*Determination*:179)

The *Determination* concluded with an unusual personal comment by the judge, in which he complained about the process of the remitter being unsatisfactory, principally because he was restrained from making findings of law. His view was that issues of fact and law were ‘inextricably interwoven’, implying that it is extremely difficult to evaluate the facts without reference to the law. Thus, his lack of precision can be seen as a response to his frustrations about his task in the overall judicial resolution of the issue by the High Court. The effect of

the ambiguity of his findings, as opposed to the precision of the findings urged on him by the parties, was to transfer more responsibility for the momentous decision back to the High Court.

Anthropologists and lawyers reflect on the case

Beckett's article

Beckett's own account of the *Mabo* case (Beckett 1995) was written with the principal aim of responding to a conservative backlash by some newspaper commentators and legal academics. They drew sustenance from parts of Justice Moynihan's *Determination* in arguing that the High Court was in error and, in any event, the decision should be confined to the Torres Strait and not extended to the very different Aboriginal culture of mainland Australia. Another aim seems to have been to provide a concise account of all the anthropological issues in the case. Although these predominant aims tend to lead away from a personal reflection on his experience of being an expert witness, some of his concerns did come through.

One particular frustration was the exclusion of his own evidence, on technical grounds, confirming the adoption of Eddie Mabo. He felt that some of Eddie Mabo's statements that Justice Moynihan found dubious could have been proven correct by other evidence that was, for various reasons, never called.²² As one might expect, this is part of a more fundamental complaint against the perceived artificiality of factual boundaries drawn by the rules of evidence in the contingencies of particular hearings. More generally, he felt that the whole process of searching for rules led to a radical de-contextualisation of the normative statements of the Islanders. These statements were used for rhetorical purposes in actual assertions of claims on the island, and were part of a complex and competitive set of relationships (Beckett 1995:21). It is apparent from the above examination of his evidence that he did try to bring some of this complex context back into view in his evidence. As with the subtleties of historical cultural transformation, however, he felt the dangers of doing this: 'Such subtleties can scarcely be risked in adversarial statements, and are hazardous in the courtroom situation, yet they are bound to arise' (1995:23). In an obvious departure from the authoritative stance required of the expert witness, he saw part of the problem—as I do—as stemming from anthropology's own difficulty in handling the question of historical transformation.

²² As explained in Footnote 13, Justice Selway has recently broken ranks with the more typical policing of the boundaries of the acceptable kinds of expert evidence to suggest that anthropologists with longstanding involvements with the claimants may also give 'primary' evidence.

Something he does not address is the seemingly central problem of the indeterminacy of 'law'. When I asked Beckett about this apparent omission in 2003—in the context of questioning his use in evidence of the opaque phrase 'law in our sense of the term'—he had a number of responses. The first was to say that he was prepared for the question of defining 'law' but was simply not given a chance to talk about it:

He [the Judge] didn't ask me. I'm not sure what I would have done, dig out Radcliffe-Brown's essay in the *Encyclopaedia of the Social Sciences*—'Sanctioned Social Law'—it was an issue from Maine onwards that anthropology did address. Maine was not an anthropologist directly and the comparative analysis is crude but it is something that must have been addressed in the colonial literature...yet it was clear that one of the problems for Moynihan was, if you can wind back before the establishment of an Island Court, how did disputes get settled and how the decisions were enforced and, indeed, that is a significant question.²³

Another kind of response was an understandable protectiveness towards encapsulated, small-scale societies. This protectiveness sees judicial attempts to distinguish 'their law' from 'our law' as inevitably being an unjustified assertion of moral and political superiority. This view often leads to a rhetorical deflection of the argument back to the pretensions of European law—typically identifying aspects of change and contingency in European law:

She [Counsel for Queensland] was trying to say that what was done in relation to land was all a response to contingency and that there was very little, nothing hard in it, people responding to issues of the moment. And to a degree that is true. I would have said, had I been given the opportunity, that is also true of any law.²⁴

