Oceania believes that in this essay the legal scholar Gary Edmond provides anthropologists with a valuable approach to analyzing the relationship which has developed in recent years between the practice of law and the practice of anthropology. Therefore we invite responses to 'Thick Decisions', which should be about 1000 words and confined to specific arguments. A selection of responses will be published in the next issue of the journal. Please contact the editor if you intend to respond.

Thick Decisions: Expertise, Advocacy and Reasonableness in the Federal Court of Australia

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ABSTRACT

Drawing from the litigation around the Hindmarsh Island Bridge (especially *Chapman v Luminis Pty Ltd* 2001) this article provides an analysis of judicial responses to anthropological expertise. Sensitive to the institutional responsibilities of judges, as well as rules of evidence, procedures and legal causes of action, it examines the strategic representation and appropriation of anthropological knowledge and practice. In exploring the relations between law *and* expertise the article illustrates how their combination shapes outcomes. In the process it explains how the judge could have produced a range of (in)consistent outcomes through the modulation of legal categories and their relations with prevalent images of anthropological expertise. This analysis positions the article to critically reflect on some of the implications for anthropologists working in and around legal or quasi-legal settings as well as those commenting on that participation.

INTRODUCTION

> 'Members should take care to know of and generally understand the requirements of laws affecting their professional activity.'
>
> Australian Anthropological Society, *Code of Ethics*.

This is an article about anthropology and law. It has two main aims. The first is to explain how a judge practically managed law *and* evidence, particularly expert anthropological evidence, in the Hindmarsh Island Bridge litigation.[2] Flowing from this explanation, the second aim is to problematise the standards associated with anthropology and the use of anthropological evidence in the Federal Court of Australia. Adopting a model of judicial reasoning sensitive to both legal practice and theory, the article will explore the significance of legal classification and assumptions about the nature of expertise and professionalism in their relationship with *evidence* (Bowker and Star 1999; Ritvo 1997). This will involve an examination of two legally-predicated descriptions of Deane Fergie's performance and

Report. In combination these readings provide fertile grounds for approaching legal rationalisation and the complex relations between 'law' and 'evidence'. They will be used to demonstrate how judges routinely invoke strategic representations of law and expertise to legitimate their decision making and socio-legal order. This focus will illustrate, quite explicitly, how recourse to different assumptions and interpretations *may* entail quite different legal consequences and how strategic combinations of law and fact provide judges with considerable scope for manoeuvre.

This article will presumably disappoint those hoping for definitive resolution or legal consensus to emerge from the litigation associated with the Hindmarsh Island Bridge. Going further, it aspires to explain the reasons for that disappointment in ways that will be accessible to anthropologists. In critically examining Justice von Doussa's judgment it provides a set of resources for challenging some accounts and descriptions of Fergie's performance permeating the Australian anthropological literature.[3] In undertaking this task it is intended to illustrate and explain the potentially unremitting vulnerability of anthropologists as they enter legal domains: whether as consultants, expert witnesses or defendants.[4]

The article is divided into several sections. Section 2 offers a brief outline of some of the recent reforms to the *Federal Court Rules* and practice directions as they apply to expert evidence. While, at first, this section might appear somewhat misplaced, it is intended to provide a point of reference for the ensuing analysis, especially the legal descriptions of expertise. Moving to examine the circumstances around the Hindmarsh Island Bridge litigation, Section 3 provides background information relevant to the construction of the bridge and the *Chapman v Luminis* litigation. Focusing on the trade practices and negligence actions against Fergie, Section 4 summarises Justice von Doussa's reasoning. In Section 5 an alternative approach to the negligence action is developed utilising some of the same authority cited by von Doussa but developing alternative lines of reasoning. Then, in Section 6, these two legally predicated, though apparently inconsistent, approaches to expertise are applied to 'the facts' in order to examine the implications of particular legal assumptions and frameworks. Finally, Section 7 provides analysis and reflection flowing from the two models. Rather than focus on factual or legal indeterminacy Section 7 explores how and why particular models of expertise are elaborated (Moore 1978:32–53). It considers the curious tendency, exemplified in professional responses to the HIB litigation, to treat the highly strategic, legally-inflected representations produced by parties, lawyers and even anthropologists as if they were adequate descriptions of practice *or* forms of legal distortion. Section 7 will provide some indication of the consequences of judicial preferences and raise issues pertinent to anthropologists, especially those anthropologists appearing in courts or working in legal shadowlands (Mnookin and Kornhauser 1979; Galanter 1983; Nader 1979).

IN PURSUIT OF *OBJECTIVITY*: RECENT REFORMS TO THE *FEDERAL COURT RULES* (FCR)

At this early juncture I want to introduce a range of recent reforms to the rules and practice directions governing the provision of expert evidence in the Federal Court of Australia. These reforms antedate the events litigated in *Chapman v Luminis*. However, given my focus on anthropology, they provide a prominent framework for thinking about legal images of expertise and some of their implicit assumptions. That, in the course of his *Chapman v Luminis* judgment, Justice von Doussa expressly referred to the reforms, namely the expert's *paramount duty to the court*, heightens their salience. In their current guise, just to qualify the implications of this section for the subsequent analysis, the rules and guidelines are restricted to the provision of evidence through testimony or reports written *for the purpose of litigation*. The rules, therefore, are not strictly applicable to

Fergie's Report, written for a submission under the Commonwealth *Heritage Protection Act* (HPA). While it is important to recognise this distinction, the rules nevertheless provide a referent for the subsequent discussion of expertise—especially normative legal constructions.[5]

In trials without juries the *Federal Court Rules* (FCR) enable the Court (usually the judge) on its own initiative to appoint an expert as a 'court expert' to 'inquire into and report upon the question' or 'to inquire into and report upon any facts relevant to his inquiry and report on the question.'[6] Order 34A enables the Court to direct 'that the expert witnesses confer' and produce a document identifying the extent of any (dis)agreement. It also enables the Court to receive experts individually or to hear and cross-examine them as a group (Heerey 2002).

Some of the models of expertise underlying the reforms are most explicit in the practice directions (or Guidelines) for expert witnesses. All experts preparing a report or giving evidence, again *in a proceeding,* are to be provided with a copy of the Guidelines.[7] The Guidelines are divided into three sections. The first section 'General Duty to the Court' explains:

- An expert witness is not an advocate for a party.
- An expert witness's paramount duty is to the Court and not to the person retaining the expert.

The second section 'The Form of Expert Evidence' includes the following requirements:

- All assumptions made by the expert should be clearly and fully stated.
- The expert should give reasons for each opinion.
- At the end of the report the expert should declare that '[the expert] *has made all the inquiries which* [the expert] *believes are desirable and appropriate and that no matters of significance which* [the expert] *regards as relevant have, to* [the expert's] *knowledge, been withheld from the Court.*'
- If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
- The expert should make it clear when a particular question or issue falls outside his or her field of expertise.

The third section empowers the Court to direct that experts meet to discuss their opinions and conduct such negotiations in good faith. Embodying their paramount duty to the Court, in pre-trial conferences experts should endeavour to resolve or narrow the extent of their disagreement.

