

## 9. Conclusion

The essence of this book, and its major claim to originality, is the move to step outside the professional discourse of both law and anthropology so that a more comprehensive account of their interaction in native title might be provided. In other words, it tries to take a genuinely sociological view of the native title encounter. To do otherwise would risk becoming captive of those very professional discourses that need to be seen as part of a bigger picture. The professional discourse of law would tend to collapse the whole of this book into categorical judgments about establishing expertise, the scope of expert testimony and questions of bias. Similarly, to simply adopt the perspective of applied anthropology might have led to a defensiveness that would promote the relevance of anthropology to native title and pass over the significant cracks in establishing a disciplinary consensus about some key issues and downplay the wide range of abilities among expert anthropologists.

To conclude this book, I intend to explore what generalisations can be made from the case studies about the nature of anthropological and judicial agency in the native title encounter—in other words: how have the original ideal models been tested in the case studies? But first I wish to address some methodological issues that emerged during the course of this research.

### Agency and method

My discussions with Craig Elliott about the draft of the *De Rose Hill* case study prompted a re-examination of the nature of anthropological agency and the possibility of methodological bias in this research project. In some respects, that case study confirmed the triangulation model of anthropological agency, if in a more diffuse way than Figure 1.1 would suggest. Elliott strongly agreed with my suggestion that Myers' approach to traditional land tenure, as the sum of negotiable individual claims, was inappropriate in the native title context. This would seem to support the process of selection that I attributed to him.

Yet, Elliott thought that my description gave the impression of methodical calculation that was in fact alien to his experience of writing his reports. His recollection was of performing a role, without explicit consideration of all the options available to him. The methodological question that these differences of perspective raises is whether my model of the process of deconstructing the archive and setting out the available choices (as I have attempted in Chapters 2, 4 and 6) produces a systematic bias towards strong, deliberate selection as opposed to a weak, implied selection. This is certainly a possibility and was

the basis of my own reservations about the strong, deliberative agency that the sceptical critique of judicial fact-finding seemed to attribute to all judges in all circumstances. As Goffman demonstrated in *Strategic Interactions* (1969), the central problem is that a key part of strategic action is not revealing one's game plan to other participants. This strategy applies to judges who take a strong view about the best outcome of the case and it would also apply to anthropologists who are interviewed by a researcher about their performance as expert witnesses. There is no easy solution to this problem. All attributions of deliberative agency beyond what is admitted are inevitably inferences from all the available information. Ultimately, all that can be done is to carefully compare my interpretation with the subject's interpretation and seek to explain the difference.

In the *Mabo* case study, a similar issue arose over my use of the word 'clever' to describe Beckett's all-inclusive and general formulation of the traditional land tenure principles. In the highly politicised field of native title, 'cleverness' could imply deviousness, whereas all I wanted to imply, at that stage, was the neat fit between his generalisations, the anthropological archive and the assumed requirements of legal doctrine. Beckett's response—to assert that his generalisations were determined by the ethnographic evidence—was more suited to the juridical field. Perhaps, given my legal background, this was how he chose to respond to the question—as if he were being cross-examined again.

In other respects, however, Beckett was happy enough with my adoption of his account of the deliberate choices he made to distance himself from Eddie Mabo's traditionalism and respond to the whole of the anthropological archive, which meant, in effect, describing the contemporary assertion of Malo's Law as neo-traditionalism. I found his account plausible because of his lack of integration into the legal team running the case. Yet, in the back of my mind is also the distant possibility of his having enlisted me in his own project of preserving for posterity his version of the historic case.

## **The case studies as a test for the model of anthropological agency**

### **Orientation to the juridical field**

In relation to Beckett in *Mabo*, I have already indicated that the legal doctrine corner of the triangle needs modification to include more amorphous or global appreciations of the requirements of the juridical field (see Chapter 3). These general appreciations are perhaps evidence of an anthropological gestalt of the

juridical field. Even after the High Court's formulation of the legal doctrine and the defining of native title in the *Native Title Act*, anthropological views of the legal requirements were not limited to understanding legal doctrine. Sullivan, for example, was dismayed by the broad terms of the legal doctrine. He and the Kimberley Land Council thought the *Mabo* decision would lead to high-level political negotiations. In fact, it became the inadequate foundation for a court-based land rights scheme. He saw the potentially destructive, regimenting effect of legal recognition and was determined to resist it by arguing for an all-inclusive grouping to become the title-holding group. Elliott seems to have been more focused on the terms of legal doctrine. Even before Howie provided the topics for his second report, Elliott, sensing the rudderlessness of previous research, had been attempting to formulate schematic diagrams of the elements that needed to be proved in order to establish native title.<sup>1</sup>

All the anthropologists in the case studies had a clear idea of the expectations in the juridical field of expert independence and their duty to the court rather than the parties that called them. Both Sullivan and Elliott, however, indicated that their appreciation of the problem of projecting independence, despite their being engaged by the claimants, only developed afterwards. It had not occurred to them that their position was particularly problematic, as a passing acquaintance with the 'junk science' debate would have indicated.<sup>2</sup> Since the jolt of the *Yulara* case, the issue of projecting independence must surely be in the consciousness of all potential expert anthropologists. In that case, practices that seemed innocuous in *Land Rights Act* hearings—such as participating in the overall formulation of the case, suggesting good Indigenous witnesses and suggesting questions to counsel—were all transformed into possible evidence of bias.

