5. The Anthropology of Broome on Trial

Background

Patrick Sullivan was a convert to anthropology from modern history and Asian studies. During 1983–84 he did fieldwork at Halls Creek in Western Australia while working as the coordinator of an outstation resource agency. This high-pressure job allowed him to observe at close quarters some of the irrational and counterproductive interventions by government agencies in the traumatised lives of Aboriginal people in Halls Creek (Sullivan 1986). It also provided him with a privileged vantage point for the subject of his thesis: the interface between Aboriginal and non-Aboriginal culture in the Kimberley region, both in administration and in less formal processes (T. 821).[1]

Sullivan's thesis included an account of the origins and development of the Kimberley Land Council (KLC), his future employer. He was critical of a larrikin political style among the Aboriginal leaders of the time, although he saw a new maturity emerging with involvement, via the Aboriginal and Torres Strait Islander Commission (ATSIC), in welfare funding decisions and negotiations necessitated by the recognition of native title (Sullivan 1996a:ch. 4). This anthropology of black–white interaction, bureaucracy and intercultural organisations was an innovative thesis for anthropology at the time. But when Sullivan took up the position of in-house anthropologist at the KLC, most of his assigned tasks took him back to a more conventional focus on traditional culture and land tenure. A few projects—such as the need to establish native title corporations and KLC's entrepreneurial policy development on regional agreements—did provide some continuity with his initial interests in intercultural organisations.[2]

Pre-claim research in Broome

Sullivan's initial professional encounter with traditional land tenure around Broome was through the Aboriginal Development Commission, which commissioned him in 1989 to produce a report on the traditional ownership of Broome. There followed a long and intensive association with the Aboriginal people of the area. Prior to the native title claim, he had appeared as an expert anthropological witness in a fishing prosecution case, involving the defence of

1 'T' is a shorthand reference to the official transcript of the hearing of the first *Rubibi* claim, *Felix Edgar, Frank Sebastian & Others on Behalf of the Rubibi Community v The State of Western Australia*, No. WG 90 & 91 of 1998. It was produced by Transcript Australia.

2 See Sullivan (1988, 1995a, 1995b, 1996b, 1997a).

a traditional right to fish in the sea adjacent to Broome. He was also intimately involved in the efforts of various Aboriginal groups to resist a proposal to build a crocodile farm close to the Kunin Aboriginal Reserve (the claim area). Sullivan's report about the traditional significance of the crocodile farm site featured prominently in Chaney's report for the Commonwealth minister on the Aboriginal heritage protection application (Chaney 1994). The repeated use of Sullivan's formal title (he is always Dr Sullivan) reminds the reader that he alone, of all the consultants used by the various parties to the dispute, had attained that academic level. Chaney also made full use of Sullivan's enumeration of the various aspects of the significance of the site.

Sullivan's long association with the claimant group provides an interesting contrast with the other expert anthropologist in this case, Erich Kolig. In comparison, Kolig had done no fieldwork with the claimants, although he knew them. He had to rely on his superior academic capital. This is not to suggest that Sullivan was a stranger to the academy. Sullivan had done work as a tutor and lecturer while completing his academic qualifications, and had held a lecturing position at Edith Cowan University and a fellowship at the North Australian Research Unit of The Australian National University between his two periods as in-house anthropologists at the KLC. To focus on his consultancy work and position with KLC would not, however, do justice to the non-applied aspects of his career. He had ambitions to theorise the whole colonial encounter in the Kimberley and, through publications and conference attendance, kept his academic options open. As we shall see, however, in *Rubibi*, the battle over the interpretation of the anthropological archive was between anthropologists of quite different levels of academic capital. Kolig was older and, when the confrontation between the two anthropologists occurred in 2000, he had devoted 20 years to his academic career, centred on his position as senior lecturer in anthropology at the University of Otago. He had been an examiner of Sullivan's doctoral thesis. Did Kolig's relative seniority in the field of the academy play a role in the reception of his opinions? Or do we see a balancing out of academic position with Sullivan's superior knowledge of the claimants?

Anthropological research for litigation

Prior to finalising his report for the *Rubibi* native title claims, Sullivan published a paper in a collection on customary marine tenure in Australia (Sullivan 1998). That paper provides an insight into his preliminary ideas and tentative formulations about traditional land tenure around Broome. He describes the continuing use of the land by Aboriginal people, who had a rich, contemporary ecological knowledge of species, habitat, seasonal variation, traditional hunting and fishing techniques and traditional pharmacopoeia, although the number of knowledgeable people is unclear (1998:98). Outlining actual use of natural

resources allowed him to conveniently introduce the concept of *rai* in all its manifestations, as would be expected from its prominence in the anthropological archive (1998:102).

Rai can justify a claim to a particular place as home, or a claim to be from there, 'while still enjoying rights over the combined land and sea of the wider group' (1998:103). As I have done, he reads back into Elkin's account of *rai* the flexibility of linkage to place that Elkin resisted. Sullivan also found an ideology of descent, which is a legitimate claim to 'come from' or 'belong to' the place of a parent. These kinds of identification with place were, however, subject to a broader consensus usually achieved via the authoritative pronouncements of a respected elder. As articulated by Sullivan, in this social process of assertion and response, not all arguments are of equal weight. He identified the most influential as

1. descent or inheritance through the male or female line
2. place of birth
3. conception spirit (*rai*)
4. knowledge of the mythology and ritual associated with an area.

The picture then emerged of a people whose members each have particular attachment to a relatively small area of homeland—an attachment they might have achieved by a number of means, and which they share with close kin, as well as those who might not be directly related. They hunt, fish and perform ceremonies over a wider area of the land, where they feel themselves to have rights in common with a larger group (1998:105).

Sullivan admitted that the set of factors mentioned above, especially *rai*, produces a highly flexible situation. With an eye to the task of working out how legal recognition might be achieved within this flexibility, he turned his attention to a maximal grouping. If such a grouping could be identified with sufficient clarity, the means of identification to particular places within the overall territory of the wider group could be more easily presented as internal questions that did not require resolution by the court.

At this stage of his research, Sullivan seemed to be groping for something rather elusive: the maximal grouping that could be considered to hold a right of possession, as opposed to a mere right of access or use.[3] He found Berndt's use of 'society' a promising concept. In his critique of the use of 'tribe' for Western Desert Aborigines, Berndt had proposed, instead, the idea of 'a

3 Sullivan commented: 'I don't think I'm groping for it. I think I'm trying to convince the judge that it is inherently elusive, it doesn't exist in the terms required of it for formal recognition' (Sullivan's comments on draft chapter, 2005).

society'. He defined society as those who meet regularly and consistently, even if intermittently, and who are closely involved in reciprocal duties and obligations and make up the widest functionally significant group. This concept allowed Sullivan to incorporate the broader connections based on Dreaming tracks and shared ritual life, which were still an important prerequisite in order to be acknowledged as a traditional elder in Broome. Perhaps anticipating the potential for his formulation to objectify and solidify relations, he expresses some hesitation about his own suggestion:

> The concept of 'the land/sea-holding society' is an abstraction from the actual practices of assertion of affiliation to the named tracts, demonstration of knowledge, socially accepted lines of descent, and assertion of competence in and rights over linguistic domains. These are socially determined, sometimes by consensus and sometimes in dispute. (1998:106).

In any event, to ensure that all the members of the Rubibi coalition, including the Goolarabooloo group, would be recognised as native title holders, a grouping at a more inclusive level of generality than a clan, dialect group (Jukan) or language group/tribe (Yawuru) needed to be identified.

Strategic choice in formulating the *Rubibi* claims

Sullivan prepared an expert anthropological report to cover all the traditional country of the Rubibi community. At some point, however, a critical tactical decision was made by the lawyers and Sullivan to split the *Rubibi* claim, so that the first hearing would be for the Fishermen's Bend Reserve, Kunin. Initially, the rights claimed were for full native title rights. But, for reasons that will be elaborated below, it was eventually decided to limit the rights claimed to ceremonial purposes, so that the disputed use of the reserve would be resolved. The claim to all the other available Yawuru traditional country would not be so limited and would be heard later (in fact, in 2004).[4]

Although the details of the reasoning behind this decision remain confidential, the benefits can be imagined: the history of the use of Kunin as a ceremony

4 At the time of concluding the research on the *Rubibi* case study, the second *Rubibi* hearing had been completed but the legal proceedings had not been finalised, pending the outcome of late mediation negotiations between the claimants and the WA Government. In an unusual move, Justice Merkel delivered reasons for decision on some of the issues (principally, which of the competing groups would be found to be the native title holders), ostensibly to assist the mediation: see *Rubibi Community v Western Australia (No. 5)* (2005) FCA 1025, 29 July 2005. For legal commentary on the unusual procedure, see McKenna (2005). Following the failure of mediation, a final determination of native title was made in 2006: see *Rubibi Community v Western Australia (No. 6)* [2006] FCA 82 (13 February 2006) and *Rubibi Community v Western Australia (No. 7)* [2006] FCA 459 (28 April 2006).

ground was well documented; the claim would be supported by regional ritual leaders; and it coincided with a folk understanding, possibly shared by any judge, of ritual as quintessential traditional culture. Objectifying culture in this way would perhaps also coincide with the juridical need for objective facts of traditional laws and customs, ritual being more law-like in the normative aspect of law as an enforced uniformity, and less likely to appear flexible and negotiable. Moreover, the sensitive subject matter would keep the *Rubibi* claimant coalition unified and enforce some discipline on the potentially disruptive Aboriginal groups outside the Rubibi coalition. Of course, on the negative side, the fragility of the continuation of specifically Yawuru ceremony would be exposed.