Overall, the Rules and Guidelines represent an attempt to overcome anxieties about expert partisanship in adversarial litigation and to make the use of experts more efficient.[8] The use of court-appointed experts, stipulating a paramount duty to the court rather than the client, identifying all assumptions, striving for objectivity and requiring the expert to disclose reasons for and limits to their opinions are all predicated upon simplistic and scientistic models of expertise (Edmond 2003).

We will return to these requirements, the images of expertise motivating them and some of their potential implications when we examine ways of interpreting the conduct of the anthropologists in the Hindmarsh Island Bridge litigation. At this point, we will turn to consider the events leading to the litigation.

CHAPMAN V LUMINIS: THE HINDMARSH ISLAND BRIDGE (HIB) LITIGATION

Protagonists

Bell: Professor of anthropology
The Berndts (Ronald and Catherine): Anthropologists and authors of the book *A World that Was*.
Binalong Pty Ltd: one of the Chapmans' family companies involved in the development on HI
The Chapmans: the developers
Dixon: Judge (1929–1952) and Chief Justice of the High Court of Australia (1952–1964)
Draper: Senior Archaeologist, Aboriginal Heritage Branch, SA
Edmonds: Consultant Archaeologist
Fergie: Academic Anthropologist, University of Adelaide
Herron: Minister for Aboriginal and Torres Strait Islander Affairs (Coalition)
Jacobs: retired Judge, Supreme Court, SA
Kartinyeri: leading proponent and custodian of the Ngarrindjeri restricted knowledge
Lucas: Consultant Anthropologist
Luminis Pty Ltd: University of Adelaide consultancy corporation
Maddock: Professor of Anthropology
Mathews: Judge of the Federal Court of Australia, second Reporter
Morphy: Professor of Anthropology
Ngarrindjeri: the local Aboriginal people
O'Loughlin: Judge of the Federal Court of Australia
Owen: Judge of the High Court of Australia (1961–1972)
Saunders: Professor of Law, University of Melbourne, first Reporter
Stevens: Royal Commissioner (1995), former Judge, District Court, SA
Tickner: Minister for Aboriginal and Torres Strait Islander Affairs (Labor)
von Doussa: Judge of the Federal Court of Australia, trial judge *Chapman v Luminis*
Windeyer: Judge of the High Court of Australia (1958–1972)

Abbreviations

ALRM: Aboriginal Legal Rights Movement
DOSAA: Department of State Aboriginal Affairs (SA)
FCR: *Federal Court Rules*
HPA: *Heritage Protection Act* (Cth)
LMAHC: Lower Murray Aboriginal Heritage Committee
TPA: *Trade Practices Act* (Cth)

This overview is drawn primarily from Justice von Doussa's judgment.[9]

Hindmarsh Island (or Kumarangk as it is also known to the Ngarrindgeri people) is a small flat island adjacent to the town of Goolwa in South Australia. From the late 1970s Binalong Pty Ltd (a company owned by the Chapmans) began acquiring land and seeking planning approval for the construction of a marina complex on the island. At that stage the island was serviced by a ferry. As part of its development plan, from the late 1980s Binalong began negotiations with the South Australian Labor government to jointly fund construction of a bridge to Hindmarsh Island. In 1989 a conditional agreement was reached whereby work on the bridge was to be jointly funded by Binalong and the state government. The government was to pay half the construction costs up to a maximum of three million dollars.

During the planning and consultation period anthropological and archaeological surveys of the area required by the Department of Environment and Planning were commissioned by the Chapmans. Archaeological studies by Edmonds documented known areas of Aboriginal significance and identified several new middens and burial areas which eventu-

ally altered the orientation of the bridge plan. Anthropological inquiry by Lucas 'failed to find any specific reference to Hindmarsh Island' among Ngarrindjeri myths, legends, stories and songs (para. 29). The processing of the site development plan was protracted. It was not finally approved and gazetted until 9 December 1993 (para. 37).

From late 1992, as construction of the bridge became more likely, opposition emerged. A group of local residents and holiday home owners incorporated as the 'Friends of Goolwa and Kumarangk'. Joined by conservation and union groups, they eventually picketed the planned construction site (para. 65). Nevertheless, work commenced on the bridge on 27 October 1993. von Doussa suggests that prior 'to October 1993 no statement had come into the public domain that identified objections by Aboriginal people to construction of the bridge' (para. 50). At that time the Lower Murray Aboriginal Heritage Committee (the LMAHC) 'expressed concern about the proposed bridge on Aboriginal sites to the Department of State Aboriginal Affairs (the DOSAA). Similar concerns were expressed by the LMAHC to the State Minister for Aboriginal Affairs' (paras. 52–53). In addition:

> On 23 October 1993 the LMAHC wrote to Mr Tickner as the Federal Minister for Aboriginal and Torres Strait Islander Affairs expressing grave concern at the proposed construction of the bridge; the approaches were near Aboriginal sites of significance; Binalong and the State had not consulted with the LMAHC about the effects of the bridge on those sites; and the LMAHC had concern about other sites on Hindmarsh Island and the ecology of the region, the northern end of the Coorong, being sacred to the Ngarrindjeri people. (para. 54)

These actions prompted the commissioning of an additional report into the Aboriginal heritage of Hindmarsh Island by Draper—an anthropologist and archaeologist employed by DOSAA. On 23 December the LMAHC again wrote to the Federal Minister for Aboriginal and Torres Strait Islander Affairs (Tickner), this time specifically requesting, due to the State Minister for Aboriginal Affairs' unwillingness to offer protection, that he use his powers under s10 of the HPA:

> to protect the two major camp Site areas adjacent to the bridge approaches, and the Sites on Hindmarsh Island as a whole, which are significant to Aboriginal persons and which are under the threat of injury and desecration by the construction of the proposed Hindmarsh Island Bridge. (para. 57)

Under the terms of the HPA, where the Federal Minister receives an application, commissions a report and is satisfied, having considered the report and other relevant matters, that the site is a 'significant Aboriginal area' which is 'under threat of injury or desecration' then Section 10 enables the making of a declaration in relation to the area.

Parliamentary elections changed the South Australian Government in December and the new Liberal Government appointed a retired Supreme Court judge (Jacobs QC) to assess the State's contractual obligations regarding the bridge. During the course of an investigation, which concluded that the government was contractually bound, Jacobs was informed by two members of the Aboriginal community that construction work would intrude upon sites with archaeological significance and that linking the bridge to the mainland would be 'an unacceptable affront to the spiritual identity which the Aboriginal community has with the land of its forebears' (para. 62). When asked why this had not been raised earlier, their reply indicated that they had expected consultation.