Nonie Sharp's critique

The whole litigation saga, including Beckett's performance as expert witness, was given a lengthy treatment by Nonie Sharp in *No Ordinary Judgment* (1996). This book can be seen as the reassertion of the superiority of her presentation of Meriam culture in *Stars of Tagai*. Her presentation of Eddie Mabo, the witness, is still predominantly the Eddie Mabo of the *Stars of Tagai*. The devastating concessions he was forced to make in cross-examination might, however, have induced a new critical distance from her exemplary Islander: 'Were the Meriam to come to take his cultural authority seriously, as I saw it, he would have to seek their confidence in the process of face to face living over a period' (Sharp 1996:67).

23 Jeremy Beckett, Interview transcript, 2003, p. 23.

24 Jeremy Beckett, Interview transcript, 2003, pp. 24–5.

Otherwise, she continues to stress the centrality of Malo's Law, both as law and as religion, which 'gives sacred authority to rights in land' (1996:87). For Sharp, Justice Moynihan's lack of acceptance of Malo's Law—as law that can be recognised by the European legal system—was bewildering and a sign of his incorrigibility.

The whole experience of the court case does not lead her to any more fundamental questioning of the utility of such terms as 'religion' and 'law' as vehicles of cross-cultural translation. The thrust of her discussion is that Justice Moynihan should have been prepared to identify Malo's Law as law because it is equivalent to a religious law. Why she thought this equivalence should have been so persuasive is difficult to imagine, considering that Malo's Law did not specify rules of inheritance and, in Western societies, there has been a longstanding formal separation of law and religion.

One of the most interesting aspects of *No Ordinary Judgment* for this book is Sharp's assessment of Beckett's performance as an expert witness. She recounts and is uncritically supportive of Beckett's evidence relating to the continuity of traditional land tenure principles in a Meriam domain. But she is predictably critical of his unwillingness to see the Meriam witnesses' assertion of Malo's Law as the deep religious basis of their attachment to land (1996:132–4).

Sharp noticed that Beckett's evidence about the contemporary assertion of Malo's Law and his speculation about the pre-contact relationship between the Malo–Bomai cult and land tenure were at odds with some of the evidence of the Meriam witnesses, but highly influential with Justice Moynihan. Sharp's critique seems to be that Beckett could have aligned himself more closely with what the contemporary Meriam were saying about Malo's Law. In reinterpreting Beckett's evidence of the reality of traditional land boundaries and the pervasiveness of ideas about not trespassing on another's land, she suggests that it does not matter that Beckett's informants in 1959–60 did not make explicit reference to 'Malo's Law', because they had internalised it and acted instinctively (1996:142).

In her view, Justice Moynihan made the same mistake as Beckett. The judge's failure to see the continuity of a religious order 'was fatal to the process of understanding Meriam social life, Meriam meaning systems and the character of the Meriam people' (1996:154). Again, there is repeated assertion without engagement with the problems of her view: the underlying issues of cross-cultural translation, interpretative indeterminacy and the judge's forced orientation towards 'laws, customs, traditions and practices' of land tenure from time immemorial.

Keon-Cohen's article

From the apogee of the lawyers' acknowledgment of the significance of Beckett's evidence in their final submissions, there was a long way to fall. Just how far was revealed in Keon-Cohen's account of the case in which Beckett's role rates just one sentence—quoted at the beginning of this chapter. In contrast, when I interviewed Keon-Cohen about the case in 2003, he was full of praise for Beckett's performance, stating that it had helped to give some structure and coherence to the Indigenous evidence.²⁵ Keon-Cohen's published account of the case is rather like the often-reproduced photo below: a direct relationship with the plaintiffs, unmediated by expert knowledge.

