

7. Western Desert Ethnography on Trial

Introduction

The significance of the early events, outlined in the previous chapter, for the anthropologists when they eventually began to research the claim was that they were presented with a *fait accompli*. Any doubts they might have had about this area becoming the test case for native title in South Australia were not relevant because the case was proceeding. Also, because it was ALRM's first claim hearing, the case was destined to become one in which ALRM would be learning the pitfalls of claim hearings as they were going along.

Research for the claim

The anthropological research for the claim was largely organised by Susan Woenne-Green, who was appointed senior anthropologist at the Native Title Unit of ALRM in 1994. Woenne-Green was another veteran of anthropology among the eastern Western Desert people. She had, for example, worked on the *Ayers Rock* claim in the late 1970s, assisting the Aboriginal Land Commissioner. In the *De Rose Hill* claim, she planned to take on the role of principal researcher and expert witness for the claimants. In order to overcome the obvious gender difficulties, she engaged a male anthropologist to produce reports of more limited scope on various aspects of the Aboriginal men's evidence.

Craig Elliott, a consultant anthropologist with an MA degree in anthropology based on fieldwork in Arnhem Land (Elliott 1991), was to be her main male counterpart in field research for the claim and chief researcher of the anthropological archive. His involvement actually predates Woenne-Green's, and, between 1994 and 1998, he conducted extensive archival research (150 days) and field research (110 days). The field research involved travelling to various communities on the Pitjantjatjara lands, usually with Woenne-Green and others, who were more familiar with the potential claimants. It also involved site visits to the claim area with the claimants. In December 2000, Elliott was directed to prepare an expert report for the claim. The terms of his brief from ALRM assumed that his report would be subsidiary to the more comprehensive and overarching report that Woenne-Green was preparing, for it directed him to focus on gender restrictions, men's contemporary religious associations, sites and particular Dreamings, associations with wider Western Desert beliefs and practices, and the results of his visit to the Strehlow Research Centre in Alice

Springs. Among other things, Elliott found in Strehlow's diaries details of his 1965 trip through the claim area, where he recorded Dreaming stories and site names—more or less consistent with the claimants' information (see Elliott 2000:71–8, 2001:56–8).

Daniel Vachon, another veteran of eastern Western Desert anthropology, was to provide details of his early research in the region, which, coincidentally, involved Snowy De Rose as one of his main informants during 1977–79. Snowy De Rose was the father of the main claimant in the *De Rose Hill* claim, Peter De Rose.¹

Dr Jon Willis, the third male anthropologist, was to give evidence about the relationship between ceremony and land affiliation. He was in the unique position of having completed PhD research on Pitjantjatjara ceremony and having been inducted into male initiation rites (Willis 1997, 2003a, 2003b). Although Elliott's research for the claim was extensive, he did not witness any initiation ceremonies (T. 2269) and it was hoped that Willis's evidence could fill that gap.

The SA Crown Law Office, representing the State of South Australia, engaged Professor Ken Maddock to give expert evidence. It was the last native title claim he was involved in before his death in 2003.

Pre-trial processes

Elliott felt that there was a reluctance in ALRM to adopt certain research practices simply because they were used in land claims under the *Land Rights Act* in the Northern Territory. According to him, there was a feeling that native title in South Australia was distinctive and needed to be approached in a different way. He was frustrated that ALRM did not seem to appreciate the need to focus on producing key documents that would inevitably be required: genealogies, site maps, site registers, and concise anthropological reports.

Elliott had initially worked towards a joint expert report with Susan Woenne-Green and had produced a draft in late 1996. About 1998, however, differences developed between Elliott and ALRM about the conduct of the research for the claim, and, between 1998 and 2000, Elliott had nothing to do with the preparations. Meanwhile, Woenne-Green had produced a new expert report under her own name, and this was circulated to the parties along with Elliott's 2000 report. Elliott was not asked to comment on, and in fact never saw, Woenne-Green's circulated report.

¹ Vachon did not publish from his research with Snowy De Rose and later conducted doctoral research with a different Western Desert group (see Vachon 2006).

The hearing

After considering a number of Adelaide QCs, ALRM eventually decided that Ross Howie SC would lead the legal team in the hearing. He was from the Melbourne Bar and was the most experienced and successful land claim trial lawyer in Australia.² When he began working on the case, however, all the extensive pre-trial proceedings had been completed. These proceedings included the provision of detailed further and better particulars of their claim, the circulation of all expert reports and the material on which they were based. Nevertheless, Howie insisted that Elliott be brought back to attend the hearing.

The battlelines were drawn in the opening addresses. Howie encapsulated the claimants' case in the word '*nguraritja*'—a Yankunytjatjara–Pitjantjatjara word for traditional owner.³ The claimants were part of the Western Desert cultural bloc and under their traditional laws and customs recognise *nguraritja* by criteria of birth at the place, long-term physical association with the place, having geographical and religious knowledge of the area, and descent from an ancestor who was born at the place or who had a long-term physical association with the place. Mr Tony Besanko, senior counsel representing the State of South Australia, argued that the Antakirinya people were separate from the Yankunytjatjara people, and that the Antakirinya people occupied land to the east of the Yankunytjatjara, which included the claim area. He asserted that the Yankunytjatjara claimants could not, therefore, demonstrate continuity of traditional connection since the time of the assertion of sovereignty. In the alternative, he argued that any traditional connection had been lost since 1977, when Aboriginal people no longer permanently resided on the pastoral lease (T. 73–4).⁴

The claimants' evidence

Despite some timesaving measures such as tendering written statements, the evidence of the Aboriginal witnesses was spread over 31 days of the hearing. It involved 13 Aboriginal men and 13 Aboriginal women. There were nine days

2 The other lawyers in the team included Richard Bradshaw and Andrew Collett, both of whom had extensive experience with Western Desert Aboriginal people. John Basten QC was also engaged to argue the legal issue of whether the granting of the pastoral lease extinguished all native title rights.

3 According to Goddard's Pitjantjatjara–Yankunytjatjara dictionary, *ngurara* means 'resident, local, person that lives in a place (placename appears in nominative case—that is, with -nya ending): Paluru Alice Springs-anya ngurara. He's an Alice Springs person (resident) and "*nguraritja*" means "someone that belongs to a place, traditional owner (from *ngurara* plus -(i)tja 'of, from')'" (Goddard 1992:90).

4 Counsel for the pastoralists similarly emphasised loss of traditional connection since the 1970s, denying that the previous Aboriginal occupants had any access problems since the 1970s and emphasising that no traditional ceremonies had been held on the land since the 1970s at least (T. 76–7).

of site visits, including two days of restricted, men-only evidence. The chief claimant and witness was Peter De Rose. His evidence-in-chief lasted for a full one and a half days and he was cross-examined for two and a half days. One feature of all the claimants' evidence was the laborious, sentence-by-sentence processing of objections to hearsay in the witnesses' statements. The judge's early indication was that he would take a liberal view of hearsay in a native title hearing, allowing hearsay into evidence but reserving the right to give it different weight according to its reliability.

For the most part, Peter De Rose's evidence followed a predictable path: his birth on the claim area; his early life with his Aboriginal mother and adoptive Aboriginal father, both of whom worked on the station; hunting and gathering; early travels with family, including visits to the Dreaming sites on or near the claim area; his working life as the station hand employed by Doug Fuller and later his son, Rex Fuller; the stages of his traditional initiation; his gradual acquisition of knowledge of the Dreaming stories associated with the area, including while he was doing mustering work on the station; the various incidents with the Fullers, precipitating the departure of the last Aboriginal people from De Rose Hill Station (his father being run over by Doug Fuller in a car and sustaining a broken leg; feeling that Doug Fuller had delayed giving him news of his brother's death in a motor vehicle accident); setting up a homeland community at Railway Bore on Anangu-Pitjantjatjara lands, close to De Rose Hill; his intermittent return for hunting; and his desire to set up an outstation on De Rose Hill.

He gave extensive evidence about the various Dreamings and sites on the area, although he was reluctant to speak about the *malu*, *kunyula* and *tjurki* Dreaming in open court with women present, since the Dreaming is associated with male initiation (see, for example, T. 165). He even gave evidence about the meaning of *jukurpa* (Dreaming) and *nguraritja*. Indicative of the multiple pathways to 'country' in the Western Desert, Peter De Rose's explanation of *nguraritja* appeared to go beyond the four criteria emphasised in the opening address and to assert, in a more impenetrable way, a direct relationship between *tjukurpa* and himself.⁵

5 For example:

PETER DE ROSE: It makes me *nguraritja tjakangka* [our way] because of the *tjukurpa* and the law. (T. 156)

In a similar vein was Whisky Tjukanku's metaphysical challenge to 'criteria for becoming *nguraritja*':

MR BESANKO: Mr Tjukanku, you were not born on De Rose Hill, were you?

WHISKY TJUKANKU: No, I didn't born there but I am a *nguraritja*. The land tells me I'm a *nguraritja*. (T. 951)

(Compare with the limits of the liberal state's recognition of traditional land tenure in Povinelli 2002.)