On 7 April 1994 the Aboriginal Legal Rights Movement (the ALRM) wrote to Tickner indicating that the State Minister had announced an intention to proceed with construction of the bridge. They asked Tickner to make an emergency declaration under the HPA. On 20 April the ALRM again wrote to Tickner adding a new dimension to the reasons for protection:

> In the course of the past four days my clients have reluctantly divulged some secret/sacred information about the Hindmarsh Island, the Lakes and Coorong area including the sea, in an attempt to more clearly show the effect of the bridge upon their cultural integrity and tradition. They have given me instructions to disclose this information to you to assist your assessment of the importance of this matter for aboriginal people and in particular the Ngarrindjeri people.
>
> *Ngarrindjeri life and culture came from the Murray Mouth, the Lakes, islands, and the Coorong. The configuration of these features has a very detailed and specific set of cultural meanings, concerning the creation and renewal of life. ...Consequently, the bridge proposal is culturally destructive. It would cripple the body and natural functioning of the spirit ancestors, and cause great cultural trauma to the Ngarrindjeri People. ... The bridge would also create a permanent physical connection between Kumarangk and the Mainland, which would be both obscene and sacrilegious to Ngarrindjeri culture. (para. 72)*

Draper's preliminary report was submitted to the State Minister on 29 April 1994. Commenting on 'the meeting of the waters' Draper explained:

> This area represents a crucial part of Ngarrindjeri cultural beliefs about the creation and constant renewal of life along the lower Murray lakes, the Murray Mouth and the Coorong. ...The cultural traditions concerning this 'site', and its relationship to the surrounding lakes and Coorong, are highly confidential, and only their very general nature is documented in this report. ... It would also permanently join Kumarangk to the mainland in a way that is repugnant to Ngarrindjeri cultural traditions. (para. 74)

Acknowledging that construction would cause great distress the State Minister for Aboriginal Affairs 'reluctantly authorised the construction' (para. 74). On 6 May 1994 the contractors were instructed to recommence work on the bridge. Work re-commenced on 11 May 1994 but was halted the following day when Tickner announced his emergency declaration under s9 of the HPA. Initiated in the same terms as s10, s9 enables the Minister to make a temporary declaration which may last for 30 days, renewable for an additional 30 days. The emergency declaration allows a reporter, nominated by the Minister, to undertake an inquiry which may lead the minister to make the more substantial s10 declaration.

On the basis of the s9 declaration Tickner nominated Professor Saunders to report on the application for preservation and protection of purportedly significant Aboriginal areas. In the course of her investigation and inquiry Saunders met with various interested parties, including several meetings with local Aboriginal women where they disclosed restricted knowledge to her and her assistant. At this time an academic anthropologist from the University of Adelaide, Deane Fergie, was contracted by the ALRM to facilitate meetings between the Ngarrindjeri women and Saunders. Fergie was engaged through Luminis Pty Ltd—the corporation managing academic consultancy at the University of Adelaide. However, the anticipated facilitation services were not required as Saunders met *with a representative group* of Ngarrindjeri women independently (paras. 293, 491,492, 496, 498). Saunders subsequently spoke to Ngarrindjeri women, with and without Fergie present, and maintained some contact with Fergie.

After the initial meetings the ALRM instructed Fergie to write an 'anthropological evaluation' (the 'Report') to be included as part of their submission to Saunders.[10] Fergie obtained further oral evidence from a senior Ngarrindjeri women, Dr Kartinyeri, which was transcribed and attached to her report as Appendix 2. She also prepared a preliminary evaluation of Appendix 2 which was labeled Appendix 3. These appendices were placed in

envelopes (which came to be known as the 'secret envelopes') marked 'To be read by women only' and included with her report (para. 109). The Fergie Report recorded the existence of a secret oral tradition and provided some indication of its content (para. 110; Rose 1994). The Report also explained that until recently the restricted knowledge had been confined to 'a small group of senior women' who were seen as 'custodians of this knowledge' (para. 112). Though later contested, there was evidence that Karinyeri was appointed to convey details of the restricted women's knowledge to Saunders and several days later conveyed similar knowledge to Fergie (paras. 98–106).

On 7 July 1994 Saunders forwarded her report, and in excess of 400 representations received in the course of her inquiry, to Tickner's parliamentary office. The bridge, her report explained, would affect a 'significant Aboriginal area' (HPA, s3) in three ways:

> first the immediate area of the bridge was adjacent to a known Aboriginal site; secondly skeletal remains, known and anticipated, were present in the area; and thirdly the bridge site was within a general area regarded by Ngarrindjeri women as crucial to the reproduction of the Ngarrindjeri people and their continued existence, that topic being the subject of the secret envelopes. (para 114)

Saunders recognised that, with respect to the first two considerations, 'the Act has not previously been used for the protection of areas of largely archaeological significance' (para. 115). The third consideration, however, was 'of a very different order.'

> As described to me, Hindmarsh and Mundoo Islands and the waters surrounding them have a supreme spiritual and cultural significance for the Ngarrindjeri people, within the knowledge of Ngarrindjeri women, which concerns the lifeforce itself. If destroyed, the Ngarrindjeri people believe they will be destroyed. ... Dr Fergie's report describes the area of the Lower Murray, Hindmarsh and Mundoo Islands, the waters of the Goolwa Channel and Lake Alexandrina and the Murray Mouth as 'crucial for the reproduction of the Ngarrindjeri people and of the cosmos which supports their existence. The adequate functioning of this area is vital to Ngarrindjeri existence'. In what was inevitably a preliminary study, given time constraints, an Appendix to her report offers analysis of the broader, cosmological significance of Aboriginal beliefs about the area. This attachment is confidential and should be read by women only. Even without it, however, it is in my view open to the Minister to conclude that the area has particular significance for Aboriginal people within the meaning of the *[HPA]*. (para. 116)[11]

On 10 July 1994 Tickner announced that he had made a declaration under s10 of the HPA on the previous day. The declaration prohibited: 'bulldozing, grading, drilling or excavating' and 'any act done for the purpose of constructing a bridge in any part of the area' without the written consent of the Minister for 25 years (para. 122).

The Chapmans, joined by some residents of the Island, sought judicial review of Tickner's decision. Justice O'Loughlin of the Federal Court set aside the Minister's decision on two grounds.[12] First, the notification published (nominally) by Saunders advertising her inquiry was apparently flawed. It had not accurately identified the area or the purpose of the application. Second, O'Loughlin found that Tickner had not adequately 'considered' (required by s10(1)(c) of the HPA) the representations received by Saunders. Tickner was in Sydney when the report and representations arrived in his parliamentary office, Canberra. The Saunders and Fergie reports (without the appendices) were faxed to Sydney. In a very short time period, his ministerial assistant had examined the various representations and 'discussed the thrust of them by telephone with Mr Tickner.' With the permission of Kartinyeri, Tickner's assistant read the secret envelopes and advised him that 'there is noth-

ing contained in them which does not support the information in Professor Saunder's report.' At no stage did Tickner read the contents of the envelopes (para.130). O'Loughlin ruled that the combination of reading Saunder's report (there was uncertainty as to whether Tickner had read the Fergie Report) and discussing the representations with his assistant did not constitute adequate consideration. Tickner appealed and O'Loughlin's judgment was upheld by the Full Federal Court.[13]

Late in 1994 a few Ngarrindjeri people began to express reservations about the restricted women's knowledge (also known as 'women's business'). These concerns seem to have spread and become public by the middle of 1995. Those who contested the existence of the restricted knowledge became known as 'dissidents'. In response to the widespread publicity and controversy associated with the emergence of dissident views, in June 1995 the Premier of South Australia announced a Royal Commission to inquire into whether it had been fabricated to obtain a declaration under the HPA. The Royal Commission began taking evidence in July 1995. Most of the proponent women refused to appear before the Commission. The Commission did not have access to the secret envelopes or hear detailed evidence of their contents from those involved, though Fergie and a number of anthropologists did appear. The final Report was issued in December. Commissioner Stevens found that 'the whole of the women's business was a fabrication, aimed at preventing the construction of a bridge between the mainland and Hindmarsh Island' (Stevens 1995:299).