The claimants' evidence

At the time of the hearing in 2000, it had been nine years since Paddy Djiagween's death. Paddy Roe was still alive but apparently too old and frail to give evidence (see T. 841). A senior Yawuru elder had disappeared a few years earlier, having walked out of an aged-care hospital in Derby. To avoid mentioning his name, the participants in the hearing referred to him as The Man Who Disappeared. The most senior surviving Yawuru elder was Felix Edgar, who gave evidence from his wheelchair, having suffered a stroke some time before. After the fluency of the opening address of Mr Kevin Bell QC, the Yawuru claimants' barrister, the evidence of Felix Edgar descended into tragi-farce. Technical difficulties with the court public-address system compounded the obvious physical and language difficulties. Also, his untrained interpreter, another claimant, occasionally gave inaccurate translations, sometimes adding his own evidence and suggesting answers to the witness. All this meant that highly contradictory evidence was left unclarified, despite the tortuous efforts of all involved. The next witnesses, Frank Sebastian (Gajai) and Francis Djiagween (Lulga) (Paddy Djiagween's son), fared a little better.

In contrast with the truncated, hesitant and sometimes contradictory evidence of the other Aboriginal witnesses were the relative clarity of Joseph Nipper Roe's evidence and the articulate expansiveness of Patrick Dodson, partly reflecting their level of Western education. Nipper had been taken away to Perth for schooling and returned to Broome to work as a trained carpenter. In later life he worked in government services as an interpreter and cross-cultural consultant. In this capacity, he produced various documents aimed at explaining Yawuru culture to white service providers. These auto-anthropological cross-cultural manuals became the focus of the presentation of his evidence about the concepts of *lian* (emotional centre, being), *rai*, *bilyurr* (spirit from within) (T. 157–9), the section system, kinship terms, avoidance relationships, joking relationships and respectful relationships and so on (T. 160–5).

Patrick Dodson had been on a remarkable journey since his birth in Broome in 1948. He grew up in Katherine in the Northern Territory, suffered the premature death of both his parents in separate accidents in 1960, attended a Catholic boarding school in Melbourne and was ordained a Catholic priest in Broome in 1975. Following a long interval, he returned in 1989 as the director of the KLC. That journey had taken him to the height of national prominence as one of the key Aboriginal leaders of the land rights movement and reconciliation (see Keeffe 2003), and in 2000 he appeared as Aboriginal claimant and witness approved by the Aboriginal lawmen of the region to give evidence about secret ceremonies at Kunin.

> PATRICK DODSON JAGUN: Well, the significance of the stories is that it belongs to the Bugarrigarra, the beginning of time. It belongs to the ceremonies that young man start off with initiation and gradually get up to a stage where there's a clarification or xx…[restricted part of transcript excised]…xx. And that's only for men. It's not for women. It's serious, serious law. It's not just talk. (T. 268)[5]

He also explained the idea of *lian* in relation to ceremony (T. 293).

A feature of Dodson's evidence was the centrality of the Aboriginal vernacular word 'law' in his explanations: the subsection system is a Bugarrigarra law (T. 283); ritual leaders are lawmen; a ceremonial ground is a 'law ground'; some rituals are 'law'; shared rituals and Dreaming stories are a 'common system of laws' (T. 350); and sacred objects are 'law'. While this seemed to reflect the Aboriginal vernacular use of the word, its polysemy did require untangling at times—for example, in clarifying that 'law', in the sense of ritual shared with neighbouring tribes, did not necessarily imply shared country—since people could not speak for another's country and Yawuru was a separate country (T. 349–52).

Five of the senior male Rubibi claimants gave evidence, as did six of the senior female claimants. Patrick Dodson and Nipper Roe gave evidence in a restricted session at Kunin in the presence of the ceremonial leaders from neighbouring tribes, including Mangala, Nyangumarta, Walmajarri, Nygina and Karrajarri (T. 265–6). Through these witnesses, the main elements of the case emerged.

- All Yawuru have rights to all traditional Yawuru country.
- Yawuru are descendants, through the male or female line, of the original Yawuru, irrespective of whether those ancestors identified as Yawuru, Djukan or Goolarabooloo.

5 Note: I did not make the judgment about excising the restricted material. This is a direct quotation from the unrestricted transcript, which is all I had access to.

- Kunin is now the principal Yawuru law ground, ordained in the Bugarrigarra (Dreamtime), not just a site of historical convenience for ceremony.
- The current Yawuru senior lawmen are the five Rubibi witnesses and they are responsible for Yawuru law (in every sense) at Kunin.
- This position is supported by neighbouring senior lawmen.

Another Yawuru group opposed this generalised formulation of the title-holding group and the extent of the law ground at Kunin. They argued that the land in the vicinity of Kunin belonged to their Yawuru 'clan' called Leregon after the name of a soak adjacent to the reserve. What emerged was a bitter, longstanding family dispute. Paddy Roe and others had originally pursued the formal reservation of the area as a ceremonial ground and a place to store sacred objects. The original declaration in 1971 stated that the reserve was for a ceremonial site. A reorganisation of reserve administration resulted in a change of purpose of the reserve to more general 'Aboriginal purposes', paving the way for the leased area to be used for other purposes, such as housing and possible commercial development of a crab farm. At one point, those pushing for the lease seemed to have obtained the agreement of some of the influential Yawuru leaders of the time but there was also significant opposition from others, particularly Paddy Roe. He initiated legal proceedings to stop the Aboriginal Land Trust issuing a lease, on the basis that the whole of the reserve was required for ceremonial purposes. Because of the controversy, a lease was never issued. Nevertheless, members of the Leregon group, including Jacky Lee (now deceased), built houses near the edge of the reserve and just inside the reserve overlooking the law ground. The impropriety of that action was a festering dispute among the Yawuru up to the time of the claim.

The dispute was exacerbated in the early 1980s when sacred objects in the storehouse at Kunin were stolen. That theft caused great distress among the Yawuru and throughout the region. Jacky Lee's son, Colin Lee, was eventually charged with having one of the objects unlawfully in his possession. He said that another man, who had since died, gave him the object. Thus, the native title claim became the vehicle for a historic settling of scores. The stakes were high. On one side were the five remaining senior Yawuru lawmen asserting their continuing traditional authority to decide what is appropriate in the vicinity of Kunin. If their position was endorsed by the court it would mean the removal of the Lee houses. On the other side, the Leregon claimants challenged the idea that traditional title was held at the level of the Yawuru, instead asserting their own traditional ownership at the level of the 'clan' that would give them the necessary rights around Leregon to construct permanent dwellings. As we shall see below, these contrary positions broadly coincided with the opposite views that Patrick Sullivan and Erich Kolig took of pre-contact traditional land tenure.

The Leregon group was unsuccessful in obtaining funds for a lawyer and was represented by a family friend, Mr Johnson. He did not appear to have a sound grasp of the legal doctrine of native title or legal procedures—a problem that also undermined other Yawuru people who wanted to intervene in the hearing. For the Leregon group it meant that opportunities to effectively cross-examine the Rubibi witnesses were never fully realised. It also meant that the feuding between the groups clouded their appreciation of their own need to prove traditional continuity in order to succeed. A clear example of this was when one of the Leregon senior witnesses, Rosie Charlie, declared: 'our law is dead, it went with the old people' (T. 628).

She seemed to be basing her claim to the land on a number of factors including the place of birth and residence of her mother's mother, agreements between a previous generation of Yawuru elders, and the blunt assertion of 'clan' and of the white kangaroo 'totem' (T. 594–633). Their other main witness, Colin Lee—the man convicted of the unauthorised possession of the stolen sacred object—also asserted connection through 'clan' and 'totem' (White Kangaroo), and in his statement to the court drew support from a translation of an article by Father Worms (T. 684–5).[6]

Despite their inept representation, a relatively clear position emerged.

- A previous generation and some of the present senior Yawuru leaders approved the location of the houses.
- The sheds storing the sacred objects could be moved without breaching traditional law.
- The ceremony ground was a much smaller area than suggested by the boundary of the reserve and was well within the reserve, away from the boundary.

Notwithstanding their oppositional stance to the Rubibi claimants and their doubts about the traditional propriety of Patrick Dodson's and Nipper Roe's induction into the 'second stage' of initiation, the Leregon witnesses did, at times, acknowledge the traditional seniority of some of the other Rubibi claimants and, in various ways, demonstrated that they still complied with traditional prohibitions on women and uninitiated men speaking about secret male-only ceremonies—for example:

> MR BELL: You don't speak for that ground, do you?
>
> ROSIE CHARLIE: No, that's not my business, that's men's business. (T. 601)

6 The translation was probably of a story in Worms' 'Fifty legends' paper (1940).

In Colin Lee's case, he implied that he would have supported the concerns of the previous generation of ceremonial leaders about Kunin as they had been initiated according to his own high standards of traditional continuity:

> MS WEBB: Colin, you said you refused to take part in law ceremony. Can you tell us why?
>
> COLIN LEE: Well, it was explained to me at that time by the late Jack Edgar that they could do a lot of cheating as far as going through Aboriginal law. They don't have to go through full initiation to be a lawman. And that's when I didn't want any part of it. (T. 737)

The other impression from their evidence is the shifting alliances between key players and family fragmentation, as key elders passed away. What appears to be a *modus vivendi* of previous generations—the give and take between the traditionalists and their 'Coloured' relations, who chose not to follow that path—is taken up by later generations as increasingly inflexible positions. Family honour requires that the family's version of the *modus vivendi* of the previous generation is preserved and, with fewer opportunities for celebrating their commonality with other families—for example, in shared rituals—these differences take on an entrenched bitterness. The insularity of family versions of history is then reinforced by separate incorporation of associations. At the time of the hearing there appeared to have been five such bodies: Leregon Aboriginal Corporation, Walman Aboriginal Corporation, Djukan Aboriginal Corporation, Yawuru Aboriginal Corporation, and the older Goolarabooloo Association Incorporated.