Another aspect of anthropological images of the juridical field was revealed in Kolig's high expectations of standards of proof—what should count as convincing evidence (see below).

## Orientation to the anthropological archive

As an overarching proposition, the idea of the deconstruction and reconstruction of the anthropological archive in the light of the requirements of the juridical field covers most of the anthropologists in the case studies, but not all. Beckett, Sullivan and Elliott took a broadly evaluative approach to the archive, whereas Maddock, and especially Kolig, adopted a more respectful and protective attitude. In Kolig's case, this attitude seems to have extended to adopting Elkin's

1 Interview with Craig Elliott, 26 March 2005.

2 For the meaning of the 'junk science' debate, see Chapter 1 under the subheading 'Law and scientific expertise'.

dismissive attitude towards Piddington. This difference suggests a continuum of approaches to the anthropological archive. At one end, early ethnography is seen as sealed off from criticism because of a conviction about its methodological rectitude and the fact that the world of the early ethnographers' informants is no longer accessible. At the other end is a view that the whole of the archive, including the methodology used in creating it, is in a process of continual reinterpretation as new material is added. These considerations are suggestive of a more nuanced model than the simple deconstruction–reconstruction that I originally proposed. All anthropological experts have an interest in defending and promoting the value of their disciplinary archive, even if they have come to different conclusions about what is destructive of the general standing of that archive, and what simply represents a new disciplinary consensus about the relative merits of its different parts. Thus the orientation of the expert witness to the anthropological archive should be reformulated as one of deconstruction within the bounds of the perceived disciplinary consensus.

### Demonstrating a disciplinary consensus

The case studies in this book draw attention to two vital topics in Australianist anthropology in which a disciplinary consensus has been difficult to find and project in court: the best description of the ownership group in the pre-contact period and what current rules and practices relating to land can be cast as traditional.

The first of these topics has become entangled in what is known in anthropology as 'the local organisation debate'.<sup>3</sup> But for the advent of land rights legislation and native title this arcane debate might have died a natural death long ago because the evidence required to advance its resolution continues to recede into the distant past. This receding evidential base means that expert disagreement about pre-contact land tenure is likely to be a continuing feature of native title claims.

In many parts of Australia there is very limited evidence of the pre-contact era and consequently the task becomes one of extrapolating from other areas. This involves the modification of Radcliffe-Brown's horde model and, for some, the complete rewriting of the horde model. The main conceptual modification has

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

been to separate the land-exploiting group (the band) from the ownership group (the patrilineal clan) that owns the sacra for a defined area and has exclusive rights to use the area.<sup>4</sup>

Other modifications will typically make more complex the self-sufficiency of the original theorising of the horde and its all-or-nothing concept of ownership. The supposed self-sufficiency of the horde is made more complex by bringing in the regional systems—for example, trade, shared kinship and section systems, regional initiation rituals, shared long-distance Dreaming tracks, identification of language areas, dispute-resolution procedures and so on. Simple ownership is made complex by providing a grading of different kinds of ownership rights, which minimally mean including secondary rights to mother's father's country. Still further modifications could be extrapolated from Myers' approach to Western Desert traditional land tenure with its variety of legitimate bases for traditional claims leading to a flexible and contingent grouping of owners for any one area. To be clear, Myers never suggested that his approach—of commencing with the terms of legitimate individual claims to traditional country—was a general Australia-wide model; quite the opposite. He presented it as a distinctive regional cultural variation.

Rather than justify a position here, the point I wish to make is that the rather subtle differences of interpretation I have been canvassing tend to be amplified in the adversarial system of native title hearings. This means that anthropologists are sometimes caught in a bind. If the relevant grouping in the pre-contact era is characterised as a regional grouping, it tends to make the argument about continuity with the contemporary era easier but at the risk of undermining key figures in the anthropological archive. Postulating minimal change over the colonial period also challenges credulity because the momentous changes to the lives of Aboriginal people must surely have had their effect. On the other hand, those who characterise the relevant ownership group as the clan with its clan territory then have to explain that the dramatic early collapse of the patchwork of clan territories and the rise to prominence of language group territories are still within the range of acceptable change contemplated by the legal doctrine of native title.

### Cultural change and the anthropological archive

Beckett and Kolig stand out among their contemporaries for their interest in the historical transformation of culture, and their approaches in the case studies have exemplified the problems of forming a disciplinary consensus.

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<sup>4</sup> Because of inconsistencies in Radcliffe-Brown's own terminology, it is also necessary to make some technical clarifications to Radcliffe-Brown's original theorising so that it is clear that out-marrying daughters of the patrilineal clan retain ownership rights to their father's country.

