The rise and rise of forensic anthropology

In the 1990s, anthropologists are increasingly visible in Australia. Political visibility, as the former leader of the Country Party, Doug Anthony, used to say, tends to encourage criticism. He didn't quite put it that way of course. When asked for his definition of politics on some occasion his reply was, as I recall: 'When you see a head, kick it!'

More and more, it seems, anthropologists are called on directly for assistance in a wide range of judicial and administrative processes. In both arenas their work is increasingly contracted with the possibility of an ultimate litigation or tribunal investigation in mind. In other words, an anthropologist's report which forms part of a heritage survey for a government program of site listing or landscape registration, or a privately funded environmental impact study, may become challenged. The anthropologist may end up in court, in an appeals tribunal, perhaps a Royal Commission, defending their work against attack, just as they regularly do in land ownership cases.

Anthropologists are also engaged in an increasingly wide range of criminal and civil cases. They may be called on to give testimony about the relevance of, for example, Aboriginal law and custom to defences of provocation or lack of intent to commit a crime; the admissibility of alleged confessions; claims of rights in property by 'traditional spouses' surviving the death of a partner; the award of access or custody in child custody cases; and eligibility to adopt. This kind of work is relatively invisible politically, although the success of politically inspired attacks on the profession generally may have an adverse effect on practitioners trying to bring their skills to these areas.

Far more exposed to controversy and public criticism are anthropologists who work in the fields of sacred site surveys and land ownership cases. The most intensive use of anthropologists as expert witnesses for some 20 years now has been in the processing of Aboriginal land claims and similar actions. Apart from their roles in negotiated settlements such as the one which created the Pitjantjatjara Lands in South Australia (see Toyne and Vachon 1984) and common law assertions of native title such as the Murray Islands and (initially) Wik claims in Queensland, anthropologists are now heavily engaged in indigenous land
ownership cases in three jurisdictions, those of the Northern Territory and Queensland which hear claims under their own legislation, and that of the Commonwealth's *Native Title Act 1993*.

The pattern of the last two decades has thus been one in which parliaments have repeatedly created new legislation which requires formal research in the domains of Aboriginal and Torres Strait Islander cultures and societies. The demand for anthropologists has outstripped supply for as long as I can remember, and has now reached something of a crisis point.

These changes reflect the rising formal recognition of indigenous relationships to land. Those who are opposed to this rise may be hesitant to express themselves on the subject. But to attack anthropologists as the handmaidens of this shift towards greater indigenous legal powers represents less of a problem, because only a few anthropologists in this country are of indigenous descent. The practice of attacking land rights through attacking anthropologists is perhaps one of attempting to shoot the messenger.

**Shooting at the messenger, and missing**

In recent years in Australia we have seen an unprecedented series of attacks on the profession of anthropology, on the credibility of anthropologists as expert witnesses and, to some extent, on the system which makes their presence necessary or desirable within the world of the law. These criticisms have generally come from people with little or no practical experience of the field of indigenous land cases in this country. I will detail some of the arguments in these attacks and comment on them shortly. There has always been a healthy field of combat between lawyers and anthropologists, and at times some jealousy between the two even when they are working on the same side. In 1995, however, attacks on anthropology as a profession in this domain of indigenous affairs reached the mass media in a way never before seen here.

A 1995 screening of the Channel 9 program *Sunday* contained a fairly sustained attack, beginning with the false statement that the Hindmarsh Island Royal Commission was the first time evidence regarding a sacred site assertion had been tested in an Australian court. In fact, in scores of land claims heard by tribunals in Australia since the mid 1970s such evidence from indigenous witnesses has been presented in detail, and that of expert witnesses tested against it, both on site and in the courtroom. The program went on to say that various State and Federal laws had 'vested extraordinary power in anthropologists, archaeologists and linguists .... . The job of assessing their claims fall as usual to the small club of anthropologists, archaeologists and linguists whom government entrusts to
make these judgements ...'. In fact, the job of testing and assessing such claims is normally carried out by career bureaucrats or, in some contested cases, cabinet ministers or judges.

Sydney anthropologist Ken Maddock then suggested in the program that there was a need to put more emphasis on what Aborigines themselves say. In fact, in a tribunal situation that is normally what happens. Maddock, and the Hindmarsh case lawyer who was also interviewed, were right when they said things have to change. Purely administrative mechanisms for assessing sacred sites claims should be replaced by a national tribunal system akin to the land claim hearing process, at least when serious disputation is involved.

Testing the expert witness

In Australian indigenous land claims and native title adjudications the major part of the anthropological work does not, in fact, consist of appearing in court to give evidence and to be cross-examined. That is a brief part that comes close to the end of the hearing. Most of the anthropologist's time is taken up by the preparation of a report in the form of writing, charts and maps, submitted some weeks before a hearing commences. This work usually takes many weeks or even months. These anthropologists are not free to make whatever kind of report they like, nor is there uncritical acceptance of their reports even by those who engage the anthropologists. This point is not well understood by some critics of the process who tend to be critics of the players, rather than of the game itself.