The outcome of the conflicting Rubibi and Leregon claims was not a foregone conclusion. There was a great deal of evidence about cultural change that could be interpreted as demonstrating the fragility of specifically Yawuru ceremony continuing at Kunin. When asked about the future initiation ceremonies, Joe Nipper Roe said that he thought young Yawuru men would have to learn about Aboriginal culture before being considered for initiation. That comment gave the impression of a profound distancing of the younger generation from traditional culture (T. 172). Patrick Dodson spoke of how a drinking man would not be trusted with the secrets revealed in various stages of initiation and thus might not be considered as a candidate. Nipper Roe and Patrick Dodson had been put through the law in 1994 amid concerns about who would look after the law when the few remaining senior Yawuru men passed away. On their version of events, they were inducted by the senior lawmen of the time in the tradition of being 'grabbed' in order to be put through the law. But they were also cross-examined about embarrassing entries in Patrick Sullivan's field notebooks, which referred

to Nipper Roe as pestering his father for initiation and that Patrick Dodson's inclusion was an afterthought. These suggestions were denied, but they were potentially undermining of their credibility as witnesses.

There was also the fact that there had been no ceremonies at Kunin since 1994. Patrick Dodson tried to explain this gap as being the result of various factors, including the theft of the sacred objects, the disappearance in Derby of the senior Yawuru lawman, who had put them through the law, and the continuing encroachment of the Leregon houses. But it was not clear whether there were any suitable Yawuru candidates for initiation being considered after 1994. The regional picture of the continuation of initiation ceremonies seemed to be much stronger.

Cross-examination by representatives of the State of Western Australia was predictably based on inconsistencies in both the governmental and anthropological archives. The State had engaged Erich Kolig to excavate the anthropological archive and, as we will see below, he was a defender of the 'horde' and was quite impressed with Hosokawa's work. Thus, the cross-examination of the Aboriginal witnesses tended to seek out a clan level of traditional ownership, explore the nature of Djukan identity and confirm the movement of sacred objects from Thangoo pastoral lease to Kunin.

Sullivan's evidence

Sullivan explained that the first part of his expert report stated the nature and extent of the various Rubibi claims in plain English and the second part was a very detailed review of the anthropological archive. The aim of his review was to demonstrate that, because of the various inconsistencies, weaknesses and contradictions, and the lack of consensus, none of it could be relied upon.[7] Not having access to the report, I am unable to give an independent assessment of it and my account of Sullivan's contribution to the case will inevitably be biased towards his court performance.[8]

The ideal of the choreographed performance of the barrister leading his expert witness—absent in *Mabo*—also failed to eventuate in *Rubibi*. Bell referred to

7 Sullivan's comments on the draft chapter, December 2005.

8 I received word via a KLC lawyer that the claimants had refused my request for access to the non-restricted parts of Sullivan's report. This seemed to have had a domino effect, as the WA Crown Solicitor's Office refused me access to the non-restricted parts of Kolig's written report for no other reason than I had been refused Sullivan's report. The KLC did not give me any reasons for their refusal. Consequently, the factual basis of this case study is incomplete. Ultimately, I decided to proceed, judging that there was sufficient detail—in the transcript (including extensive cross-examination of Sullivan and Kolig), the judge's reasons for decision, the interviews with Sullivan and Kolig, their written reflections on the case and their responses to my draft chapters—to enable me to complete the case study.

Sullivan's report as 'rather complicated' (T. 814) and so justified leading evidence from Sullivan to summarise the main points. Some of Sullivan's responses were unhelpfully taciturn—quite the opposite of Beckett's expansiveness—and sometimes gave the impression of lack of coordination between expert and counsel. In my interview with Sullivan in 2005, he confirmed that there had been a basic misunderstanding: Sullivan thought that he would have another opportunity to expand on his answers. Bell bluntly corrected him during a break: 'If you have got something to say, say it now.'[9]

Tensions between barrister and expert had been simmering. Sullivan thought that Bell, who had no prior experience with Aboriginal people, did not appreciate the KLC's achievement in convincing the Djugan and Goolarabooloo groups to give up their separate legal representation in favour of the KLC, and did not appreciate the continuing significance of the Rubibi coalition for the whole Aboriginal community of Broome. More fundamentally, Sullivan found himself defending the complexities of the on-the-ground situation against the simplifying tendencies of the whole process, which seemed to be imposing the false uniformity of a Yawuru linguistic–tribal grouping. This tendency would marginalise the members of the Goolarabooloo group, who were fundamental to the Rubibi coalition and the ceremonial life of the region.

Sullivan also felt other conflicting pressures that made it difficult to choose the most effective register for his oral evidence. He explained:

> Firstly, I wanted to talk to the judge in the most comprehensible manner possible, non-academic, and was not sure how to do this. Secondly, and much more difficult, I simply could not switch to academic mode to describe the people I'd known so well who were sitting behind me. It seemed to me a gross insult and a breach of our relationship to represent them thus while in their presence, though I did this in my report.[10]

As anticipated in Sullivan's 1998 paper, his general approach to traditional land tenure was as follows.

- A relatively large area of land (defined at T. 830–1) is held in common by the Rubibi community, who have a shared history, language, kinship system and understanding of the natural world (T. 834). Membership of this group depends on descent from the previous generation of Yawuru. Traditional authority within this group is a question of a person's claims to be Yawuru through descent and *rai* affiliation, then knowledge of the country, its traditional ceremonies and songs, and whether there is a high degree of community consensus about the person's status (T. 847–8).

9 Transcript of interview with Patrick Sullivan, August 2005, p. 26.

10 Sullivan's comments on draft chapter, December 2005.

- Subgroups within the Rubibi community have particular interests in smaller local areas. The subgroups might be defined by a variety of criteria, sometimes overlapping, but rarely is there an exclusive identification with one small area (T. 831, 838). The two principal kinds of affiliation to specific places within the Yawuru country are via descent or *rai* (T. 850). Other criteria for the formation of subgroups include different dialects of Yawuru (for example, Djukan), attachment to named locales (for example, Leregon, Yardugarra, Walman), association with the practice and custodianship of different ritual complexes (for example, the Goolarabooloo with its 'northern' ritual as opposed to the rituals associated with Kunin) (T. 836–42, 851–3).
- This situation is substantially in accordance with the pre-colonial past in which there were no exclusive, small horde territories (T. 848) but flexible land tenure patterns that are seen in other arid regions of Australia (T. 831, 837).
- The existence of traditional Rubibi community authority structures, the continuation of ceremony and the seriousness with which the current senior lawmen take their traditional obligations demonstrate 'in the face of considerable adversity Yawuru culture being alive and well, vigorous and vibrant and in good hands' (T. 869, 874–5).

In relation to Kunin, his evidence could be summarised as follows.

- Dreaming stories can specify the kinds of landscapes or vegetation that link those stories to particular places for the performance of related ceremonies. The physical features of Kunin and the stories from ceremonies performed at Kunin are so linked and the details were given in a restricted session of the hearing (T. 826, 916).[11]
- The earliest anthropological records (the fieldnotes of Daisy Bates made in either 1902 or 1907) link Kunin with the seclusion of initiates, using an Aboriginal term that was also reported by Worms and is still in contemporary use (T. 828, 912).
- Given the centrality of ritual to traditional Aboriginal life, it is reasonable to infer a continuity of ritual at Kunin since the assertion of European sovereignty in 1829 (T. 829).
- The ceremonies performed at Kunin are of significance to the wider Yawuru group—even if most do not participate—because the ceremonies are part of their cultural inheritance (T. 843–4), and they are the key to the traditional authority structure among the Yawuru (T. 866), 'the backbone of authority' (T. 946).

11 Kolig later claimed that evidence of such specific links was never presented (Kolig 2003:216–17). Sullivan rejected this in my interview with him in 2005.

- Kunin is central to the continuation of the Yawuru as a separate identity because it is the only site where Yawuru secret ceremonies are carried out, especially the 'second stage'.
- The claimants asserting to be the senior Yawuru lawmen for Kunin are in fact the senior lawmen and their assumption of that role was made in an orderly fashion in accordance with tradition (T. 867–8).

As with the cross-examination of the claimants by the barrister representing the WA Government, Ms Webb's cross-examination of Sullivan appears to have been inspired by Erich Kolig's report. Her line of questioning pursued the following arguments.

- Sullivan's focus on the contemporary Yawuru situation resulted in a highly flexible and negotiable membership of the Yawuru community that de-emphasised primary attachments to particular places within Yawuru country.
- These primary attachments are consistent with a clan model of traditional ownership described by the early ethnographers.
- Sullivan is too dismissive of them for supposed internal inconsistencies, especially Worms.
- The Broome region is not really arid; therefore, the argument for the ecological necessity of flexible land tenure arrangements is not sustainable (T. 896–7).