Where he gave unexpected answers was in response to questions about confrontation with the Fullers and about the rights of the *nguraritja*. Peter De Rose and other witnesses tended to downplay the extent of confrontation with the Fullers and to leave out details. Craig Elliott told me of his own direct observations of the fear that the claimants had of Doug Fuller when taking them on research field trips on De Rose Hill Station. He said that he was well aware of the need to verify any allegations made and in fact he did obtain detailed and, in his view, convincing statements from various claimants. The confirming details, however, tended to disappear from the Aboriginal evidence in the witness box.

Questions designed to elicit evidence about the rights of *nguraritja*, particularly rights of exclusive possession or control of resources, tended to reveal cross-purposes. Questions about rights were answered in terms of responsibilities to care for land. Questions asked to elicit evidence about permission-seeking behaviour were answered in terms of a norm of generosity and, perhaps, the Realpolitik of their current powerlessness. For example, following some strong evidence of *nguraritja* enforcement of their rights against others in the past, the following interchange took place:

MR HOWIE: What about today? What does the *nguraritja* do?

PETER DE ROSE: Today the *nguraritja* they still have their strong law and today also they got on AP lands, Anangu Pitjantjatjara lands, they have got a law and the people go within that rules.

MR HOWIE: I'm not asking you about the law on Anangu Pitjantjatjara lands but I am asking you about the Anangu law on De Rose Hill lands. I'm only asking you about the Anangu law, not about the law for the pastoral lease, today what can *nguraritja* do if visitors don't behave properly?

PETER DE ROSE: The *nguraritja* they happy to have visitors who they wanted to show places to the visitors. (T. 166)

Howie, however, made some headway with the example of mining:

PETER DE ROSE: The *nguraritja* say no because that sacred site is close. (T. 169)

Riley Tjayrany, Whisky Tjukanku, Witjawara Curtis (an elderly woman), Alec Baker, Peter Tjutatja, Tim De Rose and Owen Kunmanara gave similar evidence to Peter De Rose, if somewhat less detailed. It reinforced the semi-nomadic life of the Aboriginal people living on the station in the early days and included Riley Tjayrany's account of a momentous fight between the original partners, Tom O'Donoghue and Doug Fuller, after which O'Donoghue left (T. 187). The women's evidence tended to be more about family history and hunting, and little about ritual.

One of the questions asked of the Aboriginal witnesses by their lawyers was 'What language do you speak?' The witnesses duly answered Yankunytjatjara, and in some circumstances Pitjantjatjara. In the light of the distinctions in the anthropological and linguistic archives, the answer to such a question has very limited value because it incorrectly assumes monolingualism, and does not distinguish between a dialect and a language (inherently difficult as the Western Desert language does not have a single name), nor does it distinguish language competence, personal identity and group identity. When I asked Elliott about these problems, he agreed that the question suffered from many inadequacies but said that there was a gradual appreciation of the fundamental distinctions among the claimants' lawyers over the course of the hearing.

Another problem was what the Aboriginal witnesses would say about the Antakirinya. They knew that their Aboriginal kin at Oodnadatta and Coober Pedy referred to themselves and their language as Antakirinya, although to them the language was indistinguishable from Yankunytjatjara. Over the course of the preparation for the hearing, however, the claimants became aware of the potential problem Antakirinya posed for the success of their claim⁶ and adopted an exaggerated attitude of ignorance of all things Antakirinya, which sometimes was unhelpfully at variance with their written statements:

PETER DE ROSE: I'm not sure about Antakirinya. I heard about when people talking about. I don't know Antakirinya. I never meet Antakirinya. (T. 849)

Cross-examination

The extraordinarily thorough two-day cross-examination of Peter De Rose raised most of the themes taken up in the cross-examination of all the Aboriginal witnesses. Besanko laboriously went back over the details of Peter De Rose's ancestors and a year-by-year account of Peter's life. Other aspects seemed designed to elicit answers either undermining the witness's credibility or laying the groundwork for specific final submissions. Questions were asked of Peter De Rose and all the Aboriginal witnesses about the birthplace of their parents, demonstrating that they had all come from the west, thereby laying a foundation for the usurpation argument (Pitjantjatjara and Yankunytjatjara usurping the Antakirinya). There were many questions about the Antakirinya, including whether there had been discussions during the research process about Antakirinya on Tindale's map. Excessive denials tended to bring into question the credibility of the witnesses (T. 849–53). Also of relevance to the usurpation argument were questions about boundaries between Pitjantjatjara and Yankunytjatjara country. In his answer, Peter De Rose hinted that the language in Dreaming stories indicated traditional boundaries (T. 880).

There were questions about the principles by which one became *nguraritja* that seemed designed to emphasise the importance of birthplace and question the weight traditionally given to growing up at a place per se or knowledge of associated Dreaming stories and ritual per se (T. 869–71). There were other questions about why specific individuals, who seemed to meet one of the four proposed criteria for being *nguraritja*, had not been included in the claimant group (T. 889–900). Some other questions were transparently designed to demonstrate loss of traditional connection or general decline in adherence to traditional law—for example, questions about not cleaning sites as they did in the pre-pastoral era (T. 840–4, 864–5).⁷

The restricted sessions

My presentation of the claimants' evidence is not complete. I decided not to request the restricted part of the transcript, as this might have added a layer of complexity that would have threatened my ability to complete the case study. From the open transcript and the judgment, however, it is apparent that the restricted sessions involved taking the judge to gender-restricted sites and the explanation of and performance of gender-restricted songs. This omission from my data was a problem for Howie and Elliott, who thought that these sessions contained the most significant evidence.⁸

The anthropological evidence

Susan Woenne-Green

For reasons that will be explained below, Susan Woenne-Green's report, although circulated, was never tendered in evidence. Some account of it is necessary, however, to understand subsequent events. The largest section of the report described 'the cultural landscape of the claim land' (pp. 58–205). This section

⁷ They were also questioned about why they had not complained to the Fullers when one site was trampled by cattle (T. 875–7), and why they had not taken up opportunities to hunt on De Rose Hill Station or to teach the younger generation about the sites on the station.

⁸ The omission of the restricted evidence has caused me some concern because both Ross Howie and Craig Elliott are of the view that it is only by being familiar with the detail and the strength of the evidence given by the claimants in restricted sessions that the scale of the injustice done to them in O'Loughlin's judgment can be fully appreciated. Without revealing specifics, they were impressed with the level of detail, clarity and force of the restricted evidence and were appalled that the judge did not seem to appreciate it or to understand the significance of the concessions that were being made by the claimants in order to present some of their most secret songs to him. I can record their views, but I am in no position to assess them. The focus of this thesis is on anthropology and I have made the assessment that there is sufficient material in the open transcript and the unrestricted parts of Elliott's reports to pursue the case study, notwithstanding that my account of the evidence must necessarily be incomplete.

comprised a comprehensive catalogue of significant sites including photographs, site names, Dreaming associations, kin associations, and quotations from the claimants outlining historical and religious significance—in other words, the kind of evidence one would expect from Aboriginal witnesses on a site visit. It might have served the useful purpose of familiarising the non-Aboriginal participants in the hearing with the way in which the Aboriginal witnesses would speak about the country. The remainder of the report dealt with the way in which the claimants spoke about their connection to the country, including as 'member', *nguraritja*, *ngurawalytja* (family for country) and *waltjapiti* (extended family), and it included 24 examples of how they spoke about *nguraritja*. There was relatively little in the report about historical transformation and the older anthropological sources. Tindale's tribal boundaries were rejected, as was the applicability of the anthropological concept of succession of ownership. Instead, there was an assertion that the claim area is 'Yankunytjatjara country' and that those people currently identifying as Antakirinya are not a separate people. Thus, Woenne-Green's report remained close to the claimants' perspective and tended not to make links to the larger anthropological archive on the Western Desert cultural bloc, or move towards systematising her material into the specifics of 'traditional laws and customs' and the 'rights' of *nguraritja*.

Maddock's first report

Of all the Australianist anthropologists, Ken Maddock has been the most prolific on the interaction of law and anthropology, particularly in the land rights era.⁹ This book could be seen as a response to his formulations of the problem (see Chapter 1).

Maddock's tendency to conflate all issues into the polar opposites of expert versus advocate, or science versus sympathy, recalls the structuralist heritage of which he became the main exponent in the Australianist specialisation (see Maddock 1969, 1970a, 1970b). It was his increasingly trenchant criticism of the contamination of the science of anthropology by advocacy that led him to take on a particular role in the native title era. He offered his services to those parties that he thought would have difficulty obtaining the advice of an experienced anthropologist—as if in personal response to criticism of bias in the profession towards working exclusively for Aboriginal interests: 'In proceedings in which expert testimony plays a critical part, the inability to obtain expert advice can be as prejudicial as inability to obtain legal representation' (Maddock 1998c:1–2).