Constraints on what the anthropologist has to do begin with the practice directions issued by the relevant tribunal or court. These directions outline the types of material required for the case, and even the format in which aspects of it are presented. Typically, these include not only a main text or 'claim book' setting out relevant aspects of the social and local organisation, land tenure system and occupational history of the people asserting title, but also a set of detailed genealogies, a list of claimants showing their dates of birth, residential address and other personal particulars, a map of sites (often colour-coded for Dreamings or mythic themes), and a site register giving grid references, site descriptions, and information sources. Such sets of documents often run to a combined total of two to three hundred pages. Deadlines set for their production may have to be reached within only a few months. A critical additional constraint, then, consists of time and money limits.3

The body employing the anthropologist on behalf of the claimants also issues its own constraining instructions in the form of a contract for services. The testing of the anthropologist's initial results begins with some
in-house assessment of reports carried out by staff of the engaging body, and review by senior and experienced anthropologists engaged from outside the organisation. I am not aware of any case where this kind of assessment has been merely perfunctory. The reviewers, usually anonymous as far as the drafts' authors are concerned, are tough on anything that does not meet rigorous standards. The criteria provided to peer reviewers by the client typically include questions such as whether the land tenure model has been described with sufficient clarity and comprehensiveness to meet professional standards; whether there are descriptive weaknesses in the ethnographic details supporting statements about traditional ownership; and whether the draft is sufficiently well-written and clearly presented for the purpose. Peer review has also become a standard procedure for dealing with consultants' reports on impact assessments and sacred site and heritage surveys.

When the case comes to a hearing, the anthropologist is usually in the background, available to help with questions and others, normally barristers lead the evidence of the indigenous witnesses. All parties to the action can test the anthropological report against witnesses. Witnesses recount relevant site details, and genealogies are checked systematically and exhaustively with witnesses in many cases, or are tested at least on a large sample basis. Discrepancies between the claimants' own evidence and the anthropologists' distillation of the evidentiary base encountered during fieldwork can be exposed in this way. It is true, nevertheless, that not all the material in the anthropologists' reports is tested in the hearing, as this would make the process unnecessarily detailed and lengthy. Given that many hearings take place in hot, humid, fly-and mosquito-infested windy, dusty or rainy places, this is perhaps welcome.

Such al fresco conditions are onerous, but the whole hearing process itself is often onerous on other grounds. The sheer logistics of assembling, feeding, sheltering and otherwise looking after dozens, perhaps hundreds of people in these circumstances represent a major challenge to the responsible organisations. Witnesses have from time to time complained about the intrusive nature of the questioning and the long hours spent by counsel turning over rather ambient or even trivial aspects of their cases. There is also the consideration of funding, and sheer stamina problems. Hearings in this domain can cost $10,000 more per day, and may run for many weeks. Over a million dollars have been spent on some of the more expensive individual hearings.

There must be a better way to deal with evidence in such cases. The processes are in need of some dramatic streamlining. Procedural fairness and political realities demand some public testing of assertions by native title holders or claimants, in the absence of a settlement or regional agreement between parties, where these are feasible. There will always be
more rigorous testing of indigenous assertions and expert witnesses where a case is particularly adversarial or involves complex and difficult issues. But much tribunal time is wasted, in my view, on repetitive non-contentious ethnographic details. This cannot advance resolution of the underlying arguments in a complex case. Where it is seen as a necessity, this usually seems to arise out of fear that the transcript, without it, will lack parallel details on enough places, people or topics to establish an impregnable case. As a technique it may also arise from a lawyer's desire to control the evidence. This stultifies the process, and fails to allow for witnesses' own insights into their systems of relating to land. Critical evidence on core issues is often best obtained in unelicited, free-flowing statements by witnesses.

Videotaped evidence of interviews at particular places under claim, conducted among a small group of the witnesses' familiars and outside the context of a formal hearing, is likely to be richer and more concentrated than what can be elicited from the same people in a hearing. This applies even more powerfully in the case of women, where they may be unable for cultural reasons to hold forth publicly and confidently before a mainly male, mainly non-Aboriginal tribunal, most of whose legal professionals are strangers. The use of videotapes has long been accepted practice in the Northern Territory and Queensland jurisdictions. They are also particularly valuable where the country may be very difficult to get to.