In pursuit of these conclusions, Ms Webb made much of apparent inconsistencies in Sullivan's fieldnotes. Some entries indicated that several families apparently rejected the idea of holding Yawuru land in common and instead suggested that it was subdivided into land held by different families, described in his notes as 'primary attachment' (T. 888–9, 892). In a similar way, extracts from Sullivan's fieldnotes reporting a preference for 'following the father' were raised (T. 893). Sullivan tended to parry the implications of these questions by characterising the notes as the incomplete evidence of an early phase of his research. But they do raise questions that will need to be considered at the conclusion of this chapter about how Sullivan conceived of his task. Did he see it as constructing a model from all the divergent, inconsistent positions that would express a general proposition that encompassed the divergent views, but was not reducible to them? If so, did this not risk proposing a model that included everyone, but that few strongly supported? Sullivan later commented that he was acutely aware of these issues, and had discussed with the KLC's in-house lawyer the prospects of using the differences of opinion as evidence of an underlying system.[12]

Inevitably, Sullivan was confronted with his note of a conversation with The Man Who Disappeared in which the revered leader seemed to have been quite

12 Sullivan's comments on draft chapter, December 2005.

dismissive of the last two recruits to 'second-stage' initiation (Nipper Roe and Patrick Dodson). Acutely embarrassed, Sullivan stated the obvious, averting to the pressure towards a new level of juridification of fieldwork practice in the native title era: 'I've not written it with the intention that it should do anything other than inform me of that. So certainly if I had felt that it was going to receive this level of scrutiny these words [would] never have appeared' (T. 904).

Sullivan also had to respond to similarly awkward passages from his fieldnotes of private conversations with a senior claimant, in which the claimant contemplates the end of Yawuru culture if The Man Who Disappeared was no longer around, and canvassed the possibility of some ceremony continuing because of its similarity to Karadjeri ceremony (T. 905–6).

It might have been the discomfort of cross-examination that focused Sullivan's mind, because, for whatever reason, his re-examination provided an opportunity for him to give some of his most coherent evidence and to make a concession that would, in my view, prove critical to the claim. He explained the precise aspects of the continuity he was asserting:

> DR SULLIVAN: It's received knowledge and knowing themselves to be members of a language community, whether or not each one has competence in that language, they're members of that language of that language community…More fundamentally, the knowledge of a shared law in the sense of shared ritual, ritual specific to that group there, their origins in the Bugarrigarra and their own rituals on their own land. The operation of the kinship system that they believe to be—may be shared with other groups but they believe it to be a particular defining characteristic of themselves. Other beliefs such as *rai* belief, practice of using the land in a way that they feel is appropriate for Yawuru people, including talking to the spirits of the land when they go into an area, and dealing with the natural species of the area in the appropriate way, the way that's appropriate for Yawuru people. All of these things.
>
> MR BELL: All of these things. The conduct of ceremony in lawgrounds?
>
> DR SULLIVAN: That's what I intended to say when I said the ownership of—I think I said fundamentally, the ownership of Yawuru ritual and carrying out of Yawuru ritual, yes. (T. 946)

He also explained his own testing of the clan estate hypothesis and the reasons he rejected it as an inadequate explanation of the contemporary scene. Critically, he conceded the possibility of a historical transformation from a clan estate of the past to the ambilineal descent community of the present (T. 944).

This concession should not have been difficult to make since the process of transformation from patrilineal to cognatic reckoning of group membership had been posited in many parts of settled Australia (see Sutton 1998:45–53).

Erich Kolig

Kolig completed his doctorate at Vienna University and was researching an Islamic topic in Afghanistan when an opportunity arose to do fieldwork at Fitzroy Crossing in the eastern Kimberley in 1970. Helmut Petri had given occasional lectures at Vienna University and kindled Kolig's interest in Aboriginal Australia. Kolig's Kimberley research, consolidated in his book *The Silent Revolution: The Effects of Modernisation on Australian Aboriginal Religion* (1981), can easily be seen as a continuation of Petri's interest in the dynamics of the religion of Western Desert peoples moving out of the desert and re-establishing themselves in the former country of other tribes on the fringe of the desert. In Petri's case, the movement was north-west to Anna Plains Station and La Grange, and in Kolig's case, the movement was north to the Fitzroy River Valley.

The Silent Revolution is an ambitious and original work of historical anthropology. It sat provocatively alongside his contemporaries' ethnographies, which were dominated by synchronic generalising. It was ambitious in its attempt to imagine a transition from pre-contact to contemporary Aboriginal consciousness. It was also original in that it applied to the Aboriginal people of Fitzroy Crossing, less than a generation removed from their hunter-gatherer life in the desert, Weberian and Durkheimian themes of modernity, especially the fragmentation of consciousness accompanying the division of social spheres into work, leisure and religion—a sort of microwave modernisation of the Western Desert diaspora. The 'silent revolution' refers to his argument that, although Aboriginal ritual life around Fitzroy Crossing seemed to be effervescing with cultic imports, its significance was fundamentally changing. The original total world view supported by broad consensus, strict enforcement, a strict hierarchy of knowledge and ritual austerity was becoming more a vehicle for ethnic awareness associated with more liberal attitudes to enforcement, a flatter ritual hierarchy and eutrapelia in ritual performance.

Kolig's account of the dynamics of religious change is much more comprehensive than anything achieved by Petri. There are, however, still some difficulties in his exposition. His key descriptive concept, 'consciousness', is left at a high level of generality. This means that the mechanisms through which changes in material circumstances and practices transform 'consciousness' remain impressionistic, rather than systematically analysed. Moreover, the broad scope of the historical

narrative means that there is little detailed marshalling of the evidence for his conclusions. Some of these conclusions are relevant to the native title claim. They include the following.

- Pan-Aboriginality in traditional law is a new development (Kolig 1981:11).
- Clan identities were stronger in the past (1981:30) and there was a more straightforward inheritance of patriclan lodge sacra in the past (p. 35).
- There is a generalised trend among Aboriginal people towards rethinking traditional cosmology along the lines of Western thought (1981:38).
- With the move out of the desert, there has been a general decline in the need for topographical authentication of mythological incidents (1981:46).

Most of these propositions seem plausible, but, because of Kolig's writing strategy, it is simply impossible to see how they arise out of his data. His older informants could have helped him reconstruct their life in the desert, but we simply do not know.

His assumptions about a simpler past compared with the complex, degenerate present continued in his subsequent book, *The Noonkanbah Story* (1987). He acknowledged that all accounts of pre-contact traditional land tenure are to some extent speculative. This does not, however, cause him to hesitate and methodically justify his acceptance of the prior ubiquity of the patrilineal clan and his interpretation that vague clan boundaries are evidence of severe disruption (1987:84–5). To be fair, Kolig's level of disclosure of his methodology is not unusual for anthropology and he has continued to wrestle with issues of changing ritual practices and world views/consciousness that were first raised in *The Silent Revolution*.[13]

His published oeuvre and the few available biographical details allow us to construct his approximate positioning within the field of anthropology. Following his postdoctoral research based on Fitzroy Crossing (1969–72), he worked for a few years as the Regional Anthropologist for the WA Aboriginal Affairs Planning Authority. Then in the early 1980s he secured the position of senior lecturer in the Department of Anthropology at the University of Otago in New Zealand—a position he still holds. He has maintained his links with German and Austrian anthropology through several publications in German (see, for example, Kolig 1973–74a, 1979b), publishing in the journal *Anthropos*, and through visiting professorships at Vienna University. He is a major contributor to the regional specialisation of Aboriginal Australia and the subregion of the Kimberley in edited collections of papers and leading journals. There is some evidence that

13 See Kolig (1972, 1973–74a, 1973-74b, 1977, 1978, 1979a, 1979b, 1980, 1989, 1995a, 1995b, 1996, 2003). Most recently, he has made a contribution to the expanding literature on the historical anthropology of the Pacific (Kolig and Mueckler 2002).

he feels a little marginalised within the regional specialisation and does not receive sufficient acknowledgment for his early contribution to historicising Australianist anthropology. He complained, with some justification, that the papers on the change of traditional ownership in the Peterson and Langton collection *Aborigines, Land and Land Rights* completely overlooked his previous work on the topic (1987:155, endnote 7). In summary, apart from the brief interlude of full-time applied work with the Planning Authority, he has pursued an academic career based on research and academic publications.

His involvement in the high-profile political confrontation of the Noonkanbah affair convinced Kolig of the need for strict independence and detachment in applied anthropology (1987:10).[14] He expressed this sentiment much more forcefully in his response to Marcia Langton's suggestion in 1981 that anthropology must now work at Aboriginal direction and for Aboriginal interests: 'I think it is time that Anthropology makes it clear to everybody that as a discipline of some intellectual integrity and ambition, it intends to be nobody's whore' (Kolig 1982:27).[15]

Kolig's evidence

Kolig was quite clear about the limits of his research for his expert report. It was a desktop literature review and critique of Sullivan's report. He deferred to Sullivan's account of the contemporary Rubibi community (T. 958), but he was not a complete neophyte regarding Broome. When interviewed, he said that, because of his extensive contact with the Aboriginal people of the Kimberley, he knew the Aboriginal people involved in the claim and the general background of local Aboriginal politics ('the political constellation').[16] He concentrated on establishing 'the historical presence of group identities and to trace ancestral continuities' (T. 957), and he claimed to be doing this in an objective and detached way that would not take oral history at face value and would assume the likelihood of historical change (T. 958). Elsewhere in his evidence, he expanded on the ideal of objectivity, but in a way that risked appearing disingenuous or naive about drawing conclusions from a very uneven anthropological archive:

> MR BELL: You've expressed rather firm views about the presence of the Djugan—
>
> DR KOLIG: Again, I would want to correct you there…I have not expressed views, personal views—I've simply recorded what I've found in the literature. (T. 1011)

14 Compare this with his views on other issues—for example, Christian Missions, grog, and land rights—in Kolig (1973a, 1973b, 1974, 1988).