This had been a concern of his from the very beginning, commencing with his analysis of the *Gove Land Rights Case* and continuing throughout the land rights era (see Maddock 1998b:167). In the native title era, it meant, in effect, that he

9 See Maddock (1980a, 1980b, 1981a, 1981b, 1983a, 1983b, 1984a, 1984b, 1998a, 1998b, 1999, 2001b).

was usually called as a witness by State governments that were opposing, or at least testing, native title claims, and his typical role was one of reviewing the work of anthropologists called by claimants.¹⁰

In terms of both ‘scientific’ capital and academic capital, Maddock was a formidable presence. He had conducted long-term fieldwork in Arnhem Land for his doctorate. He had combined an original contribution to Australianist ethnography with metropolitan theorising, specifically Lévi-Straussian structuralism at the apogee of its international influence, and published the results in leading academic journals, as well as an introductory text aimed at the general public (Maddock 1972). There are some indications that he did not cope well with the complexifying of theoretical approaches in the 1980s and the anti-colonial challenges to the discipline. Les Hiatt summarised this period in his obituary:

The fact of the matter is that the profession itself was in a state of crisis, whether as a prelude to death or some unrecognisable metamorphosis no one could confidently say. Topics and issues that had been at the heart of the discipline since its inception, including many of those that Ken had devoted his best years to, no longer seemed to be of interest. More to the point, they were likely to be stigmatised as inappropriate. In the view of a new generation the primary responsibility of anthropologists was not to advance their discipline but to advance its subjects. (Hiatt 2003:404)

Despite his misgivings about the direction of the discipline, Maddock had a long career in academia, commencing as a lecturer in anthropology at Macquarie University in 1969, steadily rising through the ranks to a personal Chair in Anthropology (1991) and, in his retirement, the title of Emeritus Professor (since 1997).¹¹ This position enabled him to be referred to as ‘Professor Maddock’ in the *De Rose Hill* hearing. Of additional relevance to his standing as an expert witness was his initial degree in law and his long record of research and publication on land rights and the recognition of customary law.

Maddock’s brief from the SA Crown Solicitor’s Office called for a review of all the expert reports that had been tendered by the claimants. His report (Maddock 2001a) has the feel of the professor correcting the students’ essays as it concentrates on the areas he felt were lacking, principally in Woenne-Green’s report: lack of attention to describing the nature of traditional laws and customs, the relevant ethnographic archive and proof of continuity of

¹⁰ He was called by the NSW Government in the *Yorta Yorta* claim and by the WA Government in the *Miriuwung Gajerrong* claim (Ward’s case: *Ward v. WA* [1998] 159 ALR 483, see description of Maddock’s evidence at pp. 528–9).

¹¹ This is not to say that he was always appreciated by his students, one of whom was Elliott himself. He recalled Maddock being ‘unengaged and unengaging’.

traditional ownership. But he also seemed not to accept that Elliott and Vachon were circumscribed by their specific briefs from ALRM, for he took them to task for not covering basic matters—Vachon for not relating his fieldwork to the anthropological literature, and Elliott for not clearly describing how one becomes *nguraritja*, for not analysing the ethnographic reality of Antakirinya and for not describing the relationship between the claimants and the surrounding groups.

Maddock was more explicit than the other anthropologists about the translation process involved in searching for relevant concepts in the anthropological archive and the relative lack of guidance from legal doctrine (see para. 12). In seeking further specification of 'Law', 'custom' and 'traditional', Maddock surveyed some anthropological theorising about social order and social control (Berndt 1965; Malinowski 1926) as well as more direct attempts to define law in small-scale societies (Hoebel 1954; Llewellyn and Hoebel 1941; Pospisil 1971; Radcliffe-Brown 1933). He also extended his survey to quasi-legal sources: the Australian Law Reform Commission on the recognition of customary law (Aboriginal customary law as 'a body of rules, values and traditions, more or less clearly defined, which were accepted as establishing standards and procedures to be followed and upheld') and Justice Wootten in his report under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth) on the proposed Alice Springs dam ('tradition' as meaning handed down from generation to generation). Having raised the problem of the translation process, though, Maddock did not come to a conclusion about it and introduced his own broad distinctions between living culture and vestiges and between tradition and innovation without a discussion of their problematic nature (para. 34). In the witness box, however, he simply equated 'traditional laws and customs' with traditional Aboriginal culture or 'Blackfella Law' (T. 3450–1).

Presumably in response to the gaps in Woenne-Green's report, Maddock surveyed the literature on local organisation.¹² In the witness box, he elaborated on what Aboriginal 'ownership' might mean, asserting a distinction between an economic and a religious aspect. With regard to local organisation, he favoured Peterson's band perspective—the band as the primary land-occupying and resource-utilising group. Apart from implying that occupation and use per se would eventually be seen as 'rightful use', he did not really explain how the theorising about local organisation related to European concepts of ownership rights (T. 3414–16).

Maddock also surveyed the literature on traditional succession, on Western Desert migration and on Western Desert population movements. He concluded this review by raising the question of whether any change of traditional

12 In his review, he referred to Radcliffe-Brown, Peterson and Long, Strehlow, the Berndts, Elkin, Hamilton and various reports of Aboriginal Land Commissioners in *Land Rights Act* claims.

ownership of the claim area took place according to traditional laws and customs (para. 90). The importance of this question was reinforced by a review of all the references to the Antakirinya in the literature. Again, this was probably in response to Woenne-Green's strong assertion of Yankunytjatjara continuity and her dismissal of Tindale. Although distancing himself somewhat from Tindale's tribes ('whatever might be the precise significance of those labels'), Maddock tended to avoid a thorough critique—for example, avoiding taking a position on Berndt's 1959 critique of Tindale.

At the end of his report, Maddock stated that there were three areas of doubt that the Aboriginal evidence needed to dispel

- the time depth of their association with the claim area
- whether there was significantly more to the claimants' association with the land than spiritual affiliations
- the degree to which traditional laws and customs were currently observed (T. 3418).

Despite Maddock's doubts, both Howie and Elliott thought that his first report was generally helpful to the claimants' case.

In passing, Maddock speculated on the reasons the claimants' experts—principally Woenne-Green at that stage—had not adequately covered the possibility of a change of traditional ownership, returning to one of his longstanding concerns about anthropology in the land rights era: 'The experts may have been prevented from addressing this critical issue by their apparent acceptance of the dogma that the applicants' relation to land is eternal and unchanging' (Maddock 2001a:para. 248).

Critically for the claimants' case, he concluded his review of the literature on the Western Desert cultural bloc by stating that 'the available evidence does not suggest a total rupture of continuity with the pre-contact culture, in spite of territorial shifts, population movements and probable changes in law and custom' (Maddock 2001a:para. 251).

Craig Elliott's second report

During the hearing of the claim, Woenne-Green became ill and had to be taken to hospital. The diagnosis and prognosis were uncertain for some time and during that period the claimants' legal team decided to make a contingency plan. It involved Craig Elliott producing a second report that would take the place of Woenne-Green's report in giving an overview of the anthropology of the whole claim. Susan Woenne-Green was eventually diagnosed as having had three minor strokes. She did not return to the hearing since her condition was stress related.

The plan was a high-risk strategy, but there was not much choice. Without such a report, there would be no expert evidence linking the claimants' evidence to the anthropological archive and the broad requirements of the legal doctrine of native title.

Except for the last item below, Craig Elliott's terms of reference reflected the terminology of the legal doctrine of native title, separated into its constituent elements. They asked him to address

1. the nature of the traditional laws and customs
2. the Aboriginal people who acknowledge and observe the traditional laws and customs
3. the Aboriginal people who have a connection with the claimed land by those laws and customs
4. the nature of the connection of the Aboriginal people with the claimed land by those laws and customs
5. the Aboriginal people who have rights and interests in relation to the claimed land under the traditional laws acknowledged and traditional customs observed
6. the nature of the rights and interests of the Aboriginal people under the traditional laws acknowledged and traditional customs observed
7. whether since the acquisition of sovereignty in 1825 there has been a cessation of the acknowledgment and observance by the community of the traditional laws and customs on which the native title has been founded
8. whether since the acquisition of sovereignty in 1825 there has been a loss of connection with the land by the community which acknowledges and observes the traditional laws and customs
9. an account of the early ethnographic sources.

It can be noted that there is a complete overlap between this list and what one would expect to find in the claimants' final submissions and in the ultimate judgment. When I spoke to Howie in 2005, he did express some misgivings about the questions being exactly like final submissions (advocating a position rather than expressing a balanced expert opinion), but he felt that, considering the problems with Woenne-Green's early report, explicit direction was required to ensure that the resulting report would add something to the overall case.

Elliott had to complete the report under extreme time pressures, during a break in the hearing between the Aboriginal evidence on country and the reconvened hearing in Adelaide for the evidence of the various experts and the pastoral

lessees. He produced the report in 10 days (T. 2368–9). He did have his previous report and his accumulated knowledge of the archive to draw on, as well as Maddock’s first report and the evidence of the claimants. He told me in 2005 that he had been thinking about the issues for a long time, implying that, although the time frame was tight, it was not impossible. Given the circumstances, however, it is no surprise that this critical report is also very concise.¹³ What was left out of the report was to feature prominently in the judge’s findings of Elliott’s supposed bias. Because of the urgency, there was also no possibility of peer review of the report.