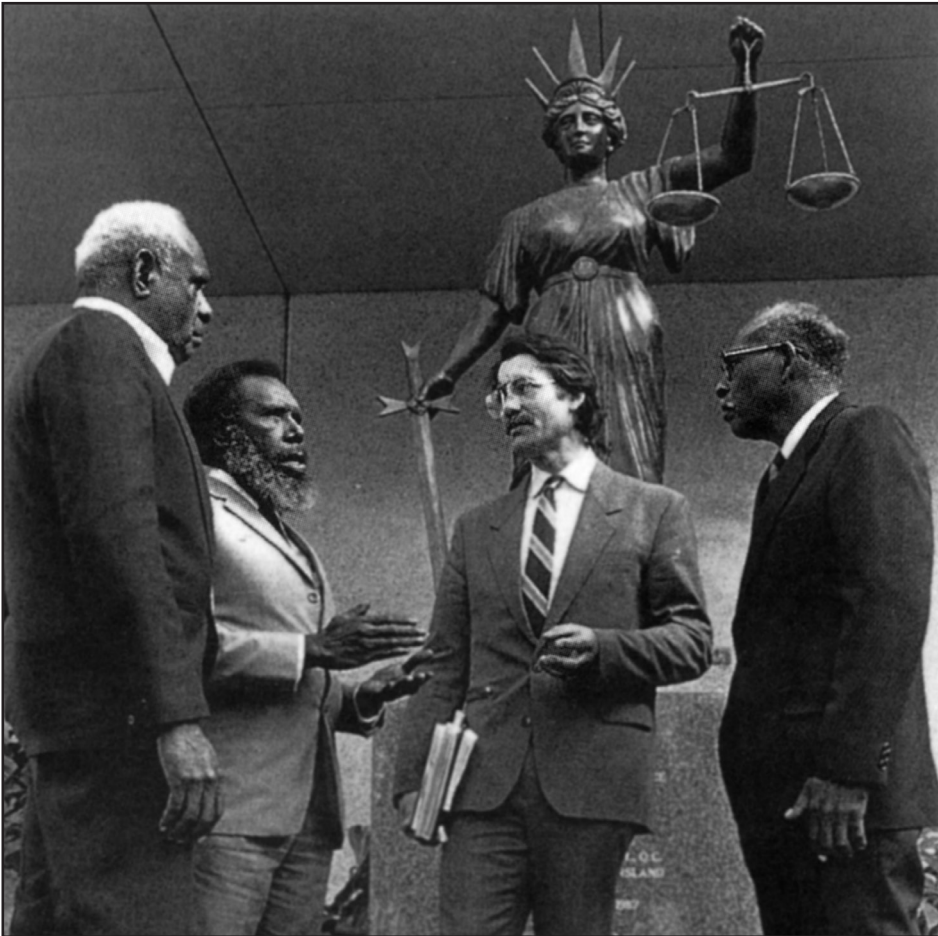


Figure 3.1 Dave Passi, Eddie Mabo, Bryan Keon-Cohen and James Rice outside the Queensland Supreme Court in 1989

Courtesy of Yarra Bank Films, photo by Jim McEwan

²⁵ Brian Keon-Cohen, Interview, 7 November 2003, Tape 1, Side B.

Conclusions about the *Mabo* case study

The encounter between law and anthropology in the *Mabo* case confirms some of the basic features of the two fields. In academic anthropology there is, ideally, a relative openness to what counts as evidence, a heterogeneity of approaches, and the continuing expansion of evidence and revision of interpretations. In contrast, the judicial process is essentially about drawing boundaries around the totality of evidence and constructing an interpretative finality about the enclosed material, at least with regard to the formal processes of the judicial hierarchy. This contrast is evident in the absence of Kitaoji's and Sharp's material from the court case, and Beckett's frustration that he was not allowed to express an opinion or simply provide relevant evidence about the issue of Eddie Mabo's adoption.