If there were ways in which essentially non-contentious material, including that contained in anthropological and similar reports, could be sample-tested and then agreed on by the various parties as having been proven for the purpose of assessing the evidence, several advantages would flow. Apart from financial savings, more time could be devoted to the core issues of each case. In most indigenous land cases, once the initial hurdle of a reasonable evidentiary base has been passed, the case will typically revolve around a small number of key interpretative issues, such as what constitutes the best fit between the communal entity referred to in legislation and the nature of some one (or more) collectivities in the social field concerned, or whether certain transmissions of property rights can be said to occur on the basis of descent, or whether residential rights give rise to possessory ones, and so on. It is true that such questions are harder to explore in a direct way with claimants than with expert witnesses who are inexperienced in discussing such objectifications of system, so I make this suggestion at the risk of being accused of wanting to shift the balance of weight away from those asserting title and towards those who report on them. Anthropologists could perhaps, play a slightly stronger role without tipping the balance away from the claimants themselves.

Historically, in indigenous land cases in Australia, judges and tribunals have typically chosen to give the greatest weight to what the claimants say
rather than to what anthropologists say, which I believe is only proper. It is clear that decisions of this kind are based heavily on claimant evidence. Indeed, it is common now for tribunal reports to state their conclusions largely on the basis of evidence from indigenous witnesses, with a brief anthropological commentary at the end. The alleged ‘power’ of anthropologists in these circumstances is therefore greatly exaggerated, usually by those who know little or nothing about the process. The same may not be so true of purely administrative determinations as to the status of sacred sites or land tenure.

It is not only objectors who test our work in tribunals. The cases heard in the Northern Territory and Queensland typically involve a person who serves as ‘Counsel Assisting’ the tribunal or Commissioner, and this role can be just as confrontational as that of counsel for objectors claiming detriment. Furthermore, in the Northern Territory cases, at least, the presiding judge usually has a consultant anthropologist who examines the claim documents, listens to the evidence, may at times examine witnesses, and may assist with the writing up of the tribunal’s report. If this system, for some of its critics, is not sufficiently rigorous, to some other people it probably sounds like an obstacle race.

'A small club of anthropologists ...'?

There have been cases where anthropologists have disagreed with each other quite publicly when taking part in the same land claim (see Maddock 1983: 156). In the case of Limmen Bight the anthropologists disagreed with their clients’ instructions as to who should qualify as traditional owners under the Aboriginal Land Rights (NT) Act 1976 – their more prominent clients wanted only patrilineal descendants listed, while the anthropologists concerned believed, on the evidence, that children of women of the patriline also qualified. The anthropologists in this case later published a careful analysis of the complex problems of achieving both equity and a high degree of faithfulness to local cultural imperatives when preparing a claim under the legislation (Bern and Larbalestier 1985; Maddock 1983: 156). Frances and Howard Morphy, anthropologists who have worked for Aboriginal land claimants, have published a detailed analysis of the influence of ideology on anthropologists’ arguments for a widening of the ‘traditional owner’ category in Northern Territory land claims, and were quite critical of some such work:

We do feel that many of the arguments used are of dubious validity and that some of the motives involved in widening the category of traditional owners have been misguided and that in the long term major problems may emerge (Morphy and Morphy 1984: 63).
Such debate is not uncommon. For these reasons I do not think 'clubbiness' between anthropologists or between them and their clients applies here as a major problem. The 'closeness' between anthropologists and the people with whom they work has also often been exaggerated. It is usually true of the relationship between anthropologists and the people with whom they live over the many months required for postgraduate research, but a large number of the research projects I am discussing here are done over much shorter periods and with people the researcher has never met before. Most anthropologists guard against 'clubbiness' in their work. They know that the results of their research will be subject to testing, not only via cross-examination of the anthropologist as 'expert', but also by cross-examination of the very people from whom the anthropologist learned the key things in their report.

Possible improvements

While lawyers with little or no knowledge of the large and complex subject of indigenous land relationships undoubtedly feel disadvantaged in cross-examining witnesses without the benefit of anthropological advice, this raises the questions:

1. Is the answer to ensure that they do get good anthropological advice?
2. Is the answer to call into question the usefulness of standard witness examination as a method of uncovering weaknesses in a case?
3. Is the answer to develop greater expertise in this new branch of the law among lawyers themselves?

Perhaps the only way to give a 'yes' to question 1 above would be to legislate to force anthropological consultants to take work from any quarter. This draconian approach would be met with complaint and is not politically feasible (the 'closed shop' accusation is discussed below).

As to question 2 above, I think the present situation does represent a challenge for the examination method. Apart from its weakness as a means of eliciting usable evidence from people who are culturally different or have English only as a second or even fifth language, it typically relies on linguistic strategies, chiefly the short question and short answer method, which may be counterproductive. There is now considerable literature on this and related topics which I have summarised, discussed and referenced elsewhere (Sutton, in press).

As to question 3 above, there is a now growing number of lawyers gaining confidence in their understanding not only of indigenous systems of land tenure and religion and similar matters, but also in their ability to elicit good evidence from indigenous witnesses. But so long as they are
dependent on anthropologists for documentation of each case, which they are usually handed before they arrive to proof witnesses in advance of a hearing, there are limits on the extent to which their dependency on anthropologists can be reduced. This increasingly applies also to matters of strategy, such as the way the claim is structured and presented, and even to the interpretation of the law, as anthropologists extend their ability to formulate arguments that address the relationship between the evidence and the legislation which it must satisfy if the claimants or asserters of title are to be successful.