In responding to the issue of the nature of traditional laws and customs, Elliott’s report bypassed most of the academic literature on primitive law, legal pluralism and modern law. It took the expedient of approximating ‘traditional laws and customs’ as ‘culture’ and adopted Berndt’s distinction between the Dreaming law and custom, on the one hand, and kin-based law and custom, on the other. Elliott saw this distinction as one version of the classic formulations of the distinction between ‘culture’, as a system of ideas and beliefs, and ‘society’, as governed by principles or laws of social organisation.¹⁴

It is difficult to see how this distinction advances an understanding of the nature of Aboriginal ‘traditional laws and customs’, but it did provide Elliott with a framework for outlining the Dreaming as an ontology, cosmogony, system of beliefs, practices and rituals, and a hierarchical economy of sacred knowledge backed by social sanctions, as well as outlining various kinship rules and traditional practices relating to sex segregation, hunting, mourning, visiting sites and so on. His list of traditional ‘beliefs, rules and practices’, including examples taken from the transcript of the claimants’ evidence, was quite extensive (Elliott 2001:3–12).

He identified the Western Desert cultural bloc as the Aboriginal people who acknowledge and observe the traditional laws and customs described, but attempted to identify an eastern subgroup of this cultural bloc. The way he did this became surprisingly controversial in the hearing. He suggested a community of Yankunytjatjara, Pitjantjatjara and Antakirinya-speaking peoples within the Western Desert cultural bloc. He listed 10 features of this ‘community’, but the distinguishing features seemed to be the last three: residence in the eastern area; shared history, particularly in relation to pastoral leases in the eastern area; and the absence of ‘sections, subsections and patrimoieties’ (2001:14–15).

Questions 7 and 8 in his brief requested Elliott to consider continuity of traditional connection in terms of whether there had been a ‘cessation of the acknowledgment and observances’ and whether there had been ‘a loss of

¹³ It was 64 pages, excluding a male-only restricted section.

¹⁴ Craig Elliott’s comments on my draft chapter, July 2005.

connection with the land'. In comparison with the robust academic model raised in Chapter 1, it can be observed that the form of these questions directs Elliott to come to a judge-like categorical conclusion, rather than explore the nature of the historical transformation of traditions over the period of colonisation. Elliott obligingly responded only to the questions as framed.¹⁵ In brief, his argument was that, at the level of the Western Desert cultural bloc, the writings of Elkin, Tindale, the Berndts and Strehlow, properly understood, demonstrate that there has been no substantial discontinuity of traditional laws and customs. This position involved a critique of Tindale's Western Desert tribal boundaries 'as not having stood the test of anthropological scrutiny and as a cartographical misnomer' (2001:55).

It also involved a critique of the theory that, over the period of colonisation, Aboriginal groups from the west have been usurping the traditional country of eastern groups (2001:43–55). This was an argument based, in part, on an anthropological deconstruction of Tindale's assertions, rather than a detailed historical demographic study, which would have been beyond the resources of the claimants to undertake, even if there were enough Aboriginal people still alive to provide a conclusive answer about early twentieth-century population movements. The argument was that, within the Western Desert cultural bloc, individuals have multiple traditional ties to various places and that usurpation at the level of 'tribe' is highly unlikely:

Accounts of the Western Desert that interpret population movements in terms of 'displacement' and territorial 'usurpation' overlook a fundamental feature of the traditional system of connection to land, in my view. Namely, that the system has a significant life history or biographical component, chiefly through the mechanism of country of birth. Therefore, people with ancestral connections elsewhere can and do acquire a legitimate, recognised connection to another area, including to an area with different language identity. (2001:54–5)

This was an effective argument against taking tribal usurpation too literally, but has its own problems, perhaps reflecting the general difficulty that anthropology has in grappling with historical transformation. There is a mismatch between the question formulated in terms of historical change and the answer in terms of the synchronic generalising of ethnography. Moreover, if there were in fact unprecedented, relatively large-scale population movements to the fringes of the Western Desert then it would seem that a relatively rapid succession of traditional ownership, consistent with shared traditional principles, could have happened.

With the benefit of hindsight, I asked Elliott why he felt that he had to resolve the question given the lack of conclusive data—in other words, why he could

15 Elliott pointed out in his comments on the draft chapter (July 2005) that he did refer to cultural and historical change in his report (in paragraphs 1.15, 3.14 and 7.4). While this observation is true, those brief comments tend to simply assert the continuity of traditional culture despite historical change, so I think my general point remains valid.

not have said that the current claimants are part of the eastern Western Desert cultural bloc, who have always been the traditional owners *or, alternatively*, that the claimants are people from the west within the Western Desert cultural bloc, who succeeded to traditional ownership of the area according to legitimate traditional principles such as place of birth, descent, long association, knowledge of local Dreaming stories and ceremonies. His answer was that he felt it was incumbent on him as an expert witness to provide a firm opinion and that he had resolved the issue to his own satisfaction.

Under the rubric of ‘connection’ (Question 8), Elliott traced early Aboriginal occupation of the claim area, drawing on the conclusions of the archaeologist’s report, the accounts of early explorers and his older Aboriginal informants. He then narrowed the focus to the eastern Western Desert bloc, his Yankunytjatjara Pitjantjatjara Antakirinya community, again drawing on the anthropological work of Elkin, the Berndts, Tindale, Strehlow (especially his 1965 field trip), and Vachon’s fieldwork in 1977–78. Elliott pointed out that the postwar period was also covered in the claimants’ evidence and oral history taken by him. He referred to continuing knowledge of the sites, Dreamings and regional ceremonial life to conclude that there had been no loss of traditional connection (2001:32–7).

Maddock’s second report

Maddock’s second report was essentially a critique of Elliott’s second report, particularly the idea of a Pitjantjatjara Yankunytjatjara Antakirinya community. Maddock accused Elliott of not defining what he meant by ‘community’—that is, in relation to the various ways in which the word ‘community’ had been used in the anthropological literature—for example, as a group of tribes (Matthews), as a sub-tribal unit (Meggitt) or as a residential settlement (Doohan, Palmer) (T. 3431–3). He thought that there was no precedent in the anthropological literature for a Pitjantjatjara Yankunytjatjara Antakirinya community. He examined Elliott’s 10 criteria individually and concluded that none of them produced a distinctive group that was an ethnographic reality or part of the claimants’ consciousness, rather than a construct of Elliott’s:

It is really a topological exercise in which you are seeing how people can be classified in terms of some feature of their language or their social or religious life, which happens to be of interest to you...I would have thought that there must be some sort of structure of authority or structure of organisation which holds it together as a community. (T. 3434)

In his critique, Maddock seems to ignore the legal framing. It is the legal doctrine that requires some sort of title-holding group. In other words, he seems to make no allowance for the imposed artificiality of the claim process. Instead he framed it as an anthropological question independent of the legal framework: what are the features of a group as an ethnographic reality? Even within anthropological discourse, this question does not make much sense without specifying the purpose of the inquiry. Maddock himself demonstrated how the word 'community' could be used in various ways, yet he does not identify how his largely impressionistic ideal of corporate-ness relates to the anthropology of groups generally or the ethnography of the Western Desert cultural bloc, with its rather loose social structures. His expectation of a relatively high degree of corporate-ness is not necessarily required by legal doctrine, which, as we have seen in Chapter 1, is unhelpfully indeterminate.

Maddock also thought that, in listing all the traditional activities mentioned in the evidence, Elliott had not discriminated between activities that really mattered to the claimants and activities that they might not have strong views about, so that he 'overstated the position' (T. 3439). Having heard the Aboriginal evidence, Maddock still had his doubts about the extent to which the applicants observed their traditional laws and customs, as opposed to simply recognising them as being the law. In other words, he wondered whether the evidence he had heard was part of a living culture, whether most boys were still being put through initiation ceremonies, whether other ritual practices were being maintained, whether they related to the claim area itself and how the traditional system of promised marriage was faring (T. 3438). Elliott was incredulous that Maddock still had these doubts, given the evidence in the restricted sessions covering these issues.

Craig Elliott's cross-examination

By any standards, Elliott's cross-examination was a gruelling marathon. His examination-in-chief went for two full days and his cross-examination by two Queen's Counsel lasted eight days—a total of 10 days. This compares with Beckett's total of three days and Sullivan's one and a half days.

Besanko QC for the State and Whittington QC for the owners of the pastoral station had plenty of material on which to base their questions, having undertaken an extensive discovery process.¹⁶ It became apparent in the course of cross-examination that Besanko and Whittington did indeed have the resources

¹⁶ Apart from the circulation of the formal reports of Susan Woenne-Green and Craig Elliott, the other parties had obtained all the original fieldwork data, including fieldnotes, tape recordings, transcripts of tape recordings, videos, and photographs. In addition, all the relevant anthropological journal articles had been conveniently collected by Elliott into three folders and copied to all the parties.

between them to exhaustively sift through all the material that was available to them. Moreover, they had two reports from Professor Maddock, in effect critiquing Elliott's first and second reports.