Beckett had developed a comprehensive account of the transformation of island custom under colonial circumstances. In comparison, his account of the Meriam domain changing at a slower pace—while plausible in relation to traditional land tenure—seemed more of an improvisation. By this I mean that it had not previously been analysed in those terms so that the features of a Meriam domain and its relationship to other aspects of Meriam life and the wider world could be specified and come under academic scrutiny. On the mainland, the idea of an Aboriginal domain has been used in a variety of circumstances to denote Aboriginal camps on pastoral stations, remote cultural enclaves or as a deliberate Aboriginal strategy to cope with overbearing missionising in government-sponsored settlements (see overview in Rowse 1992). It is easy to see how such a concept—although not used in the mainland case studies in this book—could be part of an explanation of continuity over the colonial period.

Despite Kolig's longstanding interest in the process of modernisation of Aboriginal religion, cross-examination of his assessment of what constitutes 'reasonable change' revealed a surprising absence of a convincing theoretical position. I explained this absence as resulting from the critiquing role he adopted in the *Rubibi* hearing since it is clear from his published work that he *had* deployed ideas of cultural change such as a generalised Aboriginal consciousness changing as Aboriginal people adopted European daily routines and came into contact with a wider circle of Aboriginal people.

Thus, alongside the process of deconstruction and reconstruction of the existing archive is a process of attempted improvisation where the requirements of legal doctrine reveal a gap in the archive. For a variety of reasons, such gaps are not easily plugged. As in any large field such as Australia, the ethnographic and historical record is likely to be patchy and vary enormously in quality when researching particular claims. Fardon's theorising about the unique development of regional specialisations would suggest that early ideas for a historical anthropology, and later critiques by Wolf (1982) and Fabian (1983), about the pitfalls of ignoring historical context and global interconnections, did not take root as strongly in Australia as in other specialisations. The pre-contact era was still so tantalisingly close—at least in remote areas—during the post-1930s professionalising of anthropology in Australia, it is understandable that the focus was on reconstructing those societies and bracketing what was called 'culture contact'. Even though community studies began to appear with subtitles such as 'tradition and change in an Aboriginal tribe' such concepts remained at an unhelpfully general level. It was not until much later that more complex analytical frameworks and different writing strategies were developed. Merlan's 1998 book *Caging the Rainbow* is a landmark in these developments with its explicit theorising of the intercultural. She fully explored the implications of the reality that all personal identity is relational including in relation to the European colonisers and contemporary state projects to recognise land rights.

These belated advances in the understanding of intercultural history coincide with the belated legal recognition of native title with its seeming emphasis on a relatively complete and separate system of laws and customs that is substantially continuous with the pre-contact system. In other words, there is an anti-intercultural bias in the legal doctrine and this poses particular challenges for anthropologists writing native title reports for groups that have a long contact history. To clarify how anthropologists have chosen to bridge this gap between recent anthropological theorising and legal doctrine, I will outline two broadly opposed possibilities and revisit the approaches taken in the case studies.

The two opposed approaches might be understood as the difference between bookends and the layers of sediment built up over time. The bookends approach is to characterise the elements of the contemporary system of laws and customs and then identify similar elements in the pre-contact system. This approach responds directly to the categorical forms of legal doctrine and to an earlier era of overgeneralised labelling of tradition and change.

The alternative, sedimentary approach would trace cultural changes from the immediate contact generation to the next generation, and so on, to the present. It would demonstrate the evolution to the current system of laws and customs. In doing so, it would respond to that part of the legal doctrine that acknowledges some indeterminate degree of allowable change of traditional laws and customs within substantial continuity. The sedimentary approach allows for a more comprehensive and realistic engagement with intercultural history, which the bookends approach passes over in apprehensive silence. Beckett in *Mabo* was closest to the sedimentary approach with the bedrock of Haddon's *Reports*, the layer of his own fieldwork and his wise distancing of himself from the synthesising projects of a later layer of history. The bookends approach can be seen most clearly in the terms of reference given to Elliot in *De Rose Hill*. They demanded a categorical evaluation of whether there had been a loss of traditional connection since the assertion of sovereignty, and Elliot was not in a position to provide a detailed evolutionary history in response.

What I have been hinting at here is the view that for groups with a long contact history a sedimentary approach to the explanation of change will be more convincing. But there are so few thoroughgoing examples of this in the publicly available anthropological archive for Australia, it is likely that the diversity of approaches exemplified in the case studies in this book will continue. In Chapter 1, I mentioned the assertion of American applied anthropologists that they are the leaders of research into 'change theory' despite the relegation of their work by the pure researchers. In Australia, the writers of anthropological reports in native title cases might be at the cutting edge of the development of historical anthropology within the broader discipline but the reports are generally inaccessible, so it is hard to tell.