Meanwhile, at the federal level, in response to a further application for a s10 declaration from the ALRM, received after the Minister's unsuccessful appeal to the Federal Court, Tickner announced another independent inquiry. This time he nominated Justice Mathews of the Federal Court as the reporter. Preparing for the submission of the Mathews Report, Prime Minister Keating appointed a woman, Senator Rosemary Crowley, 'to act on behalf of the Minister for Aboriginal Affairs for the limited purpose of determining the application' (para. 135). Conscious of the Full Court's critical response to aspects of Saunder's performance, Mathews invited submissions using more detailed public notices. While Mathews undertook her inquiries and invited representations several dissident Ngarrindjeri women sought and received a declaration from the High Court that Mathews' nomination as reporter was inconsistent, on the basis of the separation of powers, with her appointment as a judge under Chapter III of the Australian Constitution.[14] In the interim, and without the participation of the dissident women, Mathews had completed her inquiry and delivered her Report. This had been assisted by anthropological mediation, from Diane Bell, and was influenced by another Federal Court decision delivered during the inquiry which prevented other Aboriginal peoples from limiting access to restricted knowledge which had been partly disclosed.[15]

With the change of government, brought about by a federal election, the new Coalition Minister for Torres Straight Islander and Aboriginal Affairs, Senator John Herron, tabled Mathews' report in the Senate. Even though the process had been technically vitiated, the new Government relied upon the findings in the Mathews Report. The Report focused primarily upon aspects of Ngarrindjeri culture and history that did not include 'women's business' because 'proponent Ngarrindjeri women were not prepared to reveal the contents of any restricted knowledge' (para. 139). In consequence, the emphasis on archaeological and traditional significance—similar to the first two points originally identified by Saunders—led Mathews to advise that there was insufficient material to support the making of a declaration. On this basis, Herron announced that the government would legislate to authorise construction of the bridge.

Legislation to prevent further applications under the HPA and to facilitate completion of the bridge was passed by the Coalition government in May 1997. The validity of the *Hindmarsh Island Bridge Act* 1997 (Commonwealth) was challenged in the High Court by Kartinyeri and another Ngarrindjeri person (Gollan) on the ground that the special legislation was constitutionally invalid. The challenge was dismissed in April 1998.[16]

Thereafter the Hindmarsh Island bridge was completed and opened to traffic on 4 March 2001.

Alleging substantial economic loss caused by the delay to the construction of the bridge, the Chapmans and Binalong commenced actions against Fergie, Luminis, Saunders and Tickner for negligence, breaches of the *Trade Practices Act*, breaches of statutory duties, misfeasance in public office and the acquisition of property, by the Commonwealth, on unjust terms.

THE EXPERT AS *ADVOCATE:* JUSTICE VON DOUSSA AND HIS (LEGAL) WORLD[17]

Broadly, the main causes of action alleged that 'Luminis and Dr Fergie, Professor Saunders and Mr Tickner each failed to do their respective jobs properly; had they done so, the s10 declaration would not have been made, and the bridge construction would have proceeded' (para. 149).

This article is predominantly concerned with representations of anthropology and the conduct of anthropologists in relation to the negligence action. Before pursuing that theme, however, I wish to dispose of the *Trade Practices Act* (TPA) suit asserted against Fergie.[18] This action provides a useful comparator for the subsequent analysis and illustrates a degree of inconsistency in the way von Doussa treated expertise in the two actions. While the descriptions of the TPA and negligence actions may appear overly legal they do provide an important platform for understanding the litigation; including the integration of law with the peculiar evidentiary ensemble. As we shall see, rules of evidence and procedure, strategy, and substantive law all inform the way cases are conceived, argued and judged (Wootten 2003; Glass 2003; Connolly 2003).

'Trade and commerce' under the TPA

Litigation under s52 of the Commonwealth TPA required the applicant (the Chapmans/Binalong) to prove that during the course of 'trade and commerce' the respondent (here Luminis/Fergie and Saunders) engaged in conduct that was 'misleading or deceptive' by which they suffered loss (para.164). Liability was pleaded against Fergie on the basis of her involvement with Luminis Pty Ltd and being 'knowingly involved in ... contraventions' (para.162). Drawing on the considerable volume of legal authority on the subject, von Doussa explained that the phrase 'trade and commerce' referred to '"the central conception" of trade or commerce and not to the "immense field of activities" in which corporations may engage' (para.165).[19] For von Doussa, the question of whether the anthropologist Fergie had engaged in trade and commerce was resolved by classifying Fergie as a '*professional person* utilising her *professional skills* in the course of the consultancy' (para. 186: italics added).[20] This enabled him to distinguish between 'representations *about* the intellectual product or about the professional practice which generates it' which are part of trade and commerce and the intellectual product itself which does not have a commercial character (para.187).[21] This distinction meant that the contractual negotiations between ALRM and Fergie/Luminis were in 'trade and commerce' but the product of the consultancy was not. Accordingly, for von Doussa, the preparation of the Report was 'in no sense promotional of the services of Dr Fergie or anyone else' (para. 190).

What is interesting, in light of the subsequent discussion, is how Fergie's professional role was described in relation to the TPA action:

> The [Fergie] report was concerned with the *description and analysis* of Ngarrindjeri culture and spiritual matters. It had nothing to do with trading or commercial considerations of the Ngarrindjeri people, of the ALRM, or of Luminis or Dr Fergie. There was *no element of promotion or indirect protection of commercial interests of the Ngarrindjeri people, of the ALRM*, or of Luminis or Dr Fergie. The pur-

> pose of the report was to provide Dr Fergie's *professional assessment and opinion* upon the Aboriginal tradition that she was asked to consider. The report was the intellectual product of her activities. (para. 187: italics added)

In this context the judge emphasises 'description and analysis' and 'professional opinion' rather than advocacy or advancing the interests of clients.

The negligence action: the expert as advocate

Now, in turning to consider the negligence component of this case, we will observe how von Doussa managed the (legal) adequacy of Fergie's performance by characterising her as an advocate.