15 For Langton's original comments, see her article in *Identity* (Langton 1981).

16 Transcript of interview with Erich Kolig, 14 September 2005, p. 5.

He concluded from his literature review that, although the evidence is slight, it is likely that the Djukan 'tribe' was in the past a separate group and not simply a subgroup of the Yawuru. The evidence included the fact that the Djukan have long been mentioned as a separate group in the early ethnographic accounts of Bischofs, Bates, Elkin, Radcliffe-Brown and Petri. Bischofs' listing of 'Karnen' (= Kunin) as the 'bor' of the speakers of 'Tjogon' (= Djukan) is particularly significant because 'bor' is a clan estate. A Djukan identity persists into the present according to the more recent researchers: Dalton, Hosokawa and Glowczewski. Moreover, he argued, several of the earlier researchers and, later, Dalton speak in a general way of cultural differences between Djukan and Yawuru (T. 959–60).

Kolig thought that the early ethnographers should be taken as correct in asserting the patrilineal clan as a landowning entity. He explained:

> DR KOLIG: [T]he presence of clans or clan structure in this area has been quite unambiguously recorded in the older literature. That it has been recorded and maintained by fieldworkers who are widely respected in the anthropological profession and that in the meantime, as far as this area is concerned, nothing has been said, nothing has been produced bar Dr Sullivan's report and a paper of his map [sic] would soundly disprove the findings of Elkin which in turn are based on the findings by Radcliffe-Brown. Radcliffe-Brown is widely criticised in anthropology as having got it wrong. I would disagree. I think basically his contention, based on fieldwork, based on the help by Daisy Bates, for instance and also by Elkin, his findings are of a clan structure, are sound, correct. What had to be done in later years was to make some corrections, some fine touches, some elaborations, but basically and I repeat, for this area here, there's no doubt in my mind that, especially Elkin in the way he portrayed the situation here, was absolutely correct. (T. 961–2)

Kolig then argued as follows.

- Primary rights to the clan territory, including the right to exclude others, belonged to the clan. Secondary rights may derive from matrilineal linkage, spirit origin on the clan estate, and rights in a Dreaming track that passes through the clan estate. Clans were embedded in a large network of relations that are not identical to tribal awareness (T. 964).
- Worms' overlapping identification of the claim area with the Leregon and Walman sibs (= clans) is not a reflection of unreliable fieldwork, but of the 'highly disturbed' state of the society (T. 960).
- The adoption of land tenure models from arid regions, especially Berndt on the Western Desert, is questionable because the coast is not arid in the same way as the desert, and despite Berndt's scepticism about the concept of tribe in the Western Desert, he still believed the clan structure to be the core of land attachment (T. 962–3).

- Sullivan's proof of cultural continuity, by reference to essential features of a culture, is problematic because it is never possible to describe the totality of a culture, and what is considered to be essential by the people themselves might change over time and, thus, there is an arbitrariness about essential features (T. 956–7).
- Because of inadequate records there is no conclusive evidence in the genealogies of descent of any kind, only 'hearsay family tradition' (T. 969).

When I interviewed him in 2005, Kolig was even more direct in his assessment of Sullivan's report: he thought it was a poor piece of advocacy anthropology.

Kolig also introduced the idea that there was an anthropological consensus about what would be 'reasonable change', implying that a move away from group membership according to patrilineal descent would be a move beyond reasonable change (T. 970). Paradoxically, this judgment seemed to assume that there were, in fact, some essential features of traditional society.

The possibility that Kolig's idea of 'reasonable change' incorporated an 'essential features' approach was confirmed the next day after the judge had pressed Kolig to think overnight about what he considered to be the traditional criteria for membership of the Yawuru:

> DR KOLIG: I think there are two criteria that were relevant here. The first is membership of a clan by descent, through patri-filiation, and the second criterion is that this clan is recognised as part of the speech community of Yawuru, speech or language being used here in a wider sense referring also to culture. Traditionally Aborigines would have regarded language as a vital part of their culture. (T. 978)

Kolig thought that, with the loss of language, a vital building block of culture would be missing and that the language connection to the Dreamtime would be broken. He imagined that, with few Yawuru speakers, the traditional culture would become an elite culture in which only a few could participate (T. 1033).

Kolig made several other points on the subject of change.

- The current degree of sharing of ritual between the different tribal groups involved in Kunin ceremonies, which includes implanting and incorporating religious patterns from a neighbouring group into another group (presumably Karadjeri into Yawuru), is of recent origin (T. 988–9, 1031).
- Not conducting initiation ceremonies more frequently than every 10 years could be a breach of traditional law (T. 1033–4).
- The permanent absence of sacred objects from a law ground would make it doubtful whether it continued to be law ground (T. 1035).

It is difficult to say how critical the cross-examination of Kolig was to the applicants' case. It was evident that the judge was becoming a little exasperated with Kolig's apparent reluctance to give straightforward answers to the key questions of the case, such as how he, as an anthropologist, would resolve the continuity–change dilemma. On the other hand, if the judge accepted Kolig's standard of traditional continuity, the claim would be defeated. No doubt, in an attempt to make him seem unreasonable, Kolig was systematically led by the claimants' barrister through the claimants' evidence and forced to agree that many aspects of their evidence showed continuities with ancient traditions—for example, belief in the Bugarrigarra, the use of ceremonial grounds, kinship, sequential initiation processes, restricted sacred knowledge, sexual division of labour in ceremonies, sharing of law with neighbouring groups and the consequences of disclosure of secret sacred information (T. 980–91). In response, Kolig asserted, on behalf of anthropology, a higher standard of evidence:

> MR BELL: But these individuals, nearly 20 in number, men and women, have told you about their life, about their customs and ceremonies as they observe them, so that evidence is evidence of what they do.
>
> DR KOLIG: It is not evidence from an anthropological point of view; you have to see these things in operation; you do not rely—and this is no disrespect to the people who have made these statements—you cannot rely on what people say, you have to see that in operation, and the reason is not because there's a profound distrust that anthropologists have for what people say, but the reason is the fact that there's often a discrepancy between what people say they do and what is actually being done. (T. 992)

The paradox of this stance is that the extremely limited observation of systems in practice was exactly the fieldwork situation of Radcliffe-Brown and Elkin, on whom Kolig relied in support of his reconstruction of pre-colonial local organisation. Kolig's answer might well have been a turning point for the judge, who felt obliged to point out what could count as evidence in the court hearing:

> HIS HONOUR: Your qualification is understandable but because the Court can't go out and live in the community, and maybe it should, but it's not the way it operates at the moment, the only way these matters can be established is through evidence of the kind that has been called. (T. 992)

Kolig's similarly high standard of proof of traditional continuity of ceremony was also revealed:

> MR BELL: And where you find it among communities, observing that structure in a particular place by reference to particular tracts of land you have community title in that land by those groups, do you not?
>
> DR KOLIG: If you do not take regard to content; if you just refer to structure.
>
> MR BELL: What is an item of content in your view, separate from the structure?
>
> DR KOLIG: For instance the ceremonies that are being conducted on that law ground; the particular myths that are being cultivated… The particular details of kinship and marriage obligations; the stories associated, particular stories associated with particular sites; the contents of rituals performed; the designs being used in ritual procedures. (T. 996)

One of the most interesting episodes in Kolig's cross-examination was how an academic argument within anthropological discourse about traditional land tenure became the subject of direct cross-examination. One of the ways for the claimants to undermine Kolig's claim of objectivity was to demonstrate that he had taken an extreme position within the academic field of anthropology. The only way to do this effectively, given Kolig's academic seniority over Sullivan, was through Kolig's own concessions in cross-examination. Thus, we had the unusual spectacle of Kolig being confronted with the details of the subsequent anthropological critique of the position taken by Radcliffe-Brown and Elkin, including Hiatt's direct assault (Hiatt 1966) and the relevant passages from Piddington's work on the Karadjeri, which I have quoted in the previous chapter:[17]

> DR KOLIG: I'm aware of that, and with respect it doesn't mean anything. In fact, this very passage [Piddington's suggestion that the Karadjeri never possessed a rigid clan associated with their local groups] was rebutted by Elkin by saying that this is a post-contact alteration, or innovation.
>
> MR BELL: I see. So the passage is the subject of anthropological dispute?
>
> DR KOLIG: Not really.
>
> MR BELL: We have Piddington on one side and Elkin on the other, with you? You are the disputants?

17 The material for this part of the cross-examination had, of course, been supplied by Sullivan.

> DR KOLIG: No-one has followed that dispute to my knowledge. (T. 1004–5)[18]

Later, in response to the suggestion that Elkin's account of land tenure in the Broome region might have been compromised by lack of time:

> DR KOLIG: Some people are able to produce sterling work within a short period of time; others can spend a lifetime and produce nothing.
>
> MR BELL: But you'd have to admit that to try to describe the richness and intensity of cultural life of an Aboriginal group in 15 days is an extremely difficult task?
>
> DR KOLIG: It is. Some people are qualified to do that task in a reasonably short time. (T. 1010–11)

The judge

To attempt to position Justice Merkel within the juridical field and the broader social field is to immediately step outside the formal discourse of the hearing and take up a stance that might be seen as contemptuous if repeated in the formal hearing. But to raise Merkel's impeccable liberal credentials is not necessarily to suggest reprehensible bias, because actual motivations still remain relatively impenetrable. These credentials are part of the wider background that judges inevitably bring to the task of resolving the various indeterminacies in native title doctrine in particular cases.