The attack on Elliott's reports can be outlined in a summary way as statements that were implied in the questions he was asked.

- His research methodology did not live up to the ideal of participant observation in anthropology because he relied largely on interviews and did not observe the performance of any ceremonies (T. 2391, 2537).
- He was too reliant on a few key informants rather than testing data with a variety of informants (T. 2541).
- There were inconsistencies between his reports and some of his fieldnotes on which they were based (T. 2613).
- There were inconsistencies between the evidence of the claimants and the transcripts of taped field interviews—for example, about whether there had been discussions with the claimants about the Antakirinya (T. 2619–22).
- He was selective in his use of the older anthropological authorities in a way that was biased towards supporting the claimants' case.
- A fair reading of Elkin, Tindale and the Berndts would indicate that Antakirinya was more than a dialect label applied by others; it was a widespread self-identification of people who had left the vicinity of the claim area (T. 2545–6, 2559–60, 2719–20).
- A fair reading of the anthropological literature would indicate that there had been disputes over territory and there had been a permanent migration out of the desert—that is, the usurpation of Antakirinya territory by Yankunytjatjara or Pitjantjatjara people from the west was plausible (T. 2568–99, 2735–65).
- There is no support in the anthropological literature for the existence of a Yankunytjatjara Pitjantjatjara Antakirinya community (T. 2646–52), nor is it an ethnographic reality (T. 2370–2, 2798–802).
- There is evidence in the anthropological literature for a distinction between Yankunytjatjara and Pitjantjatjara identities and traditional territories that indicates the artificiality of a Yankunytjatjara Pitjantjatjara Antakirinya community (T. 2553–7, 2653–8).

To make these statements, with the benefit of hindsight, is to say nothing of the process involved, the difficulties faced by the witness in responding to questions, their hidden implications and the effect that misjudged answers might have had on the witness's credibility with the judge. The actual cross-examination was conducted at a much more minute level, exemplified by Besanko's early attention to references in a footnote in Elliott's first report. Elliott's footnote referred to a

footnote in the Berndts' report on fieldwork at Ooldea and Besanko suggested that Elliott had misrepresented the Berndts' footnote. The footnote was of minor significance to Elliott's report, but the judge, who also had the relevant passage from the Berndts, tended to agree, from his own reading, that there had been a misrepresentation (T. 2376).¹⁷

This exchange began a long series of questions that examined passages in particular articles in the anthropological literature and questioned Elliott on why his conclusions seemed to be at variance with the quotation. The process of considering each individual item in the archive tends to reinforce the background assumption that the archive is easily accessible to the non-expert and is not a diverse, complex and ever-expanding and continually revised body of knowledge. Then the repetition of each instance that does not directly support the expert's conclusion creates a cumulative effect of the recalcitrance and unreasonableness of the expert.

The only effective way to deal with this kind of cross-examination is to convincingly demonstrate that the passages quoted have been taken out of context and that, given a proper understanding of the totality of the archive, the expert's concluded view is correct. In effect, this means reclaiming mastery over the anthropological archive. Elliott managed to do this on a number of occasions—for example, when Whittington confronted him with one episode,

17 The disputed footnote was in an appendix to the Oceania monograph *A Preliminary Report of Fieldwork in the Ooldea Region, Western South Australia*. The appendix described an initiation ceremony held at Macumba Station in 1944 involving 'Antingari, Pidjandja and southern Aranda' people. Following the sentence 'The songs employed referred to the *Ma;lu* and *Kanjala* myth', the footnote reads:

This Kangaroo and Euro myth belongs partly to the Pidjandja and partly to the Aranda people; it is because of this feature that the ceremony applies appropriately to people of Aranda and Pidjandja (*and hence Antingari, because of its similar cultural background*) extraction, such as are to be found in the Oodnadatta–Macumba area. It further accentuates the fact that it is not only since European times that these two peoples have been in close contact; although each group has maintained a definite pattern of culture clearly dissimilar to that of the other, a certain merging of religious dogma and ritual was unavoidable and was indeed welcome as a means of revivifying certain ceremonies from time to time. In fact the further a certain myth extended, the greater the prestige and sacred aura assumed by the relevant cult lodge; the ceremonies, the ritual, songs and relics (i.e. the sacred objects) developed into a 'big law' or 'big word'; see also Oceania, Vol. XIV, No. 1, p. 42. [Emphasis added]

The footnote then goes on to outline the myth and at various points contrasts 'Pidjandja' and Aranda terminology. Elliott's footnote read:

In the Berndts' usage, 'Pidjandja' [= Pitjantjatjara] includes 'Antingari' (which I expect denotes Antikirinya). According to the Berndt's [sic], the 'Pidjandja' and 'Antingari', while being 'clearly dissimilar', share a 'similar cultural background' due to close social contact, occupation of an association with nearby areas and the 'merging of religious dogma and ritual' over time (1945:243). (Elliott 2000:35)

Besanko questioned whether the Berndts' footnote supported the assertion in Elliott's footnote, suggesting that the Berndts' footnote was essentially a comparison of Aranda and Pitjantjatjara. The judge tended to agree (T. 2376). In my view, Elliott was correct in his reading of the phrase in brackets, but incorrect in his reading of the remainder of the footnote, which is more consistent with a Pitjantjatjara–Aranda comparison.

supportive of his case, in the long-running Australian local organisation debate. Elliott was able to pinpoint just where Whittington's selective quotation appeared in the broader debate (T. 2712). Many times, however, Elliott's answers were a taciturn denial of the proposition being put to him. In effect, he was standing his ground, but not taking up the opportunity of providing a further explanation of his view.

Elliott faced the dilemma that all expert witnesses face: knowing that the cross-examiner is trying to trap them and having to decide whether to concede a seemingly innocuous proposition or quickly intuit the implied critique and attempt to answer it in advance. To concede too readily will undermine a considered opinion. Not to concede a seemingly obvious proposition might appear to be unresponsive, inflexible and biased. These critical decisions have to be made instantaneously. The experienced expert witness is able to project independence by being able to engage in hypothetical discussions, by readily agreeing to seemingly innocuous propositions, while adding any relevant reservations or qualifications and, generally, by giving expansive answers. Elliott did manage this on occasion with answers in the following form:

C. N. ELLIOTT: I think that's right but, to be more accurate, I think...
(T. 2545)¹⁸

The rattled, inexperienced expert witness tends to be negative and defensive. Even experienced expert witnesses can be made to appear unresponsive and biased, if they respond to seemingly obvious propositions with the technical reservations that can be portrayed as pedantic, which is so readily perceived as evasiveness (accordingly, accuracy becomes quibbling and pedantry). Elliott's overcautiousness at times exasperated the judge (see T. 2691–2, 2576–7). In this battle of perceptions, there is an obvious mismatch between the field of the academy, in which fine distinctions and counter-intuitive refinements might be rewarded, and the juridical field, in which encapsulating generalisations and agreement to 'commonsense' observations might be more persuasive.

Elliott explained to me that there was another, more compelling, reason why his answers were short; this reason was not reflected in the transcript. He was simply cut off by the judge, who would indicate with a nod that the cross-examining barrister should continue.¹⁹

Unfortunately, Elliott often tended to anticipate questions rather than answer the question asked, and this had a similar effect of projecting unresponsiveness

18 Elliott thought that he had answered in this form on many more occasions and pointed to examples at T. 2539, 2541, 2563, 2564 and 2700.

19 Craig Elliott's comments on the draft chapter, July 2005.

and inflexibility. One example was Whittington's attempt to engage Elliott in hypothetical discussions about different models of population movements, contrasting peripatetic movements and permanent migration:

MR WHITTINGTON: The essential difference is this, is it not, Mr Elliott, that in the latter case, the migratory model, the movement is permanent?

C. N. ELLIOTT: No, I don't accept that, I think the record shows that people moved around to settlements such as Ooldea and to the stations on the eastern side of the Western Desert and further to Oodnadatta and Finke...

MR WHITTINGTON: Now, you're there addressing what you considered to be the fact of the matter as opposed to the two models I've put...you would accept that conceptually there are two different models, wouldn't you?

C. N. ELLIOTT: I don't accept that kind of distinction because in this region, a region of great aridity, it's not possible to say that people would move with the intention of migrating to another place. The people moved around in order to sustain life and for other social and religious reasons. There are both similarities and differences in the two processes.

MR WHITTINGTON: So you will not as an expert witness even allow the possibility of those two theoretical models so we can attempt to test what you say? (T. 2741–2)

When the expert witness is being cross-examined, he finds himself alone in the world. He cannot seek safety in having confined himself to the terms of his brief.²⁰ His own counsel cannot help him, apart from objecting to questions on an extremely limited number of grounds. The judge cannot help him, for fear of unfairly limiting the right of opposing counsel to test his evidence.