In their pleadings the Chapmans alleged that Fergie and/or Luminis owed them a duty, as part of a legal duty of care, to take reasonable care with the preparation of the Fergie Report. This was, they asserted, an implied term in the agreement between the ALRM and Luminis/Fergie. The pleadings explained:

> (b) The fact that Luminis and/or Dr Fergie knew, or ought to have known that Binalong would likely suffer loss if there was any lack of care in the performance of such services, or any failure to perform such services in accordance with such an *implied term of agreement*.
>
> 43. Further, or in the alternative, at all material times Luminis and/or Dr Fergie owed to Binalong a duty of care to make the Fergie Report *an accurate report* containing *opinions expressed on reasonable grounds*, and further *to ensure that sufficient tests and all proper investigations were done*, and that *reliable and sufficient information was obtained, for the purposes of such report*, by reason of it being foreseeable that, if they were not, Binalong would suffer loss by reason of the likelihood of the making of a s 10 declaration. (para. 277: italics added)

For the Chapmans, the relationship between a duty of care and the possibility of economic loss arose by reason of the 'proximate relationship' between Dr Fergie and Binalong. The duty of care owed by Fergie was linked to her special anthropological skill:

> Those factors are said to include the *special skill or expertise* in anthropology possessed by Dr Fergie, the fact that she knew that her report was to be used by the ALRM in attempting to secure a s 10 declaration, the fact that Dr Fergie knew Binalong had been deprived of the details of women's business, Dr Fergie's knowledge that Professor Saunders and Mr Tickner would rely on her report, Dr Fergie's knowledge or means of knowledge of the existence of Binalong's contractual rights which would be affected by a s 10 declaration and that Binalong was vulnerably exposed to, and unable to protect itself against loss arising as a consequence of any lack of care on the part of Dr Fergie. (para. 278: italics added)

von Doussa *translated* these pleadings into (more) legally tractable causes of action. One for negligent mis-statement and another for negligence—an omission to 'carry out tests and make all proper investigations'—in the preparation of the Fergie Report (para. 279).

Addressing himself, initially, to the issue of negligent mis-statement the judge referred to the applicable common law. To sustain an action for negligent mis-statement the plaintiff, as a member of a specific class, has to be induced to act in reliance on a particular statement

and as a result sustain economic loss.[22] von Doussa explained, dismissing the claim, that it was not foreseeable that Fergie's Report would be forwarded to Binalong with the intent that it be relied upon and that, moreover, 'Binalong did not and never intended to, rely on the report' (para. 289). Having dismissed the claim for negligent mis-statement, the judge moved to consider the Report itself.

In order to succeed in a negligence suit, again at common law, a plaintiff is required to demonstrate that the defendant owed them a duty of care and identify a breach of that duty which caused damage or loss to the plaintiff of a kind that was foreseeable. Applied to the specifics of the case:

> the pleadings seek to base a duty of care on the foreseeability of loss if the Fergie Report was prepared without due care (including without adequate investigation), on the fact of the contractual duty of reasonable care owed to the ALRM and on the various factors indicative of a close relationship between Luminis and Dr Fergie on the one hand and Binalong on the other hand …(para. 281)

The ALRM had originally contracted with Luminis/Fergie to act as a facilitator at a proposed meeting between Saunders and a group of Ngarrindjeri women. Those instructions were modified when the anticipated assistance was not required. Fergie was subsequently requested, again by the ALRM, to produce a written report for the application under the HPA. The Chapmans/Binalong were endeavouring to recover damages from Luminis/Fergie on the basis that Fergie's Report was inadequate under the terms of the contract with ALRM. At common law, a contract or contractual duty is usually restricted to the contracting parties or the explicit terms of the contract. This does not, however, automatically preclude a contracting party from owing a duty of care to a third party. So, privity of contract between Fergie/Luminis and the ALRM would not necessarily prevent a common law duty of care from being owed to a third party such as Binalong.

Drawing upon the *relevant* case law von Doussa explained how in *Voli v Inglewood Shire Council*—where a person was injured when a structurally unsound stage collapsed in a public building—it was held that the architect contracted to design the building owed a duty of care to anyone who might have been injured—where the injury was a reasonable expectation or foreseeable—as a result of his negligence. The Australian High Court indicated that in cases where a third party asserted negligence or breach of contract—in Voli the contracting parties were the architect and the Council—the actual terms of the contract would not be 'an irrelevant circumstance.'[23]

On the evidence before him von Doussa was satisfied that the loss allegedly suffered by Binalong was foreseeable. He agreed that at the time when the Report was written Fergie should have been aware of Binalong's interest in the construction of the bridge. Consequently:

> I think there was a sufficiently close relationship between Dr Fergie and Binalong to give rise to a duty of care if such a duty, and its content, were coincident with the work to be done by her and the scope of the duty owed to the ALRM under its contract. *The terms of that contract therefore become critical*. (para. 285)

In order to ascertain what was required under the terms of the contract von Doussa indicated that the following questions should be considered:

- Whether Dr Fergie, as a professional person, was retained to act in the interests of the ALRM's clients and contrary to those of proponents of the bridge, including Binalong, and if so whether those duties are inconsistent with the alleged duty of care to Binalong: see *Hill v Van Erp* at 171, 186–187, 196, 236.

- Whether the alleged duty to Binalong is inconsistent with community standards that recognise that in a competitive world where one person's economic gain is commonly another's loss, a duty to take reasonable care to avoid causing economic loss to another may be inconsistent with what is ordinarily legitimate in the pursuit of personal advantage: see *Bryan v Maloney* at 618, *Heyman* at 503; *Hill v Van Erp* at 193 and 211; and *Perre v Apand Pty Ltd* at 200 [33], 220 [103], 224 [115], 258 [211], 290 [300], 299 [329] and 328 [419].
- Whether there was a coincident or corresponding duty owed to the ALRM 'to ensure that sufficient tests and all proper investigations were done and that reliable and sufficient information was obtained for the purpose of [the Fergie Report]': see par 43 of the statement of claim. (para. 287)

From this perspective the competing interests of the parties were conceived as the primary considerations for understanding the expert's responsibilities.

The precise terms of the arrangement between the ALRM and Luminis/Fergie were not recorded. This meant that the terms of the contract had to be constructed retrospectively (compare Macaulay 1963). According to her Report Fergie was instructed to provide 'an anthropological evaluation of the significance of secret women's knowledge within Aboriginal tradition' for the purposes of a declaration under the HPA. The 'limited nature' of the instructions was 'plainly stated' in the introduction to the Report:

The aims of this report are:

- to outline the particular significance, according to Ngarrindjeri tradition, of the area of the proposed Hindmarsh Island Bridge. (para. 293)

According to von Doussa, these instructions required an:

> *evaluation of information* ...They did not invite Dr Fergie to *investigate* whether that information reflected a genuine traditional Aboriginal belief, or whether it was fabricated. ... The instruction was, in effect, *to take the information as given*, and to express an opinion on the significance of that information for the purpose of supporting the claim...[24] (para. 292)

For von Doussa, Fergie's overview of the cultural significance of the information supplied by the Ngarrindjeri women, especially Kartinyeri, for the ALRM submission was entirely appropriate. Incidentally, von Doussa accepted that Fergie was convinced of the truthfulness (or genuineness) of the information revealed to her (para. 294).

On the basis of this interpretation of the contractual arrangement von Doussa continued his analysis of the Fergie Report (and Fergie's performance) privileging the reconstructed contractual relationship and the limited instructions from the ALRM.

> A reading of the Fergie Report in my opinion *does not suggest that Dr Fergie has undertaken investigation or research*, other than to the limited extent stated, to obtain information about Aboriginal tradition relevant to the assessment of the significance of the area, and the threat of injury or desecration. On the contrary, I think it is apparent that she has not done so. *The limited scope of Dr Fergie's* ***instructions*** *did not require her to ensure that sufficient tests and all proper investigations were done* as to whether the restricted women's knowledge *was truly a Ngarrindjeri tradition*. To have undertaken such a questioning role would have put her *in conflict* with her ***instructions***. It was not the purpose of the ALRM ***instructions*** to her to do so. To assert that she had a duty of care to Binalong or to any other proponents of the bridge to do so is to assert that she was required to go outside and beyond her ***instructions***.