It seems that we are now moving beyond the situation described by Ronald Berndt in 1981, one that clearly reflected his own rather unhappy experience of the lawyer–anthropologist relationship in the Gove case:

In a sense, and perhaps being deliberately a little unfair, one could say that the legal practitioners regard anthropologists, when they do not consider them to be obstructive, as being raw material; or to put it more kindly, as a kind of resource. To follow Lévi-Strauss, legal practitioners, in contrast, are 'cooked' – they have the final say, irrespective of anthropological opinion and irrespective of Aboriginal views (Berndt 1981: 16, quoted in Neate 1989: 284).

There is now in general a more collaborative approach taken by lawyers working with anthropologists as experts. This is particularly appropriate as indigenous land cases in Australia are, ideally, a form of inquiry rather than a litigation or trial. The task of the advocates is to help the tribunal learn enough about the local situation to make a judicial decision feasible. For this reason it may often be helpful if the leading of evidence on technically specialised subjects (such as kinship or expert discussion of competing interpretations of the data) may be carried out by lawyers and anthropologists together.

The major criticisms

It is interesting to note that the presiding members of tribunals who hear anthropological evidence in this country have rarely commented on the credibility of those who give the expert evidence, although they may frequently say complimentary or critical things about the nature of their particular analyses and observations. Reporting on the first Northern Territory statutory land claim heard at Borroloola in 1977, Toohey J. did comment that one of the researchers who was not a qualified anthropologist tended 'to wear his heart on his sleeve', but nevertheless he had no reason to doubt the truth of what he or the anthropologist told him about matters going to the question of traditional ownership (Aboriginal Land Commissioner 1978: paras 52–53). Judges have occasionally been critical of specific anthropological work in a land claim on technical grounds (Aboriginal Land Commissioner 1988: paras 19.3.1–19.4.7). But it was not
until 1995 that an Aboriginal Land Commissioner specifically addressed the anthropologists' credibility *per se* in any detail, when Gray J. rejected with some force and clarity, and at some length, unsubstantiated allegations of dishonesty, faulty methodology, conspiracy and fabrication aimed at the anthropologists in the Gimbat case by the mining company Newcrest. He was less than complimentary, on the other hand, about the quality of the evidence given by Newcrest's consultant, a political geographer (Aboriginal Land Commissioner 1995: paras 4.29–4.51; paras 4.6.1–4.6.11. On the lessons to be learned about anthropologists as expert witnesses in the Northern Territory land claims, see Neate 1989, 1995b).

*The 'unscientific' criticism*

Legal writer John Forbes (1993: 216–7) says: 'Another practical concern [about native title] is the reliability of expert evidence. ... The first question, then, is whether a relevant and sufficiently reliable body of knowledge exists'. Unfortunately, Forbes and other critics tend to pass rather lightly over this topic. Perhaps sensing this need, Emeritus Professor Austin Gough recently suggested, in an article on Hindmarsh Island, that anthropological career-building is nowadays enhanced by *postmodern relativism, according to which there is no such thing as empirically verified truth, and all belief systems are of equal plausibility. There is an overwhelming temptation to leave behind the western bourgeois ideal of the impartial observer ...* (Gough 1995: 8).

The generous form of this criticism is to say that anthropology is an *'inexact science'* prone to ideological influences. My view is that it is impolitic, to say the least, to tempt others with a false analogy between human cultures and laboratory specimens, or between a genealogy and a spectrograph recording. In terms of the substance of their inquiries, the nearest anthropologists come to what ordinary people understand to be a *'science' is their exacting work on kinship, descent, and other aspects of social organisation. The question is not, however, whether or not our forensic work can be put into a pigeonhole called *'science', but whether or not it has certain properties that lead to a sense of relaxation in the judicial mind, and that of members of the wider polity as well.

Those properties amount generally to methodological rigour, both in ethnography and its interpretation. In the case of tribunal hearings and native title cases this expectation is pretty clearly signalled by the system of practice directions. There is more of a grey area when it comes to such things as heritage surveys, which are notorious for carrying the client's expectation that they can be done on the cheap, but also often have rather nebulous guidelines. These guidelines, if the current Queensland ones are indicative, are in the process of being tightened up. Guidelines and practice directions cannot, however, prescribe appropriate levels of intellectual
rigour or offer criteria for what may count as solid, versus fanciful, interpretative insights by anthropologists. This is the domain of the discipline itself, and hence one of self-regulation.