Recalling the cross-examination when I interviewed him in 2005, Elliott admitted to a growing feeling of fatalism. He began to feel that any concession would be used against him, that standing by his reports would be portrayed as inflexibility, and that the judge had already taken a negative view of him and was cutting off his answers. This feeling might help to explain the many missed opportunities to attempt to win over the court to his point of view by further explanation. Elliott's feelings are understandable, especially considering that

20 There is a legal argument that the terms of a brief would be relevant to the assessment of professional obligations in a non-litigation setting according to Justice von Doussa in *Chapman v Luminis Pty Ltd* (No. 5) [2001] FCA 1106 (21 August 2001). The judge made it clear that these considerations did not apply to an expert witness in court. Even in non-court situations, von Doussa's reasoning has been criticised (see Burke 2002; Edmond 2004; Merlan 2001).

the judge's first intervention in his cross-examination was the negative comment about the footnote mentioned above (T. 2376), and other instances when the judge adopted a sarcastic attitude:

HIS HONOUR: In 1953 were you engaged in the discipline of anthropology?

C. N. ELLIOTT: No, I wasn't, sir.

HIS HONOUR: I didn't think so. What's your justification for saying that Tindale, who was then engaged in the discipline of anthropology, was wrong to say that Aboriginal groups fought and killed for territory? (T. 2747)

The judge's irritation did on occasion lead him to give Elliott advice on how to better respond to some questions. He advised Elliott that, if a question could not be answered with a 'yes' or 'no', he could say so (T. 2699) and that he should answer a question first then add qualifications, not answer with the qualifications (T. 2683). These seemingly helpful suggestions probably had their own demoralising effect since they provided feedback to Elliott that he was not meeting the judge's expectations of an expert witness.²¹

Daniel Vachon's and Jon Willis's evidence

To keep this case study within reasonable bounds, I have omitted consideration of Vachon's evidence. Willis's evidence, being restricted, is largely inaccessible. There are, however, some references to it in the unrestricted transcript. These references indicate the centrality he gave to the concept of *kuranitja* (spirit essence of the Dreaming ancestors)—a term not mentioned by Woenne-Green or Elliott. It was potentially important in explaining the different pathways to becoming *nguraritja* in a unified way, based on traditional Aboriginal beliefs—that is, in a way that avoided the complexities of anthropological theories, but at the same time illuminated them. Willis had apparently spoken of birth as a coming into being of local *kuranitja*, particularly entering the body during the period commencing from conception to the dropping of the umbilical stub, but also *kuranitja* entering the body through the water and food taken from the country over the course of a lifetime (T. 3455).

²¹ Elliott's view was that these seemingly helpful interventions were in fact designed to help the cross-examiners, not him (Comments on the draft chapter, July 2005).

Maddock's cross-examination

Howie's cross-examination of Maddock is reminiscent of the cross-examination of Kolig in *Rubibi*, although it is clear that Howie had a better grasp of anthropology and was able to engage in a more fluid discussion with Maddock. The aim was to neutralise Maddock's most harmful opinions by systematically recounting the evidence in order to demonstrate the observance of tradition and the existence of a Yankunytjatjara Pitjantjatjara Antakirinya community, in the hope of forcing some concessions from him or demonstrating his unreasonableness. Another, more aggressive course would have been to attack his lack of fieldwork experience in the Western Desert. Howie decided against this course because he thought, on balance, that Maddock's evidence was helpful to their case and that his evidence would be influential with the judge.

The strategy was successful up to a point, but on some critical issues Maddock remained unhelpful to the claimants. Adopting a rather strict approach to the requirements of evidence, he was not prepared to include the claimants among the strong ritual community described by Willis because he felt that there was insufficient evidence linking them to the rituals, and he noted that Elliott had not attended any such rituals as part of his research for the claim (T. 3457–62). He was also not prepared to suggest a more appropriate subgrouping, even though he thought that the claimants were within the Western Desert cultural bloc (T. 3492–520). He simply repeated his critique of the Yankunytjatjara Pitjantjatjara Antakirinya community.

The judge

O'Loughlin was a solicitor specialising in taxation law in Adelaide between 1964 and 1984 when he was appointed as a judge of the Supreme Court of South Australia. He was appointed to the Federal Court of Australia in 1989. Besanko and Whittington were both from the Adelaide Bar and Howie detected a degree of camaraderie between them and the judge, including references to cases in which they all had been involved. O'Loughlin had also had previous encounters with Aboriginal issues.²² Justice O'Loughlin was on the verge of retirement

22 He had been a member of the Full Court bench that decided that the definition of traditional owner in the *Land Rights Act* did not require patrilineal descent groups (*Northern Land Council v Olney* (1992) 34 FCR 470); he had decided that the notice calling for submissions prior to the minister's declaration in the Hindmarsh Island dispute was inadequate and he had set aside the declaration (*Chapman v Tickner* (1995) 55 FCR 316); and he had rejected the *Northern Territory Stolen Generation Case* on both legal and evidential grounds (*Cubillo v Commonwealth* [2000] FCA 1084, 11 August 2000). He had also heard a small native title claim (*The Ngalakan People v Northern Territory of Australia* [2001] FCA 654, 5 June 2001). In *De Rose Hill*, he made a passing reference to his knowledge of anthropology, gained in previous cases (T. 2277).

when he heard this case. A recurrent theme throughout the hearing was his warning about the dreaded prospect of another judge having to hear all the evidence again and his irritation that the case was taking so long.

He also seemed to have difficulty appreciating what the claimants were hoping to achieve through the claim:

[39] Some, but not all, of the Aboriginal witnesses were asked what it would mean to them if the claimants were to be successful in obtaining a determination of native title. Of those who were questioned on the subject, some did not have an answer. None of them gave detailed evidence that amounted to statements of intention to resume the observance of traditional customs or the maintenance and acknowledgement of traditional laws.²³

That the judge had difficulties with the merits of the claim was confirmed by the claimants' solicitor, Tim Wooley, who had attended all the preliminary hearings and had tried to explain to the doubtful judge the potential benefits of the right to negotiate under the *Native Title Act*.

One can easily imagine the old judge, trudging around the desert in winter in the cold and rainy conditions, wondering to himself, 'Why are we here; for all the resources put into the hearing how will the claimants benefit and will it be worth the disruption to the pastoralists?' The strategic importance of the case for the whole of the pastoral zone was not something that could legitimately be raised in the case and certainly it could not have been taken into account explicitly by the judge, who was obliged to consider the merits of the case on evidence presented. The broader considerations did enter into the judge's reasons, but in a negative way for the claimants. He seemed to think that De Rose Hill Station had been unfairly targeted since the claimants' traditional country extended beyond the boundaries of De Rose Hill to neighbouring pastoral leases, which had not been claimed (see para. 908).

The judgment

O'Loughlin delivered his exceedingly long judgment on 1 December 2002.²⁴ In his detailed review of the claimants' case and the course of their evidence, two opposite approaches to the Aboriginal evidence emerged: one sympathetic to the

²³ Also see paras 39–47.

²⁴ It was 933 paragraphs long, filling 259 printed pages.

difficulties that the claimants faced as witnesses and another based on a strong belief in the ability of forensic processes to cut through all those difficulties and find the truth.²⁵

O'Loughlin had no difficulty in finding that certain monosyllabic answers of Aboriginal witnesses to leading questions in cross-examination completely undermined the position they had taken in their written statement and examination-in-chief (paras 92–3, 95). The judge also took a hard line on the need for a high degree of consistency in Aboriginal evidence. Instead of considering the possibility of contextual factors influencing the naming of different people as *nguraritja*, the judge concluded that Peter De Rose had deliberately lied in his evidence as demonstrated by the inconsistencies in lists of names given to Elliott years before, during the research (para. 85). Moreover, although the judge seemed to be sympathetic to the many difficulties faced by the Aboriginal witnesses, he remained unsatisfied with the level of detail of their evidence in the witness box and he made an invidious comparison with the level of detail he received from Dr Willis, particularly about the laws and customs of male initiation (paras 336–42).

One of the features of O'Loughlin's judgment is how seemingly innocuous pieces of evidence are promoted to centre stage. For example, evidence about the duty of *nguraritja* to clean certain sacred waterholes, which Whittington used in cross-examination as evidence of the decline of tradition, was taken up with a vengeance by the judge. Peter De Rose had explained his neglect of his *nguraritja* duties in terms of the priority given to station work when he was employed by the Fullers. But the judge expected more energy and bravery: 'If Peter and the other witnesses who said that they were *Nguraritja* for De Rose Hill were intent on performing their duties as *Nguraritja*, I am quite satisfied that they would have entered on the land—even surreptitiously if necessary—to perform their duties' (para. 106).

As might be expected, the excessive denials of everything Antakirinya became a major theme for O'Loughlin (paras 117–44). He concluded, however, that

there was sufficient evidence adduced in this trial for me to conclude that there were (and maybe are) two closely related Aboriginal groups speaking the same language and dialect—the Antakirinya and the

25 The first approach is exemplified by his acknowledgment of the limited value of answers to leading questions and questions containing alternatives (paras 249–59); the futility of cross-examining on Aboriginal Dreaming tracks as if they were compatible with European boundaries (paras 81–2); the acknowledgment that specifying boundaries for one's traditional country in cross-examination was an unnatural exercise for these Aboriginal witnesses (para. 115); and generally acknowledging the limits of the adversarial process in finding answers to questions such as whether in the past, prospective parents would return to a husband's country for the birth of the child (para. 89). It is interesting to note that some of these passages were quoted by Graeme Neate, the President of the National Native Title Tribunal, to demonstrate judicial acknowledgment of the difficulties faced by Aboriginal witnesses (see Neate 2004:20–3). Neate tended to ignore the second tendency in O'Loughlin's judgment.