> Dr Fergie was asked to conduct *an evaluation in her professional capacity*. The clear inference from the circumstances of her engagement is that she was to do so *exclusively in the interests of the clients* of the ALRM who were seeking professional support for their contention that the area was a significant Aboriginal area deserving of protection by preventing construction of the bridge. Dr Fergie is *criticised by the applicants for assuming the role of an advocate*. An advocate is '(1) a person who supports or speaks in favour, (2) a person who pleads for another …' (*The Australian Oxford Dictionary*, 1999). *That is exactly the role she was* ***instructed*** *to undertake*. She was to assist the Ngarrindjeri women *to better articulate the merits* of the case against the construction of the bridge than they were able to do alone. To accept such a role is *entirely in accordance with the role of a professional person instructed to make or assist in making a representation on behalf of a client. This is something that members of the* ***legal profession*** *do day in, day out. In doing so, professional people are required by their* ***professional standards*** *to act honestly and not knowingly or recklessly to misrepresent the facts or mislead* (or, to use Dr Fergie's description of her professional duty, to do so *truthfully*). But it is contrary to common experience to suggest that such a person is under a duty of care to those with interests which are diametrically opposed to that person's client. (paras. 295–296: emphasis added)

The judge continued, explaining that both legal practitioners appearing as advocates and expert witnesses giving evidence in court were members of skilled professions which owed duties to the court as well as their clients. The duties arise because the legal practitioner is an officer of the court and in the case of the expert witness: 'the curial process, the oath and in some instances practice directions of courts, require that an expert witness owes a *paramount duty to the court* to assist in the elucidation of the true facts' (para. 297). For von Doussa, however, the additional duties associated with the provision of expert evidence in legal proceedings (provisionally sketched in Section 2), did not apply in other circumstances. On such occasions, adopting the role of the advocate was 'not only legitimate in the pursuit of personal advantage of the client, it is also in accordance with community expectations and standards that the professional person will do so' (para. 297).[25]

Ultimately, any duty of care allegedly owed to Binalong was conceived as inconsistent with the duty Fergie, as an expert advocate, owed to her clients:

> Here the scope of the duty of care to Binalong alleged is in direct and irreconcilable conflict with the duty owed by Dr Fergie to her clients. To her clients it was her obligation in the performance of the contract between Luminis and the ALRM to *use her professional skills exclusively in their interests* to *interpret* the material provided to her by them, and to formulate the case for threatened injury and desecration to advance their interests, which was to stop the construction of the bridge.
>
> In my opinion Dr Fergie did not owe a duty of care to Binalong either to carry out the preparation of her report *with reasonable care* to prevent Binalong suffering loss by the making of a s 10 declaration, or '*to ensure that sufficient tests and all proper investigations were done' to test the truthfulness of the restricted women's knowledge related by her informants*. (paras. 299–300: italics added)[26]

In the absence of a duty of care owed to the Chapmans/Binalong there could be no action in negligence against Fergie or Luminis. Together, the contractual (re-)construction and classifying the expert as an advocate meant that in the absence of a duty of care, even if Fergie had been negligent, no action was available. Here, the expert anthropologist contracted to write a report is equated, functionally, with the legal practitioner promoting a cause.

AN ALTERNATIVE READING: IN SEARCH OF THE *REASONABLE* EXPERT

Now, restricting myself to the same cases and circumstances it is my intention to demonstrate how an alternative reading, and a reading arguably more consistent with the revised *Federal Court Rules* (and, not coincidentally, the Chapmans' submission), might have been elaborated and justified by construing the nature of expertise somewhat differently. This alternative interpretation requires several assumptions which are distinct from those adopted by von Doussa. In effect this approach is designed to illuminate some of the interpretive flexibility in representations rather than providing a vehicle for the promotion of one putatively proper image of expertise (Potter 1996). It illustrates, quite explicitly, how recourse to different assumptions and interpretations *may* produce quite different legal consequences.

In this section it is my intention to return to the case of *Voli*, but to develop a line of argument *overlooked* in von Doussa's reasoning. Recall that von Doussa referred to *Voli* when discussing third parties in relation to breach of contract or negligence. If we re-examine *Voli*, incorporating the High Court's discussion of the standard of care for professionals, and apply them to the events in the HIB litigation, an alternative set of legal expectations can be generated.

We can accept, along with von Doussa and the High Court, that contractual terms may be relevant to evaluating the performance of a professional. Earlier we saw how the Court in *Voli* decreed that even explicit contractual terms would not invariably 'operate to discharge the architect from a duty of care to persons who are strangers to those contracts' (*Voli*:85). Consequently, if a third party suffered damage the High Court considered this situation potentially actionable:

> it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskilled conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. (*Voli*:84)

Adopting this approach and substituting the architect for an anthropologist we will consider the impact of the standards proposed by the High Court in order to gauge the performance of Fergie.

In outlining the architect's obligations and the requisite standard of performance, Windeyer J, writing for the entire High Court, explained that:

> what should have operated on his mind ... *was the need to bring his own professional skill and competence to the task he had undertaken*. ... It was to use due care and skill as an architect. ... *An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence*. ... he must bring to the task he undertakes *the competence and skill that is usual among architects practicing their profession*. And he must use due care. (*Voli*:83–84: italics added)

And,

> And what an architect must do to avoid liability for negligence cannot be more precisely defined than by saying that *he must use reasonable care, skill and diligence in the performance of the work he undertakes*. ... Lockwood [the architect], *knew the purpose* for which the hall was being built, *and the use to which it would be put. His duty of care extended to persons who would come there to use it in the ordinary way*. (*Voli*:85)

In assessing the architect's design and conduct, the High Court was not preoccupied with (advancing) the interests of the local Council (the 'client') but instead with ascertaining

general standards of professional architectual performance. Here we can observe a much greater concern with the actual conduct of the expert derived from expectations based on membership of an established profession. Consequently, an expert 'undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling', especially if he or she 'knew the purpose' of the work and 'the use to which it would be put'. In contrast to von Doussa's orientation (paras. 296, 299), for Dixon CJ, Windeyer, and Owen JJ the architect cannot act 'exclusively in the interests of the clients' *without* attending to the necessary standards of the profession. The expert is 'bound to exercise due care, skill and diligence' and to bring 'professional skill and competence' to the task undertaken. Indeed, from this perspective it is arguable, that failing to meet the requisite standard of *reasonableness* might, unless explicitly repudiated in the contractual arrangements, be construed as contrary to the interests of the clients (para. 296).

In *Voli* the High Court made no attempt to distinguish the expert's extra curial activities from the provision of evidence in court. If an anthropologist acts in a professional capacity, that is as an expert, then the requisite standard of performance would be 'to exercise due care, skill and diligence' of a level that is usual among anthropologists practicing their profession (*Voli*:84). Ever pragmatic, the law does not require an 'extraordinary degree of skill or the highest professional attainments' but only 'reasonable care, skill and diligence' (*Voli*:84). Were we to apply such a standard to the production of Fergie's Report we would be inclined to consider what a reasonably competent anthropologist would do in similar circumstances (para. 280).[27] We might also consider, and this raises supplementary issues for both the law of negligence and the practice of anthropology, whether a competent anthropologist could accept the consultancy under the restrictive regime prescribed by the HPA (Fergie 1996a; Maher 1994; Wilson 1983–1984).