The closed shop criticism
There has long been a complaint, particularly from mining companies, that they are generally unable to engage qualified anthropologists to assist them, particularly when objecting to land claims. They have had better success in attracting anthropologists for what is usually, initially at least, the non-adversarial work of meeting environmental impact assessment (EIA) requirements laid down by State and Federal authorities. Some anthropologists will not do any work for such private sector interests, although there are several who do. I did some EIA work in the early 1980s. Most anthropologists, including myself, have never assisted such a party in actually opposing indigenous interests in an adversarial context such as a land claim. On the latter score, at least, I have no regrets.

In 1982, a barrister who worked for mining companies once told me his clients complained that they could not find an anthropologist who would work for them. Our conversation in the Darwin Supreme Court toilets had left me 'with the feeling that I could not answer the criticism that independent advice was being denied by a closed shop of specialists' (Sutton 1982: 21). Having had 13 years in which to engage in further reflection on the issue, I think that under one libertarian principle, anthropologists should be able to deny their services to whoever they please, and I certainly exercise this choice myself. On another such principle, anthropologists can in theory, and should in practice, act professionally and with integrity regardless of who is paying them, and I would oppose with vigour the idea that the work is necessarily altered, rather than merely subjectively tainted by symbolic pollution, because the client is from one particular interest group rather than another. Those arguments are arguments about individual freedom and integrity. I would raise another argument regarding ethics however, before moving to those which are based on considerations of equity.

Even if one felt no particular ethical duty towards, say, an indigenous group in contrast to a commercial or government organisation, I think there is an ethical duty to consider a different kind of question, namely: Why should members of a group feed information to someone who is gathering it for a client whose lawyers will try to use it for the purpose of opposing that group's interests? If one believes it would be self-destructive (or even merely foolish) for the group's members to work against themselves in this way, then it would be unethical to encourage them to do so by attempting to carry out fieldwork with them on behalf of their adversary. There is no point in replying to this along the lines that the
group will later be giving evidence in a hearing before the same opposed interests, because at that stage the claimants will have their legal advisers present to assist them, and their own anthropologists to later offer interpretations of their evidence.

A few anthropologists including Les Hiatt, feel it may be better for us to work more as 'hired guns' (my term, not his) who may end up 'warring' (his term, not mine) in a tribunal, rather than seeing ourselves as representatives of 'truth and justice' (if not also of the American way). That may turn out to be a politically astute position, as well as a conservative libertarian one. But the immediate question for the individual is not one of heroic values, but whether we could sleep well at night after abetting an attempt to demolish an indigenous group's efforts to establish title to a piece of Crown land rejected for any commercial purpose by non-Aboriginal interests, under a system of beneficial legislation set up to enable transfers of such titles, or recognition of pre-existing titles. Few of us, it seems, can contemplate this.

The resulting difficulties faced by opponents of indigenous interests who seek to engage anthropologists are thus a product of those very same free market forces so beloved of senior spokespeople from the mining lobby. Suddenly they want a form of equity denied to them by a system of free choice.

The professional witness criticism
Those who live by testifying are often contrasted with others who don't normally act as witnesses and who are contracted from hallowed sanctuaries of alleged objectivity such as universities and museums. Professional experts have to suffer the accusation of being 'professional approvers' of their clients' cases. In fact, there is a reverse argument which says that rigour demands not only knowledge of the theoretical subject concerned, but also direct experience in the applied field concerned.

Basically, witnesses have to be assessed on the merits of the case they present in the light of the other evidence. The fact that someone acts frequently or only for a particular type of client may be explained as an 'ideological bias', but this accusation of bias does not extend automatically to their conclusions on matters of fact. In any case, no anthropologists in Australia make a living from giving testimony in court as such.

The advocate criticism
This is a stronger form of the professional witness criticism. It says, effectively, that anthropologists should not play the role of advocate for claimants in a land claim or for similar parties in other related kinds of actions. What is meant by 'advocate' here is sometimes muddied by the fact that we tend to use the term in two distinct ways. Beyond the legal context, advocates for a certain position or group are those who align themselves
with the cause concerned and may also speak on behalf of those whose cause it is, or at least speak in support of them. It should be said that anthropologists do not these days generally take it upon themselves to speak on behalf of indigenous groups, although they may often speak in support of one or more of their causes.

In a rather different sense, within a legal context, each lawyer (occasionally anthropologist) who leads evidence in order to represent an interested party in a tribunal or litigation is there explicitly to advocate their client's cause to the extent that that cause is specifically expressed in the case being heard. That is, whether or not they agree with or support the wider political position of their client they are obliged by their role to do their best to promote their client's position on the matter at hand. As this kind of advocacy is so explicit, I do not believe it is the type about which we have heard criticism.

I think it is generally true that Australianist scholars in their personal lives support indigenous aspirations such as land rights although there are some clearcut exceptions to this. Few, however, belong to formal organisations for this kind of purpose. Indigenous people are their own best advocates in this sense and, especially since the 1970s, the field of public representations for such causes has been, in the main, very properly left to indigenous representatives themselves.