Yankunytjatjara. I am not, however, able to make a finding to the effect that the Antakirinya people once inhabited the claim area but were dispossessed by the Yankunytjatjara. (Para. 144)

In relation to the reason for Aboriginal people leaving De Rose Hill Station, the judge recited the conflicting evidence about 'Snowy's accident' but refused to make a finding about whether it had precipitated a walk-off (paras 277–83). He even refused to make a finding that Aboriginal people left De Rose Hill because of perceived hostility by the Fullers, explaining that '[i]f the Aboriginal people left De Rose Hill Station for an unreasonable or illogical reason (even though subjectively they may have thought their departure was necessary) they cannot now turn their lack of reasonableness and lack of logic to their advantage' (para. 291).

The expert anthropologists

The older ethnographic sources were dealt with as a separate issue in the judgment (paras 292–305), demonstrating that they had become dislodged from the umbrella of expert testimony, somewhat like historical documents that are easily accessible to the layperson and could not be claimed as part of the esoterica of an expert anthropologist. Elkin, Tindale, Berndt and Strehlow were all introduced in terms of their academic capital, the position they attained within their various institutions, giving an indication of how the juridical field would reorder the academic field. Unlike historical sources, however, there seems to be a reluctance to reinterpret older anthropological conceptualisations of landowning groups. For example, in relation to Berndt's work the judge stated:

I do not necessarily regard the evidence of the witnesses as a contradiction of the earlier literature; rather it is explainable, either on the grounds of the evolutionary process, or because the traditional laws and customs of this area are and were at variance with the traditional laws and customs on which the early writers had based their opinions. (Para. 102)

This approach bears many similarities with the way in which later anthropologists have dealt with ethnographic information inconsistent with horde theory (see Chapter 4).

Elliott did not fare well in O'Loughlin's judgment:

[352] Unfortunately, I have come to the opinion that Mr Elliot became too close to the claimants and their cause; he failed to exhibit the objectivity and neutrality that is required of an expert who is giving evidence before the court. Rather, he seemed—too often—to be an advocate for the applicants.

The examples the judge gave had been passed over in cross-examination uneventfully. Now, they became the prime examples of Elliott's bias and advocacy. At various points during his research, Peter De Rose had given Elliott the names of people whom Peter thought were *nguraritja* for De Rose Hill Station. Some of the people whom Peter De Rose had initially dismissed as not being *nguraritja* were ultimately included in the claimant group. The judge concluded that, because Elliott had not mentioned and explained Peter De Rose's contrary opinions, Elliott had lost his neutrality and become an advocate (paras 353–7). What is difficult to follow in this example is why distancing himself from Peter De Rose could not just as easily be seen as demonstrating Elliott's independence.

The judge gave another example in which he elevated an even more obscure transcribed interview with Riley Tjayranyi, conducted early in Elliott's research. Riley had made an initial denial of being *nguraritja*. Elliott had explained this in cross-examination as being part of an Aboriginal etiquette of preferring such an identification to come from others. On reflection, he explained to me in 2005 that it might have simply been Riley's ironic humour. Now the omission of an explanation of this incident became the example *par excellence* of why Elliott's reports could not be accepted as presenting an accurate picture of the information the claimants had given him (para. 359).

O'Loughlin bolstered these examples with an account of Elliott's cross-examination:

I must say that Mr Elliot seemed very reluctant to accept, either that such migrations were permanent, or that they were in any way due to the attractions of white settlement. There was ample evidence to warrant a finding that these migrations did occur (most notably as a result of the claimants' own evidence), and his refusal to concede as much indicated, in my view, an obdurate refusal to give ground where appropriate. (Para. 366)

The judge did accept some of Elliott's evidence. He accepted much of the factual information about the various Dreamings and sites in Elliott's reports as corroborative of the Aboriginal witnesses' evidence and as providing contextual detail. Critically for the claimants, he also accepted Elliott's fourfold criteria for becoming a *nguraritja* (para. 897). The judge concluded, however, that 'his partisanship has been his undoing and, as a result, where he has expressed an unsupported opinion that is at odds with Professor Maddock, I rely on the evidence and opinions of the Professor' (para. 367).

The lack of support from Maddock for the concept of a Yankunytjatjara Pitjantjatjara Antakirinya community and the lack of explicit supporting evidence from the Aboriginal witnesses led O'Loughlin to reject Elliott's evidence on this issue (paras 360–5).

In total contrast with the judge's assessment of Elliott was his praise for Maddock: 'Professor Maddock gave his evidence in a forthright and neutral manner. I have had no difficulty in accepting him as an expert, well-qualified to comment on anthropological matters' (para. 369).

O'Loughlin's only reservation was about Maddock's misguided belief in the need to access traditional laws and customs as they existed at the time British sovereignty was asserted. On this issue, Maddock seemed to have assumed a more extreme position than legal doctrine required, for the need to make inferences about the distant past from post-contact sources and archaeology had long been accepted by the courts (paras 369–70).

On everything else, O'Loughlin adopted Maddock's views. Advantageously for the claimants, it meant support for the judge concluding:

I see no reason why the migratory movements of the Pitjantjatjara to the east—whether as a result of drought or war or marriage—should not be accepted as part of the history and social structure of the Aboriginal people of the Western Desert Bloc. This conclusion, which is no more than an inference that is based more on the evidence of *Anangu* witnesses than it is on the opinions of the experts, gains some support from the frequency of intermarriage and the consequential movement between the Pitjantjatjara and Yankunytjatjara people. (Para. 372)

That conclusion avoided the whole usurpation issue. Adopting Maddock's views also meant, however, adopting his criticisms of the lack of precision in Elliott's reports about the observance of tradition and Maddock's general doubts regarding the adequacy of the claimants' evidence of the current observance of tradition (paras 373–8).

Maddock's doubts were strictly superfluous, for the judge was obliged to make his own assessment of the same evidence that Maddock had heard. Yet Maddock's doubts are given a pivotal position in the structure of the judgment. They seem to justify the remainder of the judgment, which is an evaluation of the observance of traditional laws and customs relating to the claim area following the 1978 exodus.

The long and winding road leading to the judge's eventual negative conclusion can be summarised as follows.

- Belated efforts to protect some sites on De Rose Hill Station raise the question of the claimants' prior inactivity regarding the same sites (para. 402).
- Evidence of older witnesses that ceremonies used to be held at some sites highlighted the absence of those activities since then (para. 429).
- Despite Doug Fuller's 'aggressive, bullying demeanour' and the occasional intimidation of Aboriginal people by the use of firearms, Snowy De Rose, Peter De Rose and others gave evidence that they were not fearful of returning to De Rose Hill (paras 430–48).
- It was difficult to accept that some Aboriginal witnesses genuinely thought that Doug Fuller might shoot them (para. 482).
- Evidence of station gates being locked prior to 1994 was incorrect and not a legitimate excuse for the claimants not returning to De Rose Hill post-1978 (para. 491).
- Peter De Rose did not give any cultural or religious reason for his intermittent visits to De Rose Hill after 1978, save for hunting kangaroos (para. 592); he did not give the detailed evidence about his responsibilities as *nguraritja* for teaching others about the sites on De Rose Hill, including whether he taught his own children and grandchildren; he had not fulfilled his *nguraritja* duties to clean out certain sacred waterholes; all this is evidence of his abandonment of his traditional connection to the area.
- All the other claimants did not demonstrate a strong traditional connection to De Rose Hill as they had also failed to attend to their traditional duties as *nguraritja*, failed to visit or maintain their connection with the land post-1978, and had allowed 'non-Aboriginal factors', such as following work and educational opportunities, to rule their lives (para. 681).

In conclusion, the judge asserted

- gaps in the evidence about the communal and ritual life of the claimants (para. 905)
- lack of evidence that the claimants met each other or participated in the communal or group ceremonies, discussions or projects (para. 910)
- loss of physical connection since 1978
- loss of spiritual connection as demonstrated by the lack of performance of ceremonies on the land and lack of any plans to use the land for traditional purposes if they were successful (paras 906–8).

In short, there had been a loss of traditional connection and there was no longer any native title.