Merkel was appointed to the Federal Court in 1996 from the Melbourne Bar, where he had been a Queen's Counsel for some years. At the beginning of his career, he had worked as a lawyer for the Victorian Aboriginal Legal Service and in 1986 had helped to establish the Koori Heritage Trust. He was one of several prominent barristers, including his friend Ron Castan, senior counsel in the *Mabo* case, who had become involved in both the Council for Civil Liberties

18 Note: his answers in this passage are confusing because he was well aware of the debate and had written about it in 1973:

> The problem of traditional local organisation, which linked to aspects of land tenure, was initiated into Anthropology by Radcliffe-Brown and his concept of the 'horde' (Radcliffe-Brown 1913). The 'horde' remains a Danaidean gift to the present day. As the literature accumulates on this topic, the scholarly opinions sulkily diverge (For a brief abridge [sic] of the 'horde'-conflict vide: L. R. Haitt 1962; W. E. H. Stanner 1965; L. R. Hiatt 1966.).
>
> Other anthropological contributions aimed at the elucidation of land-tenure itself and actual landholding groups. They seem to make the point that profound variations existed in Aboriginal Australia, provided all of the scholars, or most of them, are right in their assumptions. While some anthropologists still hold to the conventional notion of 'tribes' in Aboriginal Australia, others speak of much smaller landholding units and less clearly defined 'territorial' organisation. (See, for instance, R. M. Berndt 1959). (Kolig 1973a:63)

and Aboriginal legal rights. His continuing association with the Koori Heritage Trust led the Victorian Government to challenge his inclusion in the Full Bench of the Federal Court assembled to hear the appeal from Justice Olney's original decision in the *Yorta Yorta* claim. He stood aside and was replaced with another judge for that appeal. It was perhaps sensitivity to these issues that prompted his statement at the beginning of the hearing of *Rubibi*:

> HIS HONOUR: Just before we call the first witness, there is one matter I overlooked mentioning first thing this morning. I notice that Mr Dodson is now an applicant and also a person who is giving evidence. I had met Mr Dodson over the years on one or two occasions at one or two functions at which he spoke, and therefore I have some passing acquaintance with him from the past. (T. 47)

No application was made for the judge to disqualify himself and, unlike the Victorian case, here it is difficult to see how it could have succeeded.

The *Rubibi* hearing was Justice Merkel's first native title case at the trial level, although he had been a member of the Full Court that heard the appeal from Justice Olney's decision in the *Croker Island* case. His relative inexperience might explain the many interventions he made during the hearing, or they could simply reflect a judge approaching his task in an efficient manner by trying to clarify issues at the time they arise. As in the *Mabo* case study, these interventions are revealing in a way that the tight formality of judgment writing never is.

Judicial interventions

Some of the interventions were simply questions of clarification, with Sullivan taking on a role that would be performed by the anthropologist assisting the judge in NT land rights hearings. Thus, the judge wanted to know how 'clan' was defined (T. 884), why it was that *rai* attachment to land cut across descent attachment (T. 936), and, more generally, the nature of the part–whole relationship between Kunin and the whole corpus of Yawuru sacra and country (T. 833–4). More interesting, though, is the judge's paradoxical concern about legal concepts contaminating anthropological evidence:

> HIS HONOUR: Dr Sullivan, I must say you've lost me on your answer… the problem may have stemmed from the question, because the question related to who was holding this land, and what's crept into a lot of the discussion is European concepts of land-holding and ownership which may have nothing to do with what we're talking about in this case. (T. 832)

He was also concerned that Sullivan was being too traditionalist in his identification of subgroup affiliation to place and not considering groups that were constituted by their co-residence on pastoral stations, such as 'the Thangoo mob' (T. 837).

In a similar vein, the judge seemed worried about the claim of traditional continuity of the broad Yawuru community as opposed to the possibility of a transformation from more strictly defined clans (T. 849). He seemed relieved when Sullivan made concessions about the inevitable evolution of tradition (T. 850).

One consistent feature of the judge's questioning of Kolig was his attempt to find common ground between Kolig and Sullivan. A hot-tubbing session for the two anthropologists did take place, as required by the Federal Court guidelines for expert witnesses.[19] It was brief, with both experts agreeing to disagree. The judge, on the other hand, took on a kind of shuttle diplomacy between the two experts. Having the previous day received some evasive answers from Kolig on the question of discontinuity versus evolutionary cultural change, the judge pressed him again, this time using the example of Nipper Roe, who under a strict patrilineal clan model could not have primary traditional rights to Yawuru country, but who could have such rights in a descent system modified because of the increasing number of non-Aboriginal fathers:

> DR KOLIG: The focus would have shifted away from purely patrilineal descent as conferring primary rights to ambilineal descent and possibly other mechanisms. But if we consider that primary rights, landholding rights, were probably not simply bound to descent, but depended also on the assumption of religious responsibilities, taking care of clan land, not just for the benefit of the clan, but for the benefit of related clans, surrounding clans, then possibly the perception of the unit that meets those responsibilities may have shifted away from the focus on patrilineality, first to matrilineality or ambi-lineality and possibly in further consequence to other units who could meet that responsibility, and by virtue of meeting that responsibility of caring for the land, to assume actually under traditional Aboriginal rules, title to that land. (T. 1025)

19 'Hot-tubbing' is the nickname, widely used in legal circles, for the meeting of all experts to attempt agreement on the issues in the case. For an account of another hot-tubbing experience in a native title claim, see Brunton and Sackett's 'Anthropologists in the hot tub' (2003). For the legal framework of the hot-tubbing, see Federal Court Rules, Order 34A (Evidence of Expert Witnesses) and Federal Court Practice Note CM7 Expert Witnesses in Proceedings in the Federal Court of Australia.

Then:

> HIS HONOUR: The difficult task one has sitting as a Judge in a native title case is to ascertain what is an evolving of a tradition and what is a new tradition. Your definition this morning in respect of traditional society and the resistance you had to answering some of Mr Bell's questions seemed to raise that issue very starkly. I'm trying to understand how the court can draw the line between what you yourself said is a cultural response to changing needs in a society which is an evolving tradition as I understand it. Is that correct?
>
> DR KOLIG: Yes.
>
> HIS HONOUR: And maybe starting something totally new, which is not an evolving tradition, but if you want, some new social or cultural practice which isn't based in tradition.
>
> DR KOLIG: Possibly for opportunistic motivations. (T. 1026)

Subsequently, referring to the difficulty of reconciling Kolig's critique of Sullivan's 'essential elements' approach with Kolig's 'isolable traits' approach to continuity, the judge challenged Kolig by saying:

> HIS HONOUR: I suppose what I'm really putting to you is—this may be a very difficult question to answer, but given your acceptance of cultural change as part of a continuing tradition and you say, I think, at page 78 that
>
> *no one cultural feature is apt to establish cultural continuity. It's the sum total of isolable traits.*
>
> That's like a weighing process, an evaluation process. I'm not sure in what precise way that differs from what Dr Sullivan was putting. He seemed to be saying there's a whole lot of factors that you put into the balance and you have to measure them and evaluate them and look at it in terms of the tradition and the evidence in the particular case, but no one factor can be determinative and he had a very—I raised with him his very broad criterion. I raised with you your very narrow criterion. It seems to me once you introduce cultural change into the model, you both may not differ at all in any significant respect. I'm trying to understand what is the difference between you and Dr Sullivan on that point.
>
> DR KOLIG: Only to the extent that Dr Sullivan rationalises the existence of—or the basis of this view without reference to the past and presents the picture as one—or the situation as one that has always existed like that, that there wasn't an evolution, that there was no change. (T. 1027)

It seems to me that this answer provided the judge with the means of reconciling the two experts. In effect, Kolig was saying that Sullivan had got the pre-contact land-tenure system wrong and had overemphasised continuity. Taking this view of Kolig's evidence would allow the judge to formulate the common ground by allowing Kolig to be right about the pre-contact situation, Sullivan to be right about the contemporary situation, and to link the two by legally permissible historical transformation that would accept some of Kolig's critique of Sullivan and settle on Sullivan's fallback position—that is, the transformation from a strictly patrilineal to an ambilineal system.

The judgment

Justice Merkel delivered his judgment in Broome on 29 May 2001. It commenced and ended in a slightly unusual way by addressing a wider audience than the parties. He introduced his reasons by quoting previous judicial acknowledgment of the strong spiritual attachment of Aboriginal people to their homeland (adopting Stanner's formulation in his Boyer Lectures) and concluded with a plea for greater understanding between Aboriginal and non-Aboriginal people in Australia (paras 1, 198). Between these bookends of liberal sentiment is a concise judgment, of which only 117 paragraphs cover the entirety of all disputed factual issues. This perhaps indicates that the overriding judicial task is one of simplifying and condensing.

Our chief interest is how he presented and resolved the differences of anthropological opinion. The first dispute deals with the difference of interpretation about the use of Kunin as a ceremonial ground prior to the sacred objects from Thangoo being moved there in 1947. After reviewing the documentary evidence, Justice Merkel comes to the conclusion that, by itself, it is not decisive:

> [52] While there is some substance in Dr Kolig's criticisms of the conclusions drawn by Dr Sullivan, ultimately the material must be weighed in the context of the totality of the historical and ethnographic records, as well as the oral history provided by the local community.

But he also briefly turns his mind to what weight should be given to the meagre archival evidence in the circumstances:

> I would add that because of the highly secret nature of the second stage ceremony, during which important and esoteric aspects of traditional law are revealed, it is not surprising that little appears to have been written or disclosed about its occurrence at Kunin. (Para. 60)

He then moves to oral history evidence and legal pronouncements, including his own in the *Croker Island* case, encouraging judges to give due weight to oral history in native title cases. He was able to draw on the recent leading Canadian case, *Delgamuukw*, which turned on this very point. He reviews the evidence of the childhood memories of the current claimants and what had been told to them by now deceased ancestors and the early agreement, dating from the 1960s, about establishing Kunin reserve for ceremonial purposes. He felt able to conclude, on the balance of probabilities, that in the 1890s Kunin had been used as a law ground (paras 76–8). What we see here is not just the authoritative finality of legal proceedings, but an implicit assertion of the superior synthesising capability of judicial methods.