The legal system's attempt to include academic knowledge in the form of expert testimony became, in this case, the scene of a subtle competitiveness between the judge and the expert witness, as evidenced by the apparent close identification of the judge with the expert during the hearing and the judge's distancing from the expert's opinion in his *Determination of Facts*. Those moments during the hearing of Beckett's evidence when Justice Moynihan interrupted the flow of evidence—creating a space of mutual respect and the free exchange of ideas—are remarkable islands in the sea of suspicion, objection, and assessments of credibility. It is as if Justice Moynihan suddenly saw someone like himself trying to sift his way through a morass of strategic statements to some truthful reality beyond—a conversation between equals, the ethnographer as a sifter of informants' statements and actions and the judge as a sifter of witnesses' evidence and demeanour. On this island the adversarial system is temporarily suspended. The judge asks his own questions, responds to answers, exposes his thought processes and seeks confirmation of some preliminary conclusions.

At a later stage of the proceedings, the well-qualified, credible expert witness, such as Beckett in *Mabo*, represents a problem for the judge: how to differentiate his findings from the expert's opinion. This problem was particularly acute in *Mabo*, where the judge resorted to a retrospective undermining of the expert's evidence on some key points and by simply asserting his superior fact-finding role. This structural superiority is typically couched in time-honoured phrases asserting an assessment of the whole of the evidence (of which the expert's evidence is only a part), and occasionally by ignoring what the expert actually said in favour of an impression.

In Beckett's own account of his approach to being an expert witness, he embraced the idea of robust independence. This approach was at least partly as a defence against the unreasonable expectations of the lawyers, who he thought

had exhibited a professional ruthlessness in disregarding evidence that did not support their Statement of Claim. But this declaration of independence did not absolve him of the necessity of reconstituting his body of work in a way that was relevant to the task at hand. This deconstruction and reconstruction of the anthropological material available to him will be examined under the previously identified headings of groups, laws and change.

The naming of 'family groups' in the Statement of Claim as the grouping of Islanders most relevant to landholding was remarkably fortuitous and remains somewhat of a mystery. Although Beckett was not involved in the drafting of the Statement of Claim, it matched exactly his own idea of the relevant grouping in the contemporary Meriam domain, in contrast with his labile, ideological groupings in council politicking. 'The family' also avoided the uncertainty of the re-emergent idea of the eight 'tribes' that was reported in, and possibly encouraged by, Sharp's writing.²⁶ The choice of 'family' probably emerged from the process of seeking instructions from the plaintiffs for the Statement of Claim. The Statement of Claim also mentions individually owned land, but asserts that only other family members could inherit this land.

The choice of the appropriate group to put forward was also a critical decision for avoiding the mismatch in the *Gove* case between the Aboriginal evidence and anthropological generalising. The Statement of Claim in *Mabo* addressed this problem by asserting that the islands were exclusively possessed by 'the Meriam people' and by presenting individual and family group ownership as particulars of the Meriam people's 'laws, customs, traditions and practices'. In effect, this approach provided some flexibility going into the hearing about the appropriate level of the title-holding group. Ultimately, the High Court's choice of the maximal grouping, 'the Meriam people', seems to have been influenced by the pragmatic factors of the generally negative factual findings about the specific claims of the plaintiffs and, mirroring Justice Moynihan's view, its unwillingness to become embroiled in the minutiae of resolving disputed claims over individual plots of land. Beckett and others did provide material that tended to support the idea of a maximal grouping as an anthropological reality, but it was always in terms of shared identity, shared history and a rather fractious commonality of beliefs, expectations and practices.

In the absence of a clear legal doctrine, Beckett's main challenge was to negotiate a course between his transformative account of Islander history and the absolute continuities asserted in the Statement of Claim, and to do so in a way that could

26 Recent events confirm Sharp's account of the contemporary importance of the eight 'tribes'. The rules of the Prescribed Body Corporate set up to help administer the native title rights won in the *Mabo* case are based on the equal representation of each of the eight 'clans' on the committee (see The Rules of Mer Gedkem [Torres Strait Islander] Corporation). On recent land disputes, including the contemporary significance of the 'tribes', see Burton (2005, 2007).

be supported by compelling facts and argument. In this, the notion of a Meriam domain, changing at a slower rate than other aspects of Meriam life, became critical to his presentation. It was a risky course because so much of his work was aimed at demonstrating how traditional concerns had been relegated to a private sphere, away from the dominant concerns of community life. The risks of appearing to tailor an interpretation to suit the plaintiffs' case were minimised to some extent by the fact that he had already raised the idea of a separate Meriam domain in his early work and he had retained the fieldnotes of his investigations into the layout and ownership of particular pieces of garden land.