That such a general advocacy position overlaps with a formal role as an expert witness should not be surprising. That is, I do not believe any person, let alone an anthropologist, is completely free of bias of some kind, if by bias means the taking of a position on the weighty issues that affect the people with whom they work. The issue is not one of whether or not anthropologists have political or other allegiances, including personal ones derived from a history of some fairly close interaction with the people whose lives they study, but whether or not they allow such leanings to interfere with the quality of their professional work. Although a few such cases are known to me, they seem to cluster around the late 1970s–early 1980s and this may indicate that as a branch of the profession we have matured quite a lot, in relation to the forensic arena, since that time.

The specific ideological criticism

In a 1993 paper, John Forbes (1993: 217) writes that: 'The old-established forms of expert evidence have little ideological content, and normally they do not encounter the rising censorship which current patois calls 'political correctness'. He says this in a paragraph that begins by questioning whether 'a relevant and sufficiently reliable body of special knowledge exists' (in relation to native title claims) and moves on to ask what will be the quality of evidence 'which determines the meaning of Mabo in practice'? Forbes is too careful to make the obvious accusation literal. He concentrates, if that is
the word, on innuendo. The accusations against anthropology and anthropologists in his publications are clear, but the language is lawyerly, well-hedged, oblique, safe. Juxtapositions, rather than overt allegations, predominate. Yet the intent is unmistakeable: anthropologists are supposed to be ideologically driven members of a profession that offers only a negative answer to the question as to whether or not anthropology is a 'reliable body of special knowledge'. Their evidence, if this is true, cannot be expert opinion evidence. The difficulties of grappling with anthropological evidence as such might thus be simply elided.

Contrasting itself by a relative absence of restraint, the recent gush of criticism of anthropologists by historian Austin Gough has alleged in the context of the Hindmarsh Island Royal Commission that feminist anthropology is a specific kind of ideological bias that may seriously jeopardise the usefulness of anthropology itself in a legal context (Gough 1995: 8; see also Lane 1995). He has also accused anthropologists of being fiercely territorial about the groups with whom we work – something that rings a bell from back in the 1970s but which is way off the mark as a statement about the present day. He also indulges in the extraordinary fabrication that we are publicity seekers all looking for a national media sensation to win a national reputation. This unscholarly scatter-gun fire of prejudices that presents us as a mob of highly partial boilersuited gold-diggers is itself more ideologically driven than anything one might read that has been written by an Australianist anthropologist. I have no problem with people having the liberty to say such things, only with their ethnography and, from time-to-time, their logic.

Where things might be heading

Given these pressures on the situation, I believe there are several directions in which people might be heading: changes in the law; changes in anthropological practice, and changes in the legal subculture.

Changes in the law

A change being mooted at present is the quite specific one that sacred site controversies need to be taken out of the purely administrative arena and placed into a national system of tribunals where relevant evidence can be presented and tested and then adjudicated by an independent person. This would be a considerable improvement over the present system whereby State and Federal departments and their ministers are required to be both advocates of sacred sites claims which they find substantiated and also adjudicators on them under the different pieces of legislation. Such a change would require, however, that the adjudicators have some specialised
competence in the field concerned. The same applies to members of the Federal Court who are asked to hear native title cases.

To suggest that any kind of judge could hear a major and complex commercial litigation, with no special background in company law or any knowledge of the commercial process, would be met with horror. The same should apply in this case. Indigenous land law, and Australian law in relation to it, constitute a complex field in which there is now a substantial body of precedent material, relevant theoretical literature and coalface knowhow. A major embarrassment to the native title process, for example, would occur if a Federal Court judge were to make a decision that was riddled with elementary mistakes obvious to any competent practitioner in this field. The same should apply to sacred sites matters.

Another set of changes in the law might be those recommended by the Australian Law Reform Commission in its report on Aboriginal customary laws, where it said that there was 'a need for clarification' (Australian Law Reform Commission 1986: para 642). Deficiencies and uncertainties in the law as it presently stands would be remedied by a provision that evidence about Aboriginal customary laws or traditions generally is not inadmissible merely because it is hearsay or opinion evidence, if the person giving the evidence has special knowledge or experience of the customary laws of the community in relation to that matter; or would be likely to have such knowledge or experience if such laws existed.

This, they said, would among other things avoid objection to such evidence on the grounds that it addressed the 'ultimate issue' that was before the court.

Changes in legal subculture
Other changes that can fairly readily be envisioned as possible, if not probable, concern the practise of lawyers. One is fairly straightforward: we may see more lawyers doing a lot more of the primary investigation of indigenous peoples' cases, including land claims and sacred site assertions, rather than leaving all of the basic research to the anthropologists. Ken Maddock has canvassed this issue at some length in a paper called 'Involved Anthropologists' (Maddock 1989). He does point out, however, that the heat, the flies, the repair of as many as ten blown tyre tubes in a single day, not to mention some very short lunches, may discourage some lawyers from expanding their practices in this particular direction. This is apart from the obvious difficulty such people would have if they lacked some quite solid training in ethnographic technique. My guess is that, nevertheless, we may see a new breed of anthropologically trained lawyers in the future. I think this should be welcomed.