The issue of whether the gap in the performance of ceremony at Kunin was a fatal break in traditional connection was dealt with by reference to long passages of Patrick Dodson's evidence. In what could perhaps be the signature quotation of Merkel's judgment, he simply states, 'Mr Dodson's evidence was not seriously challenged and I accept it' (para. 93).

The claim of the Goolarabooloo group to be part of the Yawuru community was fairly summarily dismissed by Merkel (para. 100). During the hearing, there had been a change of terminology used by the claimants' lawyers from 'Rubibi community' to 'Yawuru community'. This change is emblematic of Sullivan's difficulties with the claimants' lawyers. He felt that they had unnecessarily abandoned the Goolarabooloo and endangered the future of the Rubibi coalition. The lawyers and the judge were partly responding to the way in which the evidence unfolded, especially the prominence given to descent and *rai* as the critical criteria for belonging to the Yawuru community. The exclusion of the Goolarabooloo group highlights, in a dramatic way, the disjuncture between social reality and the judicially endorsed models. Paddy Roe's inclusion in the Rubibi coalition reflected his knowledge of Yawuru country and ceremony and his fighting to preserve Kunin reserve. Legal models, however, require consistency at the level of the principle of inclusion and apparently cannot abide historical anomaly, no matter how compelling. It was Sullivan's attempt to include Paddy Roe's group that skewed his model towards a greater emphasis on knowledge of ceremony and the consensus of elders as a criterion for inclusion in the Yawuru community.[20] In the give and take of the judge's mediation between Kolig and

20 In response to this paragraph in a draft of this chapter, Sullivan commented: 'There is much more to it than this. Paddy's involvement in Kunin is very important, but was historical. Of more importance is current Goolarabooloo knowledge of the land, associated ceremony (though of an alternate tradition) and continuing active nurturance of significant parts of the land under claim. They have all the classic attributes of a traditional owner group except use of the Yawuru language. This is why I continue to challenge the ethnic model of native title' (Sullivan's comments on the draft chapter, December 2005).

Sullivan, the exclusion of the Goolarabooloo was also something about which the judge could agree with Kolig (see T. 961) and something he could 'take' from Sullivan, because of the sheer lack of Aboriginal evidence.[21]

As formulated by Justice Merkel, the most important dispute between Kolig and Sullivan was whether the current Yawuru community, as defined by Sullivan, was sufficiently continuous with the 1829 community, or whether, as Kolig asserted, in moving away from strict adherence to the patrilineal clan having primary rights to land, they had lost something essential. Justice Merkel's mediating style of engagement with the anthropologists in the witness box came to the fore here:

> [136] Ultimately, the substantive dispute between the two anthropologists was less than it might appear to be. Both accepted that it is not possible to have a definition of a traditional community that is frozen in time. Rather, they agreed that the definition must recognise the process by which a community's traditional laws and customs evolve, respond and adapt to change. That approach finds substantial support in the cases.

There follows the reassertion of legal doctrine and the final acceptance of the judge's responsibility to resolve indeterminate legal criteria:

> [139] Although Dr Kolig accepted that allowance must be made for 'reasonable' change and presented substantial criticisms of Dr Sullivan's analysis, he offered no clear guidance as to why the matters relied on by Dr Sullivan do not fall within the concept of reasonable change to the interruption to traditional life. Dr Kolig conceded that, on the question of continuity, the evidence is in general unclear and suggests that it is 'impossible to say just how much "culture" had been "lost"' before the recent cultural revival and how much had to be 'imported' or 're-learned' in order to revive or revitalise at least a semblance of the old culture. When Dr Kolig was asked whether a change from a patrilineal clan group to an ambilineal group would fall within his concept of 'reasonable' change, Dr Kolig said:

21 The mystery of the absence of Goolarabooloo witnesses was partly explained by Sullivan in his interview with me in 2005. It seems that it was a deliberate decision, and had to do with ritual etiquette and the rapprochement between the Yawuru and Goolarabooloo groups in the Rubibi coalition. Not asserting a ritual interest in Kunin was consistent with Goolarabooloo's focus on the 'northern Law'—that is, Dreamings not associated with Kunin and ceremonial grounds to the north of Broome. Also, by staying away from the hearing, the claim of the Yawuru group would not be complicated by reviving, via cross-examination, pre-Rubibi disputes between the Goolarabooloo and the Yawuru about who was really following and defending the Law. In other words, he saw it as a selfless gesture that backfired on them (Transcript of interview with Patrick Sullivan, August 2005, pp. 14–16).

> 'I think there would be consensus in the anthropological community that such changes might not be considered unreasonable. Whether this then constitutes a break in continuity is a different matter. But the changes in themselves would be considered reasonable, I think.'
>
> [140] The problem with Dr Kolig's approach is that the concept of 'reasonable' change is problematic and requires some unstated value judgment to be exercised on a question that essentially is one of fact and degree.

Finally, the judge concluded that a change from a patrilineal group to an ambilineal group was an evolutionary change of traditional laws and customs, which was consistent with substantial maintenance of traditional connection (para. 142).

Kolig reflects on the claim

In 2005, Kolig was keen to correct a misapprehension I might have received from the written record: that he disagreed with the result of the hearing. Ultimately, he thought that the judge made the correct choice between the contending Aboriginal groups. He was, however, sceptical of the process. The depth of his scepticism about the Aboriginal evidence and the judge's assessment of credibility was revealed in an article he published in 2003, in which he brought together the Noonkanbah confrontation, the Hindmarsh Island affair and the *Rubibi* claim as examples of 'Legitimising belief: identity politics, utility, strategies of concealment, and rationalisation in Australian Aboriginal religion' (Kolig 2003). Now, after the event, he felt free to express his concerns about the absence of a viewing of sacred objects at Kunin, the unspecified link between the Two-Men mythology and the topography of Kunin,[22] and Patrick Dodson's dominant role. In relation to the first two matters, he concluded: 'When obvious vested interest is involved in the claim of sacrality, as was the case here, adducing empirically accessible detail seems to be of paramount significance in rendering credibility' (2003:218).

In relation to Patrick Dodson, whom he does not name, but clearly identifies, he states:

> Imposing his own stamp through his interpretation of traditions, his role invites analysis as to how traditional or authentic, or alternatively utilitarian and opportunistic the circumstances of presenting a dominant 'official' view is. It also raises the question as to how cloaking of traditional diversity and dissonance is achieved. (2003:219)

22 This is disputed by Sullivan, who stated that the link had been made in the restricted evidence.

Kolig also explored a paradoxical traditional continuity of 'the traditional protection and privileging of pieces of knowledge which are considered of great significance and potency' (2003:222). In earlier times, this knowledge would have been esoteric details of Dreaming stories and the deeper significance of certain rituals. Kolig thought that the potent secret among the Aboriginal claimants was that the genuine present, in reality, diverged significantly from the past. It is difficult to know how to interpret this observation, given his ambivalence about the claim process. If taken literally, it suggests deep continuities. As irony, it is a critique of Dodson's traditional credentials and Justice Merkel's gullibility.

Kolig's article is also a contradictory mixture of sophistication about the general effect of the claim process on the previous subtleties of cultural practices and high expectations about judicial methodology.[23] He makes the general observation:

> Advocate anthropology (in putting forward an official version) and court session then tend to function very much like the consensus-forming, 'orthopractical' medium of the joint ritual performances. However, while ritual orthopraxy of old was temporary and ephemeral, the legal process has more lasting gravity, as belief once recorded will remain in a legally binding version. (2003:221)

Towards the end of the article, he states: 'Perhaps, if it were not practically impossible what it [the legal process] should ethically be obliged to do is to distinguish between sincerely held views and crass forms of insincerity. In this distinction the concept of historical continuity would play only a small role' (2003:224).

Of course, the judge is already obliged to assess sincerity, as part of 'the credibility of the witness' and the 'weight' to be given to a witness's evidence. Furthermore, no participant, including the judge, can avoid the problem of historical continuity because that is what the legal doctrine of native title requires. Kolig, it seems, would have made different assessments of credibility.

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23 On the traditional instability of orthodoxy, Kolig states:

> Differences are embedded in what is no more than a thin veneer of vague agreement, made for momentary convenience, about a fleeting 'orthodoxy' and ritual 'orthopraxy'. Yet different understandings of myth and ritual, never expunged or suppressed, do not in most cases prevent co-operation, nor does this fact usually invite open censure or mutual recrimination (although that, in my experience, does happen, though very rarely). Little attempt is usually made to remove ambiguities as this would increase the likelihood of confrontation. Such a crisis is usually avoided among peers and played very cautiously by persons who considered themselves, or are considered, to possess superior knowledge. (2003:220)

Sullivan reflects on not educating the judge

Sullivan has chosen not to write about the details of the first *Rubibi* claim until all the *Rubibi* claims are finalised. He did, however, present a paper entitled 'Don't educate the judge: court experts and court expertise in the social disciplines' at a native title conference (Sullivan 2002).[24] The title refers to some instructions from a lawyer who was preparing for the next *Rubibi* claim. The instruction not to attempt to re-educate the judge seems to be a reference to Justice Merkel's summary dismissal of the inclusion of the Goolarabooloo group in the determination and what appears to be a request not to re-argue the point in the next *Rubibi* claim. Such a request represents the most acute tension between lawyers and anthropologists, ostensibly working for the same side. The pragmatics of managing a court case might require jettisoning weak or counterproductive aspects of the case to maximise the overall chance of success—like a surgeon lopping off a diseased limb. But the proposal for Sullivan to drop the Goolarabooloo, if it was that, also had its problems. Such a change of expert opinion would risk compromising the perception of the anthropologist's independence, which is also important for the overall success of the case.