The other important way in which Beckett was able to negotiate his difficult course was his conceptualisation of the systematic level of Meriam land tenure, within the Meriam domain, at the level of 'principles'. On analysis, these principles are two all-encompassing, broadly opposed tendencies. One tendency, which makes individual independence and autonomy paramount, is expressed in the opening sentence of the statement: 'owners have the right to dispose of their land, during their lifetime or at death, to whom ever they wish' (Beckett 1989:3).

The other tendency is acceding to the legitimate expectations of close kin, particularly of the eldest son, other sons and daughters. There is a cleverness about expressing these tendencies as a list of principles in a system since all instances of inheritance would fit into either category and thus support the existence of the system so described. When I put the 'cleverness' of his formulation to Beckett in 2003, his response was to revert to empiricist mode: the principles most accurately described the multitude of individual cases he had investigated.²⁷

Beckett's use of broadly opposed principles is reminiscent of the fundamental antinomy introduced by Fred Myers in his *Pintupi Country, Pintupi Self*: the tension between autonomy and relatedness (Myers 1986). One of the consequences of this conceptualisation is that it extracts simple generalisations from the apparent complexity and appearance of haphazardness of individual decision making about inheritance. Myers, however, used the concept of 'negotiation' to integrate these broad opposing principles with individual action in particular circumstances. Thus, a possible alternative way to generalise about broadly opposed 'principles' by which such societies work would be to focus on the negotiation and renegotiation of everyday life, including inheritance decisions. It seems obvious, though, that 'negotiation' would not have evoked the stability of 'law' in the same way that 'principles' could.

27 Jeremy Beckett, Interview transcript, 2003, pp. 12–13.

Beckett did not deny the competitiveness and negotiability of everyday life in his oral evidence. That evidence presented a more complex picture than his summary statement, 'Meriam Land Tenure'. It became clear that what Beckett meant when he spoke about 'principles' and 'rules' were inter-subjectively shared values that can be legitimately deployed in traditional claims to land among Meriam people—in other words, all those traditional principles that had become objectified and would be raised in Indigenous justifications.

In demonstrating continuity, Beckett could, whether fortuitously or by design, point to Wilkin's chapter on 'Property and inheritance' in the *Reports* for the description of an identical tension. But by linking any strong claims of continuity to the identified principles, Beckett was then free to admit to his oeuvre on transformation and bring it into his evidence, not as destructive of the principles, but as demonstrating their resilience.

The absence of any legal doctrine of native title at the time of the hearing of the facts in *Mabo* is a challenge to the general triangulation model of anthropological agency proposed in Chapter 1. To some extent the formulation of a proposed legal doctrine in the Statement of Claim took the place of legal doctrine in guiding Beckett's deconstruction–reconstruction of the anthropological archive. He also seems, however, to have guided himself using more amorphous ideas of what would be required for legal recognition. He had, in reserve, anthropological theorising about primitive law, but did not have to use it. What he did use were general ideas of completeness (system) and generality (principles) that could be seen as transcending historical contingency. Although Beckett did not make explicit links to legal theory, this completeness (or gaplessness) and generality had long been identified by Weber as two of the distinctive features of modern law. The implication for the triangulation model is that the 'legal doctrine' corner of the triangle should be expanded to include vague conceptions of the legal system, perhaps anthropologists' ideal images of law, to match the judge's ideal image of the anthropologist.

The other apparent challenge to the triangulation model of anthropological agency is Beckett's distancing himself from the claimants' statements about the centrality of Malo's Law. I have suggested a need to harmonise the three elements, while projecting independence. On reflection, this distancing still fits the proposed model because Beckett was trying to harmonise their evidence with the *whole* of the anthropological archive, especially the period represented by his own contribution to it, when Malo's Law was not a prominent feature of public discourse. The benefits for the projection of his independence were also enormous.