Previously we saw how von Doussa construed the contract and relationship between Fergie/Luminis and ALRM on the basis of statements drawn from the beginning of Fergie's Report. We were told that she was instructed to provide 'an *anthropological evaluation*', 'an *evaluation* in her *professional capacity*', and 'to *outline* the *particular significance*, according to Ngarrindjeri *tradition*, of the area of the proposed Hindmarsh Island Bridge.' For von Doussa, the instructions required 'an *evaluation* of information', '*description* and *analysis*' and a '*professional assessment* and *opinion*'. Applying these same instructions and findings to the standards identified in this alternative interpretation of *Voli*, a rather different set of expectations might be developed. Rather than construe Fergie as some kind of advocate, with few controls available to gauge her performance, we might emphasise the need for the application of her specialised anthropological skills and knowledge (Wootten 1995; Whisson 1985; Sutton 1986; Williams 1986). From this perspective, (a term implied in) the contract, or the standards of the profession, may have required Fergie, *qua* anthropologist, to bring a specific type of specialised knowledge or skill to her assessment of the information supplied by the Ngarrindjeri women.

If we emphasise the role of Fergie's professional capacity in acting as an anthropologist, with responsibilities to her clients, the profession, the female Ngarrindjeri client-subjects, the Reporter, the Minister, and even the Court—given that substantial financial interests were at stake and litigation was always foreseeable—then the question, posed by the plaintiffs, of whether she undertook 'sufficient tests and all proper investigations' or an 'adequate assessment and analysis' may be rendered relevant for the purposes of legal analysis. By shifting the focus from the (methodological) freedom of the advocate back toward the standards and expectations of a field (here anthropology, however imprecisely formulated) and the expectation that Fergie would act as an anthropological professional, the question of what an adequate report or competent performance might require becomes more significant. Even von Doussa expected that professional people would as a minimum 'act honestly and not knowingly or recklessly … misrepresent the facts' on the basis of their 'professional standards' (para. 296). In consequence, von Doussa's indifference to the

alleged failure to undertake *relevant* or perhaps *necessary* inquiries, because of her instructions, can be inverted. Here, either Fergie's professionalism (as an expert from the *discipline* of anthropology) or the invocation of reasonableness (a version of anthropological propriety) necessitate adherence to some minimal level of critical evaluation, investigation and analysis and any serious derogation without appropriate explanation or qualification, could render the conduct suspect, perhaps even negligent.

Voli seems to suggest that where it is foreseeable that harm may occur, and von Doussa accepted that HIB was such a case, and where it was reasonable to assume that negligence might cause injury or loss, even to a third party, the law (really judges) might be willing to find a sufficient level of *proximity* between the parties or between one of the parties and a third person to sustain an action. In this example, the parameters of the judicially crafted duty seem inextricably linked to contractual exegesis and the manner in which anthropological propriety is characterised.

Returning to the suggested analogy between the architect and an anthropologist (rather than a legal practitioner) a series of quite distinct issues emerges. The architect was engaged in his professional capacity to design a public building which included a stage. In *Chapman v Luminis* an anthropologist was engaged in her *professional* capacity—recognised by von Doussa—to produce a report to support a s10 application under the HPA in a politically volatile climate. In Voli, the architect's failure to conform with the council's building regulations or to build an adequate stage was considered to be a breach of his duty of care rendering him liable for injuring a third party user (not privy to the contract). In the HIB litigation, we are exploring the question of whether an anthropological expert, who was not involved in the provision of evidence in a legal proceeding but certainly much closer to that position (through the production of a report for submission under the auspices of the HPA and anticipating that the reporter and minister might read it) than the architect engaged to design a building, owed a duty to those suffering loss allegedly on the basis of her *questionable* performance. From this perspective, exonerating Fergie by characterising her as an advocate might not seem particularly convincing. Furthermore, that characterisation was not available to the architect engaged in a professional capacity. If Fergie is conceived as an expert (or professional) then the various expectations centered around competent (that is, non-negligent) expert performance should be evaluated in terms of the circumstances relevant to the actual case. This reading of Voli would seem to suggest that Fergie might owe a duty to a third party, but the specific constitutents of that duty, also known as the *standard of care*, would need to be determined largely on the basis of (judicial constructions of) anthropological practice. We will continue this analysis in the next section where we undertake a preliminary examination of the propriety of (reconstructions of) Fergie's performance produced drawing upon the models developed so far.

EVALUATING EVIDENCE AND EXPERTISE

In the previous analysis (Sections 4 and 5) we considered two different ways of constructing the legal framework for determining whether Fergie owed the Chapmans/Binalong a duty of care and what the specific content of that duty might look like. In examining these standards we saw how each drew upon different legal authority and alternative models of expertise (or reasonableness and professionalism) and could, at least potentially, require quite different standards of care. Namely, the anthropologist as advocate with few tangible standards and, alternatively, the reasonably competent anthropologist. In this section, it is intended to selectively apply these standards to some of the evidence, testimony, pleadings, statements of claim and findings discussed by von Doussa in order to obtain some sense of the (limited) discretion available in judicial practice and also to illustrate how von Doussa's approach appears to diverge from the dominant (scientistic) images of expertise embedded in the *Federal Court Rules* and typically featured in judgments.[28]

von Doussa's interest in the anthropological evidence appears to have been motivated primarily by his interest in the genuineness of the tradition associated with the restricted women's knowledge (para. 292). In finding that Fergie/Luminis did not owe Binalong a duty, von Doussa was not required to review Fergie's performance in relation to the negligence action. Indeed, given his *legal* determinations (Section 4) we are fortunate to have a fairly elaborate judicial response to the anthropological evidence. The detailed consideration of the evidence enables us to generate, employing some of the assumptions around the articulation of law and expertise developed in the previous sections, three quite different approaches to Fergie's performance. In the process, I hope to illustrate that *law* and *expertise* are not entirely rigid, exclusive and pre-existing categories but, rather, are mutually constituted through strategic (here judicial) imbrication. These examples should provide some indication of how judges manage expertise. It should also demonstrate the potential *value* of anthropological evidence and the *vulnerability* of anthropologists as they enter legal domains.

Fergie as 'advocate': the contingent forum

This sub-section explores the strategic integration of law and fact in a manner intended to support the propriety of Fergie's performance as an advocate. As we have seen, this approach is shaped by von Doussa's legal preferences. In this example, classifying Fergie as an advocate vindicates her actual performance.

We begin this version by emphasizing (for the judge it might be the more passive 'recognizing') that Fergie was contracted by the ALRM to provide a report in relation to a declaration under s10 of the HPA (para. 109, see also Berndt 1983–1984; Dagmar 1983–1984). On that basis, Fergie assumed a duty to the ALRM to act as its *advocate*; to assist in the preparation of a case (para. 296). Here, the requisite standard of performance is low. Fergie owed no duty to parties with antagonistic interests (paras. 299–300). The extent to which Fergie's anthropological knowledge and skills impact upon her role as advocate are unclear and potentially irrelevant. The only constraints upon Fergie, from this perspective, were ethical: 'Professional people are required by their *professional standards* to act honestly' and 'in accordance with the ethics' of their profession (paras. 296, 484).