Sullivan tried not to personalise his response in the paper, using it as a launching pad for a reflection on why 'courts' and 'the legal process' have difficulty in accepting the real-world fluidity and complexity of groups. In doing so, he touches on many of the issues covered in Chapter 1 of this book. Despite his obvious understanding of the legal process, one also senses the angst of being part of a process that recognises the rights of some and disenfranchises others:

> It would not be surprising for legal counsel for the claimants to feel that the construction of the claimants' case in a manner already familiar to the judge would be most likely to result in recognition of the claimants' rights. I think, on the contrary, the rights of claimants to be themselves are being curtailed. (2002:6)

Conclusion of the *Rubibi* case study

The singular articulateness of Patrick Dodson and, to a lesser extent, Nipper Roe raises the issue of the redundancy of anthropology, or at least competition between anthropologists and claimants for the authoritative presentation of Yawuru tradition. In the clarity, force and expansiveness of Dodson's evidence, we see a powerful combination in one person of the usual roles of claimant,

24 Sullivan has since removed the paper from the Australian Anthropological Society web site, feeling that the original provocation, which he felt was justified for a conference presentation, was becoming known to a much wider audience than was originally intended.

lawyer and anthropologist. And in Nipper Roe, we find a claimant creating an archive of his own objectifications of his culture in the form of cross-cultural manuals. Their success as witnesses, exemplified in the extensive quoting of Dodson in the judgment, could be contrasted, in a cautionary way, with the fate of Eddie Mabo's testimony in the original *Mabo* hearing. In that case, being articulate about ancient traditions might have reinforced the judge's suspicion that Mabo had learnt much about Meriam traditions from books, rather than through traditional mechanisms. So one wonders whether a different judge might have interpreted Dodson's articulateness and Nipper Roe's objectifications as further evidence of the attenuation of Yawuru traditions as a lived experience.

The most dramatic example of possible competition between claimant and anthropologist involved Sullivan's fieldnotes rather than his testimony. Although Sullivan was able to deflect some potential harm by pointing out the incompleteness of the passages quoted back to him, the more insoluble problem was the sheer length of his fieldwork—10 years of fairly dramatic transformation. The relatively small number of senior Yawuru lawmen meant that any consensus among them might be dramatically altered with the death of one or two. This might have been the situation with The Man Who Disappeared. At the beginning of Sullivan's fieldwork, this man was a key player and could afford to be offhand in his private conversation about Dodson and Roe. At the end of Sullivan's fieldwork, Dodson and Nipper Roe had assumed key traditional leadership roles and needed to consolidate the position without the help of The Man Who Disappeared.

The fact that Sullivan's fieldnotes provided an intimate account of the internal dynamics of the Yawuru over 10 years is a metonym of the larger problem of the relationship between the complete anthropological archive and the objectives of the current generation of Yawuru—both enabling and constraining them in their native title aspirations. The Aboriginal witnesses, with the exception of Colin Lee, who referred specifically to Father Worms, scrupulously avoided mentioning this archive. Patrick Dodson and Nipper Roe's anthropology was of their own experiences. It was Sullivan who had to deal with the archive.

The strength of Sullivan's evidence was in the ability of his model to reflect the likely evidence of the claimants. The most skilful part of this was in combining the maximal grouping (all Yawuru land for all Yawuru people) with particular attachments of individuals and families to particular places. This formulation allowed the evidence of those who strongly opposed the consensus reached among the Rubibi claimants to be at least partially consistent with the Rubibi model. Moreover, it relieved the judge of the need to totally disenfranchise opposing groups. In a similar way, by defining traditional activity largely in terms of authority in the ceremonial sphere, opposing claimants, even if they

challenged the traditional propriety of Dodson's and Nipper Roe's induction into the 'second-stage' initiation, were forced to defer to some aspects of shared traditional etiquette.

From this angle, there are striking parallels between Sullivan's approach to his model and the politics of the KLC representation of the disparate Yawuru groups. For the political logic of representation demanded a coalition of Yawuru groups to present a joint front for maximum strategic advantage, even if some disparate groups could not bring themselves to actively be a part of the formal Rubibi coalition, or even to make themselves known to the KLC before the hearing.

Given this kind of argument and Sullivan's actual employment by the KLC over a long period—much of which was specifically devoted to preparing for the claim—it is a little surprising that he did not come under more direct questioning of his professional independence.[25] Beckett avoided such an attack by having completed his research well before the *Mabo* case had commenced. In Sullivan's case, such an attack could have been anticipated from the science–law literature on the discrediting of 'research for litigation'. This probability occurred to Sullivan only in hindsight. An attack did come, but in a more subtle form: it was that Sullivan made the mistake of looking at the archive through the lens of the contemporary Yawuru community and consequently saw more continuity than there really was. This critique came from Kolig. It was the interpretation of the archive, particularly in imagining historical transformation, that was the main area of conflict, since Kolig had already deferred to Sullivan about contemporary Yawuru ethnography.

In doing so, Kolig could be viewed as choosing an arena in which he had an advantage: a superior place in the field of the academy. This superiority did count for something. He was able to speak fluently and coherently, as one would expect of a long-time senior lecturer. He was also able to convince the judge that there was an anthropological discourse about historical transformation using the concept of 'reasonable change'. There is a discourse of historical anthropology, but it has never used 'reasonable change' as a technical term and certainly not one in which there is any measure of consensus.

In other respects, his position in the field of the academy did not help him, and he seems to have misconceived the expectations of him as an expert witness. I have already referred to his confusing disavowal of expressing opinions about the archive. But he also seemed to want to confine his role to one of academic critique of Sullivan's report, without appreciating how much his own position would need coherent justification as well. Because continuity–change is a classic example of interpretative indeterminacy, coherent justification is

25 Sullivan noted in his comments on a draft of this chapter in December 2005 that he also worked on the claim while he was at the North Australian Research Unit and as an independent consultant.

elusive, unless an orientation is first chosen towards demonstrating continuity *or* discontinuity. Sullivan did choose one of these orientations—continuity—at the risk of compromising the appearance of independence. Kolig had not sufficiently resolved his thinking about the problem to avoid proposing yet another indeterminate concept, 'reasonable change', as if it could provide a solution. The indeterminacy of 'reasonable' is well known to lawyers through the use and critique of the concept of 'the reasonable man'. Therefore, Kolig's lack of regard for the legal doctrine of native title did not help him in the way that Beckett thought it helped in distancing himself from the unrealistic traditionalism of the *Mabo* claim, as formulated by Eddie Mabo's lawyers.

Sullivan had been working on the *Rubibi* claim throughout the period of the native title revolution in Broome and was forced to develop an understanding of the legal doctrine. His approach was firmly orientated towards the relevant aspects of the legal doctrine. Again, this did not seem to assist the acceptance of his evidence. Justice Merkel was concerned about European concepts of ownership prejudicing ethnographic accuracy. Also, while not mentioning it directly, the judge would have recognised in the form of Sullivan's conclusion about continuity ('substantial continuity') the identical terms in the formulation in Justice Brennan's judgment in *Mabo*: 'their traditional connection with the land has been substantially maintained.'[26]

While the triangulation model proposed in Chapter 1 of this book does seem to coincide with the basic tensions in Sullivan's presentation of his expert opinion, in one important respect it is wanting. Sullivan felt strongly constrained by other considerations, which were outside the simple calculus of the best alignment of legal doctrine, archive and claimants' evidence. Those considerations could be summarised as: how the presentation of the claim would remain true to the hard-won Rubibi coalition and on-the-ground complexity. In these concerns, he felt very much alone among the team representing the claimants, as if he was the only voice representing the ideals of the coalition against the win-at-all-costs professional predilection of the lawyers.

This kind of conflict represents something more than I anticipated in Chapter 1. There, I predicted that the worst disputes between anthropologists and lawyers working for the same client would be over conflicting assessments of the best alignment of the triangle of basic factors. In this case study the lingering bitterness was more about certain other issues, such as the legal team ruling as irrelevant the question of how presentational decisions would affect the community after the claim.

26 *Mabo v Queensland (No. 2)*(1992) 175 CLR 1 at 59.

Justice Merkel's mediating approach to the differences of anthropological opinion contrasts with his approach to the historians. With them, he was prepared to examine the key historical documents—for example, the original dedication of the reserve as a 'ceremonial site'—and form his own opinion of them, much like Justice Olney in *Yorta Yorta* forming his own opinion of Edward Curr's autobiographical account of his early encounters with Aboriginal people in his *Recollections of Squatting in Victoria* (1883). Where he differs from Olney is in his reserve when it comes to the anthropological archive—admittedly more clearly a product of the academy in the *Rubibi* case than in *Yorta Yorta*. The complexity of the anthropological archive and the academic capital of some of the contributors might have been a factor in the judge's inclination to mediation, rather than the dismissal of experts in dispute. But it also seems likely that he was aware that the acceptance of his liberal stance—hidden within the legal formula of 'a question of fact and degree'—would be enhanced by sharing the responsibility for his judgment with an expert consensus that he identified.

The judge's mediation of conflicting expert opinion in this case study allows a reconsideration of how to characterise the interaction of the fields of law and anthropology, raised in Chapter 1. It tends to confirm that, within the overall process of law swallowing and digesting anthropology for its own ends, there are circumstances in which sharing of responsibility is equally plausible.

In the next case study we shall see how anthropological 'research for litigation' fared when there was no broadly liberal judicial background to appeal to and no active judicial mediation at work: the *De Rose Hill* native title claim.