## Orientation towards the claimants' evidence

While it was true, at a general level, that the Indigenous evidence was broadly consistent with the anthropologists' reports, there were some important examples of divergence. In *Mabo*, there was a key divergence between Beckett and the claimants on whether to characterise Malo's Law as a general precept or as the religious foundation of their land tenure system. In *Rubibi*, there were not so much divergences as gaps: none of the Goolarabooloo group gave evidence, even though they figured prominently in Sullivan's all-inclusive grouping and his report did not include reference to the Leregon group and other dissidents, simply because he was not aware of their views. There were also dramatic divergences between some entries in his fieldnotes and the claimants' evidence. In *De Rose Hill*, the claimants failed to specifically refer to *kuranitja* (spirit essence) even though it was central to Willis's report, and the claimants did not mention Elliott's proposed Yankunytjatjara Pitjantjatjara Antakirinya community as such.

It is interesting to consider the diametrically opposed consequences of these divergences in *Mabo* and *De Rose Hill*. For in *Mabo*, Beckett's credibility was enhanced by the divergence and, in *De Rose Hill*, Elliott's credibility came under question because of the divergences. At one level, these different consequences are easy to explain. Beckett's view aligned him with the judge's own scepticism about claims of direct continuity with the pre-contact significance of Malo's Law. In *De Rose Hill*, Elliott's neologism was not supported by Maddock, whose opinions had been embraced by the judge partly because of Maddock's superior academic capital. Similarly, the limited effect of the embarrassing fieldnotes in *Rubibi* could be seen as a product of the judge's positive disposition towards the claimants' case. It seems more likely, however, that in all cases the judge's general disposition towards the preferred outcome is in tension with a more universal judicial preference for in-court testimony when it diverges from out-of-court statements.

In *Yulara*, divergences and gaps became critical to the outcome in a way that revealed potentially intractable problems for all anthropologists. To what extent should anthropologists go beyond restrictive folk models of traditional land tenure to add additional, more inclusive principles that might not be explicitly objectified but are broadly followed? To what extent should anthropologists limit their own description of the overall system of traditional laws and customs to a version that can also be articulated by at least some of the Indigenous witnesses? The anthropologist is obliged to base any expert opinion on all the information available and not make guesses about what might be said in court. Thus there might be some trepidation before the hearing with the anthropologist wondering whether some small part of what had been told to them will be repeated in court, despite the considerable scope for miscommunication, distortion and gaps in a formal hearing.

## Independence and interpretative indeterminacy

In Chapter 1, I imagined an idealised template for an anthropologist's report that projected independence by accepting interpretative indeterminacy and offering plausible alternatives to the judge on the key questions of the title-holding group, 'society', laws and customs, 'normative system' and change (the robust academic model). None of the anthropologists in the three case studies structured their reports in this way. In Beckett's case, his inclination towards inductive generalisation left little room for alternative interpretations. Also, some of the terms of the Statement of Claim already embodied indeterminacy—for example, leaving open the level of the title-holding group (Meriam people or community or family group or individual) and the degree to which relations to land had to be law-like ('laws, customs, traditions and practices'). This relative openness is characteristic of a statement of claim rather than a concluded formulation of legal doctrine. Beckett's corrective stance towards the strong traditionalism of the Statement of Claim also set him on a clear course in explaining continuity at the level of principles of land tenure, rather than in terms of Malo's Law.

In the native title era proper, the indeterminate terms of the legal doctrine did not prompt a radically different approach. In *Rubibi*, Sullivan was guided by his own convictions of the need for the court to recognise the most inclusive group. The narrow focus of the case on rights to conduct ceremony eased the translation problems of identifying 'laws and customs' relating to land, and he took the risk of assuming that only arguments about traditional continuity would be relevant. When I raised the possibility of the robust academic model of report writing, to my surprise, he immediately identified it with aspects of legal discourse, such as the inclusion of contradictory alternatives in a statement of claim or in final submissions. More particularly, he identified it with what he felt was a challenge to his professional integrity when, following the first *Rubibi* claim, lawyers suggested that he modify his firm opinion about the all-inclusive grouping of native title holders to admit to other alternatives. Thus, instead of seeing it as a logical, if risky, means of asserting independence in the legal process, he saw it as the opposite: a challenge to his professional independence.

In response to my questioning about the robust academic model, Elliott emphasised what he took to be the expectations that he, as an expert, would come to a concluded view and be of assistance to the court. It seems to me that these were pervasive expectations in all the case studies. These general expectations seem to flow from a subliminal gestalt of the juridical field to do with expert certainty and finality. Perhaps it is a vaguely apprehended but accurate view that judges want social science expertise to be modelled on that of the physical sciences, rather than be presented with a range of possible interpretations to choose from.