A more profound change would require the legal subculture itself to encompass a view of the constitution of knowledge that is philosophically
closer to the last part of the twentieth century than that of the nineteenth. Can legal culture cope, for example, with the indeterminacies of culture?

By indeterminacies in this context I refer, for example, to mutually contradictory evidence different witnesses may give that is genuinely held, such as opposed versions of myths, and mutually exclusive versions of the upper generations of genealogies of land-owning descent groups. If the law cannot cope with such things, which are part of everyday culture for the witnesses concerned, then it has a rigidity that positively encourages the selective and possibly distorting approach to the presentation of evidence of which anthropologists have sometimes been accused.

I have occasionally had to fight tooth and nail with lawyers for a cards-on-the-table approach to land claim presentation, but I maintain that it is, as a form of honesty, always the best policy. There is more than ethics to this, although that is where one starts from. More pragmatically, an honest case is always self-consistent. Even more pragmatically, an honest case ambushes many opportunities for surprise attacks by one's opponents. Let me give you an example:

I once worked on a claim where the relationship between two men and some particular Dreaming sites was consistently asserted and strongly supported over many years by senior Aboriginal authorities in their own region of residence. However, senior authorities in the group to their north did not agree that these men were primary affiliates of the sites concerned. The two residential groups were not in intimate contact and the northern men, unlike the two claimants, had no personal familiarity with the landscape concerned and asserted no rights of tenure in it. I wrote these facts into the draft claim book for the case. Our barrister asked me to remove the evidence about the two conflicting views. After a series of exchanges, he agreed to let me keep my 'guts-and-all' approach in the document. The case went to hearing. Close to the end of it we were at a site claimed by the two men on the basis of their Dreaming. They gave their evidence. It was unambiguously the same as we had written in the claim book. Just as the session was about to finish, a senior man from the community to the north took the microphone, uninvited, and addressed the witnesses, saying in effect, and pretty dramatically, that they belonged elsewhere and this was not their country. Opposing counsel said nothing. The 'conflict' was no surprise. It was all in the claim book, on page 40.

While truthfulness is certainly a way of preventing surprise attacks from one's opposition, and always promotes the self-consistency of one's evidence as an expert, it should not be confused with what tribunals may sometimes characterise as their aim, which may be described as 'a search for the truth' or for 'the facts'. This kind of truth is itself a nice legal fiction. What tribunals seek is not so much an external world of unshakeable 'truths', as accounts that may be relied upon for decisions that are shielded from appeals. Reliability is the key, not any philosophically grounded objectification as such.
Changes in anthropological practice

There is bound to be a rub between a post-positivist, phenomenologically inspired anthropology and a legal culture still very much obsessed with finding unique sets of so-called 'objective facts', even where they may in reality be simply sets of statements whose reliability has been reasonably established. Given, however, the powerful hold of positivistic traditions over legal culture and the fact that lawyers, not anthropologists, are the powerful players in tribunals, there is a possibility that the more theoretically up-to-date the anthropologist, the less seriously their evidence may be taken by courts unless, perhaps, they can explain their epistemological assumptions very clearly and persuasively.

If anthropologists with a phenomenological tendency believe their work is rigorous enough to be treated seriously as expert knowledge in a legal context, does this not present a challenge, not only to legal culture, but also to the view now held by some members of our profession that there is no clear or justifiable distinction between ethnography and fiction? Does it not present a challenge to the teaching of anthropology, in an era when ethnographic technique itself, the practice of getting something usable together on paper during fieldwork, is sometimes dealt with pretty briefly in formal undergraduate coursework? Do anthropologists have a well developed sense of what bad applied anthropology looks like? Are internal consistency, consistency with prevailing theoretical critiques, logical flow and other 'envelope features' the only ones governing acceptability for ethnographies, or is it still possible to apply damning tests of such work based on mismatches between observations and interpretations? Without some such objectivist means for rejecting poor work, one that was reasonably well accepted by a cross-section of practitioners of the discipline, it would be arrogant to maintain the relevance of anthropology to the forensic domain.

I do not intend this in the radical sense, any more than I support a phenomenological approach in the radically subjectivist sense. My objectivism here is a pathway to the assigning of weight, or operational reliability, to statements. Compare these:

One person once said to me, I think (I was just grooving with the locals, didn't make any notes), that Kallerdarwarry Lagoon was a Swan Dreaming, belonging to Old Timbuku. No, we didn't got there - it's marked on the Shell Roadmap isn't it?