Beckett did not take the path of demonstrating independence by explicitly confronting the indeterminacy of key concepts. This seems to have been his

natural inclination ('I find my theory in the street') and a result of his general appreciation of likely legal fact-finding methodology, rather than any deliberate choice.

In Chapter 1, I admitted a certain impenetrability of written judgments because of the skilful obscuring of strong gestalts about the preferred outcome. Yet this very impenetrability allows other readings consistent with orthodox legal ideology. One illustration of the potential complexity is the judge's use of final submissions. There is some slight evidence that the judge, having rejected Queensland's ultimate conclusion that there is no system of customary land tenure on Murray Island, goes out of his way to adopt many of Queensland's other negative submissions—for example, that Beckett did not have any material on which to base his opinion about the pre-contact land tenure situation. This process of selection is suggestive of a broad-brush adjustment between the parties to demonstrate his own attempt at a middle course and has little to do with the evaluation of the minutiae of evidence. It is an attempt to give something to both sides. The problem is that this 'slight evidence' is also consistent with the judge having independently reached the same conclusions about the evidence as Counsel for Queensland.

One of the most difficult issues of interpretation has been in characterising Justice Moynihan's attitude to this very issue of interpretative indeterminacy versus the assumed accessibility and stability of the fact. Some of his interactions with Beckett indicate an awareness of the artificiality of the fact-finding process, which must abandon complexity of possible interpretations, to assigning a 'yes' or 'no' against particular assertions of fact. The judge's whole approach to the structuring of the *Determination* as a book rather than as specific findings is the most obvious example of this awareness. A possible interpretation would be that we have evidence here of a self-consciousness about the obligation of the judge to find facts rather than any deep belief that the science of fact-finding can be applied unproblematically to general characterisations of a whole society. Consistent with this interpretation is Justice Moynihan's sociological acumen in working through the implications of Indigenous agency in the contemporary reformulation of tradition, albeit under the rubric of the credibility of witnesses. A sociological imagination is also demonstrated in his description of how he thought the pre-contact society worked:

It may be accepted that prior to the manifestation of the effects of outside contacts...the evolving Murray society, in common with most if not all human societies, had a bias towards social order and social cohesion. The ways in which this was implemented were many, diverse, complex and interrelated. Thus there was the complex system of social positioning by reference to descent and territory a perception of which is described by Rivers. Appropriate attitudes were inculcated into children from

an early age by exhortation, example and reinforcing behaviour. The mechanisms were inchoate rather than specific and indirect rather than direct by comparison to what occurred after European contact although the former features remain in varying degrees. Social activities based on the interrelated groupings described by Rivers, magic and ritual all were designed to reinforce adherence to the social structure and the manifestation of appropriate patterns of behaviour. (*Determination of Facts*:190)

On the other hand, there is the seemingly misguided attempt by Justice Moynihan to find the one, true, dominant purpose of the Island Court, and similar themes in his conversations with Beckett about whether the land tenure system was in fact subservient to general notions of community harmony. An interpretation of Justice Moynihan's *Determination* that tries to incorporate the two different sensibilities would have to accept the heterogeneity of approaches evident in the *Determination* and be content to track the subtle switching of approaches at different points in his reasoning.

On my reading, Beckett's performance in *Mabo* was influential with Justice Moynihan, but his performance did not have any immediate ramifications within anthropology. It was the High Court decision itself that commanded wider interest and, as Beckett observed, 'after *Mabo*, the focus moved to the mainland'. Beckett's success remained obscure partly because of the form of the proceedings. The *Determination of Facts*, which gives the fullest account of his influence, was never published separately. By the time the various justices of the High Court had drawn what they wanted from the *Determination* and written their judgments, Beckett's input had completely disappeared from view. Moreover, like everyone else, anthropologists became focused on trying to understand the implications of the newly formulated legal doctrine of native title. This will be examined in the next two case studies.