Elliott made the interesting suggestion that, while *he* would not 'get away with' the robust academic model, he thought that others, more senior in the discipline, might. Both Kolig and Maddock were in this position. Kolig tended to avoid interpretative indeterminacy about historical transformation of traditional land tenure even when confronted with it directly—answering legal indeterminacy with anthropological indeterminacy. More than most, Maddock acknowledged the translation problems of identifying traditional laws. Both, however, seem to have been guided by their understanding of their role as corrective to the perceived excesses of the claimants' anthropologists. Accordingly, they gave an alternative view without seeing the need to explore the nature of the indeterminacy or how it might be resolved.

## The place of advocacy and the fate of the robust academic model

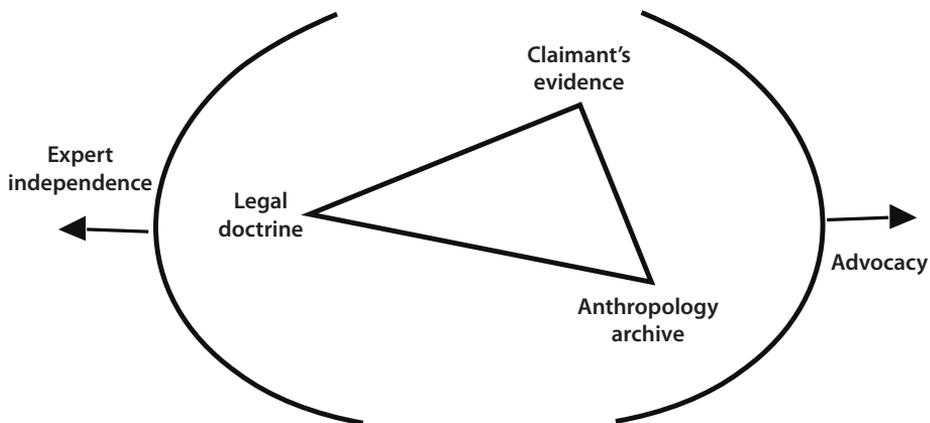
The whole idea of proposing a triangulation model of anthropologists' agency in native title was to allow a more complex account to be given of what anthropologists do in formulating expert native title reports—an account that transcends a global categorisation as expert *or* advocate. Now that the success or otherwise of that model has been examined, it is time to go back and reconsider that initial move and ask what role simple advocacy of the Indigenous position has played. For even though the advocate/expert dichotomy is a blunt analytical tool, it cannot be denied that there are pervasive social pressures towards advocacy in the social field of anthropology. It is easy to imagine self-imposed pressures coming from the forging of friendships between anthropologists and their informants and the accumulation of intimate local knowledge about the tragedies and injustices of the course of European settlement. It has also been suggested that anthropologists would be wary of exclusion from a long-term research site should they appear to be working against the interests of their original informants (Maddock 1983b:155).

There are also external pressures that could easily become internalised. The anti-colonial critique of anthropology has already been mentioned and there is an even more direct pressure in the expectation of the Aboriginal land councils and representative bodies—which engage and pay for the experts—that they will produce something that is going to advance the recognition of native title rights. Pervasive concerns about advocacy seem to lie behind Kolig's and Maddock's stance of providing a balancing critique of the claimants' anthropologist.

One senior anthropologist thought that the manuscript of this book had underplayed the significance of pressures towards advocacy at every step of the process of formulating an expert report. Through my own belated experience

of native title work, I can only agree that such constant pressure does exist and that the issue of avoiding advocacy remains one of the enduring fault lines within native title applied anthropology. By fault line, I mean a matter of internal debate, position taking and a broad criterion in peer assessment. I suspect it is the peculiar collection of case studies I have presented in this book that might have given the impression of underplaying the significance of simple advocacy. For I found the most direct attributions of advocacy and bias—against Elliott in *De Rose Hill* and Sutton in *Yulara*—to be unfair and unwarranted on my reading of the material and from interviews with the people involved. Beckett not only projected independence in the witness box, his estrangement from the legal team removed some of the typical external pressures for advocacy. Sharp, had she been called as a witness in *Mabo*, would, I believe, have been vulnerable to accusations of advocacy and bias because of the abstract level at which she asserted deep continuities with the pre-contact past. It was Sullivan in *Rubibi* who was most troubled by having to adopt a position of objectivity and distance from his friends in the hard-won Rubibi coalition. His critical concession in cross-examination of possible alternative ways to conceive of the pre-contact era deflected the charge of advocacy that Kolig thought was justified. Other case studies might have produced a different mix, which would have given more prominence to the question of advocacy.

Bringing back the issue of advocacy adds a further layer to the model of the agency of the expert anthropologist that was proposed in Chapter 1. It means that the deconstruction/reconstruction triangulation decisions are being made within a field that also features constant pressure for and against simple advocacy of the Indigenous position. The revised model of anthropological agency could be represented as in Figure 9.1.