The view of the Full Federal Court

ALRM appealed to the Full Federal Court. The bench consisted of Justices Wilcox, Sackville and Merkel. They proved sympathetic to the claimants' complaints about O'Loughlin's judgment and, ultimately, they overturned it and substituted their own determination of native title.²⁶

That the Full Federal Court could overturn Justice O'Loughlin's findings requires us to qualify the idea of fact-finding being the trial judge's empire; it now seems more like a shared responsibility with appeal courts because of the vague fact/law distinction and the fundamental indeterminacies in the key concepts of the legal doctrine of native title. The effect of this qualification is that, although appeals are meant to be restricted to questions of law only, appeals in native title can reopen many issues, to the extent of appearing to be another chance to re-argue final submissions.²⁷

Conclusions about the *De Rose Hill* case study

When I made my initial approach to Elliott, explaining that my interest was in the nature of anthropological agency in native title claims, he thought that it was laughable, given his experience. 'What agency?' he asked. Had not the terms of his involvement been dictated by law and lawyers from the very beginning? His relative powerlessness to influence the direction of claim research and the presentation of the evidence does require examination (see below). Within these constraints, however, he did have choices to make about the triangulation of the claimants' likely evidence, the anthropological archive and legal doctrine, as well as choices about the degree of explicit reflexivity regarding key indeterminate terms that he incorporated into his report and evidence (see Chapter 1).

One of his most successful triangulation choices was to avoid the Stanner-inspired ideas of a traditional 'estate' and instead opt for a looser group of *nguraritja* and a list of four principal ways of achieving *nguraritja* status. In terms of the anthropological archive, that choice distanced him somewhat from the more clearly bounded groups of Elkin, Tindale, the Berndts and Tonkinson, and so distanced him from their academic capital. It drew him closer to Myers. Elliott's pathways to *nguraritja*-ship simplified Myers' 10 types of legitimate

26 See *De Rose and others v State of South Australia* [2003] FCAFC 286, 16 December 2003 and *De Rose v State of South Australia* (No. 2) [2005] FCAFC 110, 8 June 2005.

27 This effect was exemplified in this appeal by the extraordinary re-arguing of the usurpation thesis, converted into a legal argument, and the use the Full Federal Court made of Maddock's comments about the Western Desert bloc to justify their fact/inference distinction on the issue of the relevant native title group (paras 279–81). This distinction allowed them to say they were not disturbing a finding of fact but an inference made from the fact.

traditional claims and did not adopt his individual perspective of constant renegotiation.²⁸ Unlike Woenne-Green's long list of the variety of ways the claimants spoke about country, the identification of the four pathways could be seen as more abstract, stable and law-like. Moreover, it coincided with how the claimants expressed themselves, avoiding the problem in the *Ayers Rock* claim of a divergence between the claimants' evidence and an artificially neat model of estate groups, based on principles of descent alone.

Elliott's least successful triangulation was the idea of a Yankunytjatjara Pitjantjatjara Antakirinya community. Maddock made much of the fact that Elliott's terminology had not previously appeared in the anthropological archive. There was, however, some justification in the anthropological archive for this concept, even if Elliott had not marshalled all the evidence in his second report. Regional cultural differences within the Western Desert cultural bloc had been reported since Elkin and there had been many references to the eastern Western Desert people. Also, Hamilton identified a specific 'network' that is the same as Elliott's Yankunytjatjara Pitjantjatjara Antakirinya community, including references to Aboriginal people at Oodnadatta and Coober Pedy (Hamilton 1987). The claimants themselves did not use the terminology of 'community', and their constant disavowal of all things Antakirinya presented the impression of social distance rather than unity. Part of the problem might have been the word 'community' itself. Elliott was using it in quite a specific sense of the group of people who had in common the characteristics he listed. But the word 'community' has a wide range of references, from abstract commonalities of disparate individuals to intensive face-to-face interaction of groups with a high degree of corporate self-identification and corporate action. Elliott seems to have been pitching his idea of a Yankunytjatjara Pitjantjatjara Antakirinya community somewhere in the middle. But this level was vulnerable to demonstrations by Maddock and the pastoralist's lawyers of a lack of corporate-ness that appealed to an all-inclusive, non-technical understanding of 'community'. This possibility was open, despite the fact that Elliott never asserted a high degree of corporate-ness, and that the whole unsatisfactory enterprise was forced on the claimants by the requirements of the legal doctrine of native title to identify the group under which the claimants held native title rights. One wonders if similar problems would have arisen if it had been called 'the eastern Western Desert cultural bloc' or a 'network' or, perhaps, Berndt's 'society'.

I have already outlined the ways in which Elliott dealt with the key indeterminate concepts in his second report, principally by submerging the issue of indeterminacy, by emphasising the reportage aspect of fieldwork, by equating law and custom with culture and by selecting a title-holding group

²⁸ Elliott pointed out that, although he did not adopt Myers' perspective, his model had a significant 'biographic component' (Comments on draft chapter, July 2005).

that seemed to be justifiable. In his discussion with me in 2005, Elliott spoke of being forced to demonstrate law in native title claims, which I took as an acknowledgment that the anthropologist must choose what is relevant to the court's task. He was also aware of the danger of making anthropology appear too complex. Perhaps he was right. The only time he admitted that it was possible to construct different communities among Western Desert people according to different criteria—'cutting up the pie in a different way'—he was criticised by Maddock for departing from ethnographic reality, a criticism adopted by the judge (judgment para. 363).

In any case, Elliott felt that the content of his second report was dictated by the questions Howie had formulated for him. In the circumstances, Elliott's feelings were understandable. There was a convergence of his own critique of Woenne-Green's early report—that it had failed to come to conclusions—the extreme time constraints and the request being formulated by the most experienced land claim lawyer in Australia. But he still might have underestimated his own influence at that point, because there was really no-one else to whom the lawyers could turn.

Maddock was not in a position to make the triangulations that Elliott made. His lack of relevant fieldwork and reliance on the court evidence of the claimants meant that his role began to approximate that of the judge's. His judge-like approach is also reflected in his lack of reflexivity about the implicit standards he was applying, especially when making statements such as 'I would have liked to see more evidence of the claimants' observance of tradition' and 'I would not call the Yankunytjatjara Pitjantjatjara Antakirinya grouping a community'. These submerged standards approximate a judge's orientation to practical fact-finding and the irrelevance of abstract theorising.

Because he had his own doubts about the case, O'Loughlin did not see Maddock as a competitor, but as someone who could share responsibility with him for the ultimate negative decision. This conclusion might imply that the judge took a strong view of the correct result rather than weighing up the evidence. As usual, things are not so clear cut. The indications in his judgment of his gestalt or hunch about the justice of the case have already been discussed. There is also the evidence of his interventions as recorded in the transcript. His first intervention interrupted Howie's opening address to discuss whether physical separation from traditional country could lead to a finding of loss of traditional connection (T. 23).

On the other hand, O'Loughlin's exhaustive account of the evidence in his judgment, including his acceptance of some of the claimants' arguments, and criticism of some aspects of Maddock's evidence, give the impression

of thoroughness and the process of weighing the evidence. Again, for the experienced judgment writer, this is not necessarily inconsistent with having a strong hunch about the preferable outcome of the case from the very beginning.

One of the other impenetrable subtleties raised by this case is the extent to which the judge adopted what I would call the hubris of the superiority of forensic fact-finding. The judicial role requires an attitude of acceptance of legal doctrines about deciding cases on admissible evidence only. But this acceptance can range from the pragmatic (it is necessary and sometimes can reveal the truth) to unswerving belief (it is always the best way of revealing the truth). O'Loughlin seemed to waver between these two positions, as exemplified in his contradictory stances on the difficulties facing Aboriginal witnesses in the witness box.

The professional commitment of anthropology to the value of evidence arising from long-term fieldwork suggests scepticism towards what informants might say under pressure in a one-off court appearance. Elliott commented to me, rather sardonically, that, given all the typical problems with hearings, he was actually surprised that so much of the claimants' evidence did come out in a way that was consistent with what he had previously been told. It is now only possible to wonder how Maddock would have compared the different standards of what counts as evidence. In his published work, he seemed to be quite impressed with forensic standards.

Because of the big differential in academic capital between Elliott and Maddock, this case study raises the issue of the expert's position within the field of the academy, and his broader class position, more starkly than in the other two case studies.

Maddock, at the end of his career, had nothing to lose. He was able to give expansive answers, engage in hypothetical discussion and make concessions while preserving his essential point. My critique of his reports could be summarised as his carelessness about the consequences of his submerged criteria for what constitutes an adequate anthropological explanation in a native title expert report. It was, however, this very carelessness about consequences that was received by the judge as evidence of forthrightness and independence in the witness box. His courtroom performance and his academic capital combined to give him great influence, as evidenced by the judge, the claimants' lawyers and the Full Federal Court all seeking to support their position from his opinions.

Apart from Maddock, there were also the phantom experts, the big names in the anthropological archive: Elkin, the Berndts, Tindale and Strehlow. I have suggested that the separate status they were given in O'Loughlin's judgment reflects a struggle over the 'ownership' of the anthropological archive that is

peculiar to native title processes. The early ethnography tends to be treated like historical sources: accessible and open to anyone to interpret. Paradoxically, this also tends to take them out of history, in the sense of the theoretical cross-currents of the time, and their reception and ongoing reassessment within anthropology. The struggle between judge and expert over the prerogative to authoritatively interpret the anthropological archive became even more explicit in the later Western Desert case of *Yulara*, which will be considered in the next chapter.