Seven different people told me, independently and at different times and places over a span of twenty years, that Kalithawarri Lagoon was a Swan Dreaming, and I have audio tapes of the conversation, plus dated notes, that can be produced. All assigned it to descendants of Old Timbuku. I also went there with three of them and photographed them there, and each took me to the same place and gave it the same name. I marked it on an airphoto on the first two visits and on the last visit took a satellite reading of its location. I have no doubt it is the one marked on the maps as
'Packsaddle Waterhole'. The 'Kallerdawarry Lagoon' of the Shell Roadhouse is wrongly marked.

These two statements should be given weight, and for the same reasons, in both an academic seminar room and in a courtroom. One is more reliable than the other as a basis for decision-making, both about the anthropology of a land tenure system and as a basis for recognising title in a court of law. Furthermore, if you had to rely on choosing among knowledges of these kinds when looking for water in a desert, and your life was at stake, they would hardly appear to be equivalent. This is operational reliability of a kind which has its own extreme sanctions. At heart, however, this case is no different from those faced by a judge in a native title hearing. Decisions require weighty evidence. Criteria for weight in such a consequential, socially embedded and politically intense environment must be established intersubjectively, both in court and without. That is, they have to be 'sold' to a wider public, including any possible higher court of appeal. This 'reliability' is the neo-objectivism I intend here.

I am not for a moment trying to turn the clock back, but both the media and non-anthropological academics are increasingly critical of the credibility of anthropological method. Although to some extent these are attempts to shoot the messenger, and may be based on unwarranted scientistic nostalgia or wishes for a strong resemblance between anthropology and laser photography, we have to either work to relinquish the small power we now have, and of which some others are clearly jealous or disapproving, or justify it by our performance and our ability to reply to criticism successfully. I believe that our performance as a profession in the forensic domain of indigenous land cases in Australia justifies our continuing presence there, and gives the lie to the recent criticisms to which I have referred.

Notes

1. I wish to thank Graeme Neate and Bruce Rigsby for detailed and most helpful comments on an earlier draft of this paper. Naturally, all the mistakes in it are mine.

2. Legal practitioners with concrete experience of land claims have not figured prominently among the critics. The most audible anthropologist in the ranks of the critics is Ron Brunton, who has no specialised field experience of the indigenous Australian land claims or sacred sites arenas, yet who combines commentary on specific cases such as Coronation Hill and Hindmarsh Island with a general denigration of anthropology as a discipline (Brunton 1995a, 1995b).

3. Those who want the adjudication of indigenous land cases to be technically rigorous in a way comparable to standard commercial litigations, for example, must bear this in mind. Forbes (1995b) offers an exceptionally ill-informed critique of the statutory land rights process in Queensland. The main burden of his (very politically coloured)
argument is that the process lacks rigour. He alleges that the Land Tribunal's hearing of the 1993 Cape Melville etc. case was inadequate, as it rested on an insufficiently rigorous quasi-judicial technique, vague statutory criteria and elusive evidence. This is not the place to offer a detailed rebuttal of these allegations but I reject them completely. Maurice J. in the Warumungu report (Aboriginal Land Commissioner 1988: 248), discussed the 'real problems' which distinguish traditional land claim inquiries from other types of inquiry, indicating reasons why expectations such as those of Forbes are unrealistic: 'For a start it would be impossible for any structured inquiry to begin to duplicate the fieldwork necessary to gather together the ethnographic data required to establish the validity of a land claim.'

4. In at least two cases known to me, peer review has resulted in draft claim books being abandoned: the services of the anthropologists concerned were dispensed with soon afterwards.

5. Sampling was the earlier tendency; the approach is now more rigorous. In earlier Northern Territory claims it was common practice also for the Commissioner's consultant anthropologist to discuss the genealogies with the claimants' anthropologist, and perhaps to check them with claimants. The movement of such checking into the main hearing process has meant an increased amount of the tribunal's precious time being spent grinding through charts of relatives. This has been related to an increased tendency to concentrate on the qualifications of claimants as individuals rather than as members of a group, even though it is widely accepted that the group's qualifications may be validly tested in general by evidence from key and representative witnesses speaking on behalf of each group. In a case with 1500 claimants, for example, it is obvious that hearing detailed evidence from each individual would be considered a ridiculous proposition.

6. Linguists can perhaps make more of a claim to the title 'scientist', not because the manner of their inquiries just happens somehow to be tougher and tighter, although it often is in its own typically micro-fashion, but because the very substance of their inquiries is the singular phenomenon of language, and major aspects of language positively lend themselves to controlled observation, offering lots of very readily perceived, highly patterned and replicable phenomena.

7. Forbes 1993: 217: 'The next question about native title expert evidence is whether impartial access to that knowledge is reasonably assured to claimants and opponents alike.'

8. On the other hand, anthropologists have reported for many years on the fact that there are few driving forces so irresistible as the desire to avoid high-level symbolic pollution. I can't think of a better reason for avoiding certain types of clients, frankly. If you find it hard to engage a plumber, look to your drains.

9. With apologies to the Superman voiceover.