**Figure 9.1** Revised idealised model of anthropological agency

## Implications for the practice of applied anthropology

The discussion of advocacy has persuaded me to make one final move that I had not anticipated at the beginning of this project, which was not in the first instance aimed at improving applied anthropological practice. The project was always envisaged as a sociological study of applied anthropology. But it seems to me that what I have called the robust academic model of report writing is not only an analytical tool; it can be and should be a model for writing expert reports in future claims. Before I expand upon this, it should be noted that the case studies have in various ways confirmed that there are relatively intransigent features of the social fields that have a substantial impact on the way anthropological evidence is received. Put simply, the opinions of the highly qualified, experienced expert witness who has conducted long-term fieldwork with the claimants prior to the native title era are more likely to be heard. Nevertheless, the content of the anthropological report is still a significant factor.

It will be recalled that what I had in mind was confronting more directly the indeterminacy of the key elements of the legal doctrine of native title, being more explicit about the process of deconstructing and reconstructing the anthropological archive and offering alternative ways to resolve the key indeterminacies. Using Mantziaris and Martin's (2000) terminology, it would mean being more explicit about the process of translation in the recognition space. I am acutely aware of the risks of introducing greater complexity into anthropological reports. I have already agreed with Morton in relation to *Yulara* that one of the implicit expectations of the juridical field is that anthropological evidence will help to simplify ethnographic complexity and so assist the court towards a conclusion. This pressure to simplify was noted by Berndt (1981) in the very first appearance of expert anthropologists in the *Gove* case and will probably always remain. I think, however, the benefits outweigh the risks. The benefits include the more effective projection of expert independence and the return of the responsibility for resolving the indeterminacy of legal doctrine back to the judge.

## Judicial agency

*Post-hoc* reflections by judges about particular cases are rare for obvious reasons: the potential complication of deviating from the formal written judgment might lead to apprehensions of bias and potential decline in public support for the judiciary. I did approach Justice Moynihan, but he could not remember the details of the *Mabo* hearing from 12 years before. I did not approach Justice Merkel because the second *Rubibi* hearing had not been finalised at the time I

was completing that case study. He retired from the Federal Court bench in 2006 to pursue public-interest litigation as a barrister. In a radio interview about that time, he took the expected stance of not commenting on individual cases he had heard.<sup>5</sup> Justice O’Loughlin, who had retired also, probably would have taken the same view. In any case, he died in 2005. All this means that there is a different quality to the comparison of my interpretations of the anthropological evidence and the judge’s interpretation as revealed in the judgment. I anticipated a certain impenetrability in my account of the juridical field in Chapter 1.

To be clear, what is difficult to penetrate is the judge’s performance of the role sanctioned by legal doctrine—deciding whether to accept a witness as an expert, evaluating the expert’s evidence in the totality of the evidence and deciding what weight to give it, assessing possible bias—as opposed to deploying legal doctrines about expertise to achieve a predetermined result. Perhaps this is simply a distinction between a judge’s official and unofficial agency. But this distinction is problematic as well. First, there is the problem of interpreting the meagre evidence of what the judge’s personal views about the justice of the case might have been. Then, it is to be expected that judges will bring, and must bring, their personal knowledge, in the sense of the implicit background that we all share, to fulfil their official role. It is perhaps inevitable that, in the resolution of indeterminate legal doctrine for which there is no official guidance, personality traits, personal values and political opinions will be brought to bear as well.

Despite the methodological difficulties, I have tentatively attributed an active and constructive intervention to the judges in *Rubibi* and *De Rose Hill*. In *Rubibi*, it was the active search for common ground between experts in dispute. The word ‘intervention’ might imply that Justice Merkel was outside the bounds of acceptable judicial behaviour. This would not be warranted, however, since one overriding judicial obligation is the practical resolution of the case, and finding common ground between the experts certainly assisted a resolution. The argument that the search for common ground is a constructive intervention is really made in comparison with other judges ignoring experts in dispute, as if they cancel each other out.

In *De Rose Hill*, the combination of the judge’s publicly expressed doubts about the justice of the case, the unfair treatment of Elliott in the witness box, the judge’s adoption of Maddock’s doubts, and his high expectations of the claimants’ courage and continuing application to traditional duties on De Rose Hill Station all lead to the impression that the judge had taken a strong view about the preferable outcome of the case from a very early stage. For

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<sup>5</sup> Interview conducted by Damien Carrick, ‘Leaving high office for a higher purpose’, *Law Report*, ABC Radio National, 23 May 2006. At the time of publication, it was still available on the ABC web site at <[www.abc.au/rn/lawreport/stories/2006/1644195.htm](http://www.abc.au/rn/lawreport/stories/2006/1644195.htm)> A hard copy of the transcript is in the possession of the author.

understandable reasons, Elliott urged me to call this 'bias', in the same way that he had been accused of bias by the judge. Part of my reluctance to follow his suggestion is to avoid confusion with the legal doctrine of judicial bias, for it is doubtful whether there would be sufficient evidence for a claim of judicial bias to succeed.<sup>6</sup>

The usual difficulties of attributing an active and constructive agency to judges do not apply to Justice Sackville's reconstruction of the anthropological archive on traditional Western Desert land tenure in *Yulara*. It was there in his judgment for all to see. Other choices made to resolve the key indeterminacies of legal doctrine remain implicit because of restrictions on the acceptable ways to state the content of the legal doctrine, as predicted in Chapter 1. But the implied criteria of coherence and completeness in *Yulara* in evaluating whether there was a 'body of traditional laws and customs' are suggestive of one way of reconstructing the choices open to the judge in interpreting that phrase. For the features of modern law have to be adapted to be applied to tribal societies—a process that preoccupied the early theorists of primitive law and comparative law.

There are some distinctive aspects of modern law that are not expected to be found among Aboriginal people: the formal separation of religion from modern law, the completeness and uniformity of modern legal codes within a meta-legal framework (a constitution) formally defining legal authority, the objectified and conventional nature of modern law (positive law), specialised rational adjudication processes and dispute resolution according to well-identified principles and specialised law-enforcement bodies. Some of these features of modern law might be carried over to the search for primitive laws, especially ideas of acknowledged objectified statements of norms, ideas of completeness, coherence and stability (as in *Yulara*), ideas of legitimate authority and ideas of widespread compliance and enforcement. Thus, although the *Mabo* decision legislated primitive law/legal pluralism, there are always implicit judgments being made about how far primitive law can stray from the features of modern law.

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6 Briefly, bias would be established if a fair-minded person might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case. It might be a prejudgment of fact or law or the determination of fact or credit in a previous case. But it must be more than an apprehension that the judge might decide the case adversely to a party. The making of a series of adverse interlocutory decisions does not of itself warrant disqualification, nor does a judge indicating his thinking in the course of the hearing. In addition, a judge's expressions that are acerbic, or indicative of irritation, do not of themselves justify disqualification (see unattributed case note, 'What is judicial bias', in the *Journal of Judicial Administration*, vol. 7 [1998], pp. 187–8). Thus, the elements that I have used to attribute to Justice O'Loughlin a strong view (see Chapter 7) might not have amounted to the apprehension of bias required by the legal doctrine.

## Law's anthropology?

Before turning to my conclusions on the interaction of the two fields, some of the costs of framing the fields as separate should be mentioned. The first is that it tends to obscure the deep homologies between the two fields. At a general level, for example, the persistent distinction between ethnography and theory in anthropology seems to be a counterpart to the fundamental fact–law distinction in the juridical field. So that, at a broad structural level, it could be said that:

ethnography : theory :: fact : law

This general homology could be extended. Just as legal doctrine tends to mould facts despite their clear separation in legal theory, in anthropology, theory either explicitly or implicitly moulds ethnography. These deep homologies are perhaps what allow a recognition in the juridical field of native title of the centrality of anthropological expertise among the range of available experts and the unusual discussions that sometimes occur between judge and expert anthropologist during the latter's evidence. On closer inspection, these basic distinctions operate in different ways in the two social fields. In the juridical field, the fact–law distinction is pervasive and relentless, even forcing anthropological evidence to become more fact-like by announcing a lack of interest in the theoretical entanglements of ethnographic facts. While this structuralist approach is of interest, a comprehensive explanation requires that these broad structures be linked to individual agency. I have sought to do this by invoking *habitus* and, more generally, by viewing structures as resources that can be manipulated and as constraints that can be partially evaded because of the ambiguity of language.

The other cost of separating the two fields too sharply is the underplaying of the circulation of ideas between the two fields. Anthropological borrowing from legal theory occurred most directly in primitive law and legal pluralism, but also in the language of rights and duties, and the distinction between rights *in personam* and rights *in rem* (for example, see Meggitt 1962). Because of this borrowing, Mantziaris and Martin referred to the structural–functionalist era as 'the jural paradigm' (2000:33–5). Arguably, there are even more subtle influences of legal theory—for example, the idea of the self-contained constitutional state might lie behind Radcliffe-Brown's theorising about the horde and Tindale's theorising about the tribe (cf. Gumbert's characterisation of Radcliffe-Brown's theorising of the horde as a 'mini-state' theory).

Legal borrowing from anthropology has a different character. The ties to the anthropological origin of some terms in the definition of traditional owner in the *Land Rights Act* and the mention of 'clans or groups' and 'society' in native title legal doctrine seemed to be severed once these terms became part of legal

doctrine and subject to the norms of legal interpretation in the juridical field. Also, broad judicial assessments of Aboriginal relations to land as spiritual–religious, drawing principally on Stanner's work, tend to take on the form of a precedent, or judicial notice of a widely accepted fact, and are continually quoted by later judges who require some introductory remarks or to deploy a standard of authenticity.<sup>7</sup>

There are plenty of examples in the case studies of law swallowing and digesting anthropology: the disregarding of Beckett's central argument about the Meriam domain changing at a slower rate than other parts of the society; the dismantling of Sullivan's umbrella grouping in favour of a narrower Yawuru group; the disregarding of Elliott's theorising about the Yankunytjatjara Pitjantjatjara Antakirinya community; and the extraordinary reconstruction of the ethnography of traditional Western Desert land tenure in *Yulara*. To extend the metaphor, there is also a dawning realisation that one way to view the anthropologist's task is one of predigestion of the anthropological archive to aid its digestion by the legal system.

The evidence that could be interpreted as collusion or the sharing of responsibility is also there, if not so directly accessible. It can be seen in *Mabo* in Justice Moynihan's discussions with Beckett, testing his own half-formed opinions in discussions with Beckett; in *Rubibi*, in Justice Merkel's search for common ground between anthropologists in dispute, to support his own conclusion; and in *De Rose Hill*, in Justice O'Loughlin's adoption, as his own, of Maddock's doubts about the case. In a variation on this theme, Sackville sought to share responsibility with the phantom experts, rather than with Sutton.

One feature of the interaction I did not fully anticipate in my original theorising has been the struggle between judge and anthropologist over the authoritative interpretation of the anthropological archive as occurred in *De Rose Hill* and, in its most extreme form, in *Yulara*. In both cases, most items in the anthropological archive directly relating to the claim area were tendered in evidence separately to the anthropologist's report thus providing the raw material for the judge to

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7 Although the characterisation of Aboriginal relations to land as essentially religious was more widespread than Stanner's writings, his personal influence, as an expert witness in the *Gove* case and as a public intellectual, can be directly traced. One of the most quoted parts of the *Gove* decision was Justice Blackburn's conclusion on the facts of that case, including the facts of expert opinion, that 'the fundamental truth about aboriginals' [sic] relationship to the land is that whatever else it is, it is a religious relationship' (*Milirrpum v Nabalco Pty Ltd* 17 FLR 141, Blackburn J. at p. 167). The most recent use of that quotation was in the critical decision of the High Court in *Ward*, where the majority explicitly stated: 'As is now well recognised, the connection which Aboriginal peoples have with "country" is essentially spiritual' (*Western Australia v Ward* 213 CLR 1, para. 14). Part of Stanner's Boyer Lectures in which he describes Aboriginal relations to land in terms of an everlasting spiritual home was adopted by Justice Brennan (as he then was) in *The Queen v Toohey; Ex Parte Meneling Station Proprietary Limited* (1982) 158 CLR 327 at 356. Having received this judicial imprimatur, later judges have referred to it frequently via the *Meneling* case, the latest example being Justice Merkel in the first *Rubibi* decision.

form his own view about them. There is no legal rule of evidence preventing a judge from doing this since the weight to be given to each piece of evidence is for the judge to decide. On my reading, though, there was a tendency for the judges to give undue weight to anthropologists in the archive who had a high public profile or high academic capital. That is why I used the terms ‘phantom experts’ and ‘big names’. Unsullied by an account of the reception of their work by other anthropologists or by contrary findings from other locations or by more recent syntheses, the opinions of the big names seemed to rise from their graves and be afforded similar or even greater status than those of the living experts who have the benefit of later research and debate and can also be cross-examined.

As the case studies have demonstrated, to prevail in the struggle over the anthropological archive requires more than being qualified as an expert witness. At a minimum it requires a complete mastery of the archive and an ability under cross-examination to quickly and convincingly contextualise each individual item that might be deployed separately to undermine a considered opinion.

## This book in the fields of anthropology and law

One way of bringing the consideration of these issues to a close is to outline how the results of this project might be received in the two social fields described. In the field of anthropology certain complexities arise because of the unusual nature of this research project. It is anthropology at home—exceedingly close to home—but which does not use classic participant-observation methodology. Yet, it is still seeking to be a ‘pure’ approach to applied anthropology. As such, it falls on the ‘pure’ side of the pure–applied divide. From an applied perspective, it does not seem to offer many solutions to the practical problems of performing well as an expert witness. Instead, it tends to confine what experts can directly influence (triangulation decisions, courtroom technique), by emphasising the powerful effect of the more immutable constraints in the encounter. These constraints include the level of scientific and academic capital within the field of anthropology, hysteresis effects (time lags in learning to function effectively in a new social field), the general disposition of the judge to the justice of the case and judicial scepticism about research for litigation.

In the juridical field, the attribution of active and constructive intervention to an identified judge in a particular case would be grounds for a contempt charge, if made in court, and goes beyond the usual bounds of acceptable legal commentary in most academic legal journals. With the exception of the analysis of the reception of expert scientific testimony, the analysis of fact-finding is relatively rare in that literature; it typically concentrates on developments in legal doctrine. Leaving the possibility of defamation to one side, I have

struggled with the issue of what terminology of agency to use—'forming a gestalt', 'having a hunch', 'forming a strong view', 'unofficial agency', 'bias', 'prejudice'. Even though I have distanced myself from the sceptical critique of judicial fact-finding, I have adopted some of its terminology as a partial explanation of what occurred in *De Rose Hill* and *Rubibi*. After all these years, however, such terminology still tends to be a dangerously personal affront to the integrity of the judge, not merely a challenge to greater reflexivity and openness, as was originally intended.