Applying these legal expectations to the case, 'the two *intended* readers … [Saunders and Tickner—described as 'informed intelligent people' (para. 195)][29] could be under no elusion [sic] that Dr Fergie's role was other than to act in the interests of the Ngarrindjeri women' (paras. 443, 483, 484). Consequently, there was no obligation to test or investigate the authenticity of any claims, and peer review would have contravened her (retrospectively implied contractual) instructions: 'Dr Fergie was instructed by ALRM to prepare a report exclusively for its use. It would have been a gross breach of her contractual and professional obligations for her to submit her report to a third party for comment unless express authorisation was obtained to do so' (para. 495).[30] Fergie, acting in the capacity of the ALRM's advocate, was to accept 'the information as given' (para. 292).

Adopting the nomenclature proposed by the sociologists Gilbert and Mulkay, we might label this approach to expertise as the *contingent* forum, for it emphasises aspects of expert performance which are not depicted as 'generic responses to the realities of the … world, but as the activities and judgments of specific individuals acting on the basis of their personal inclinations and particular social positions' (Gilbert and Mulkay 1984:55–56; Collins and Pinch 1982). In the example, the expert as advocate operates in accordance with a traditional, party-based adversarial role. The inability to test or consult more widely and the absence of a critical, or reflexive, orientation are trivialised (compare Mulkay 1976, 1980). Here, the major constraints on Fergie's performance are her employment arrangements—the contract, employer's instructions and quite vague allusions to honesty and the profession.

Fergie as 'anthropologist': the empiricist forum and (un)reasonableness

Now, it is my intention to provide an alternative (and partially subversive) reading of Fergie's evidence and performance to demonstrate how the deployment of different models of expertise and different legal expectations may engender different legal implications and transform the duties owed by anthropologists to clients, courts and other publics. While the model of expertise developed on this occasion is dis-similar to the model articulated in the previous example, this image of expertise is arguably more consistent with the idea that, as a discipline or profession, anthropology maintains a set of professional norms, fundamental assumptions and methodological canons.[31]

So, by emphasising the primacy of reasonable anthropological conduct, the standards of expert performance extrapolated from case law like *Voli* and some of the idealised expectations implicit in the *Federal Court Rules*, let us consider another way of conceptualising Fergie's evidence and its potential significance. The following example re-constructs what a (*reasonable*) judge might expect from a *reasonable* anthropologist.[32]

This account might begin by emphasising that experts are required to be 'independent, balanced, comprehensive and/or objective' (paras. 373, 673), honest (para. 484), sceptical and ethical (para. 484). However, rather than adopt an impartial and critical approach, reflecting her obligation to the Court (or the standards of her profession), Fergie acted as an advocate: 'to assist the Ngarrindjeri women to better articulate the merits of the case against the construction of the bridge than they were able to do alone' (para. 296). She accepted the Ngarrindjeri women's claims at face value: 'Dr Fergie is unquestionably accepting the truthfulness of the information given to her …' (para. 294).[33] Fergie did not submit her Report to peer review (para. 495).

In addition, the standard against which the expert's performance should be weighed might be the reasonably competent anthropologist. Drawing upon the criteria discussed in *Voli*, an expert: '*undertaking any work in the way of* [their] *profession accepts the ordinary liabilities of any* [person] *who follows a skilled calling*.' From such a standpoint, if Fergie acted in the interests of the ALRM and the Ngarrindjeri women there were minimal professional expectations from which there could be no derogation.[34]

From these perspectives Fergie's investigation and Report might be considered superficial or inadequate. Notwithstanding the paramount duty to be independent, balanced and objective or conform to the standard of the reasonably competent anthropologist, Fergie did not adequately engage with the considerable literature on Ngarrindjeri culture: 'A reading of the Fergie Report in my opinion does not suggest that Dr Fergie has undertaken investigation or research, other than to the limited extent stated' (paras. 355–381, 295). Fergie did not 'ensure that sufficient tests and all proper investigations were done as to whether the restricted women's knowledge was truly a Ngarrindjeri tradition' (paras. 295, 151, 277, 279, 280, 287, 300, 488). The standards of the field required at least some attempt to investigate, test, cross-reference, or analyse the authenticity of the women's claims. They required a critical professional attitude.

Fergie's investigation and Report were undertaken at short notice and in unusual circumstances. Indeed, the covering letter to her Report expresses her anxiety about the process. The introduction to the Report suggests that its author was captive (eliding her own agency) to a flawed process: 'The extraordinary limitations of this process risked putting the Ngarrindjeri case, and my professional reputation at risk. I do not think this is acceptable' (para. 496). Rather than an excuse (or confession, see Barthes 1982), failure to meet the requisite standards may seriously limit the Report's *adequacy* or *reliability* (Potter 1996:122–149). Significantly, the previous extract can be read in a way which implies that Fergie did not consider herself to be employed as an advocate for the ALRM. This reading seems to be supported by the fact that Saunders, described the Report as 'a preliminary study' (para. 116). Curiously, the Report does not explain that it is *advocacy* and not *anthropology*. Fergie was aware that it was

likely that her Report would be used in deciding whether to make a s10 declaration and could be read by non-anthropologists (paras. 195, 488, 501). Consequently, readers might have relied upon her specialised knowledge and the fact that she held herself out as an anthropologist.

Fergie's investigation and Report considered issues that were, arguably, not directly within the proper bounds of her expertise (Gieryn 1998; Edmond 1998). She was not adept in the nuances of Ngarrindjeri culture. Inexperience made her more of a generalist than a specialist (para. 503).[35] In addition, there was expert disagreement and criticism of Fergie's Report. Professor Maddock 'was critical of Dr Fergie's methodology, the accuracy and completeness of her research, and questioned whether her opinion was soundly based having regard to available literature' (para. 360). The unpublished and unreviewed Fergie Report was largely inconsistent with the pre-litigation published literature dealing with the Ngarrindjeri people (but see paras. 364, 375, 380).[36]

Finally, several critical accounts of Fergie's overall performance in the controversy, however polemical or incomplete, were already in print when von Doussa came to consider the matter (e.g. Brunton 1999).

We might describe the more conventional (and more scientistic) expectations behind these images of expertise, as *empiricist* (or constitutive). As a generalisation these standards are 'organised in a manner which denies [their] character as an interpretive product and which denies that its author's actions are relevant to its content' (Gilbert and Mulkay 1984:56; Merton 1973; Gormley 1955).[37] Derogation is used to impugn performance and knowledge. The standards might also be described in terms consistent with reasonableness, alluding to standards of the field or generally accepted levels of conduct. In these examples, Fergie's performance consistently falls short of the requisite standard.

In this example, primarily for propaedeutic reasons, Fergie's performance is problematised. While this might be a familiar reading it should not, without more, be substituted for some putatively correct approach. For it is possible to elaborate a defensible version of Fergie's performance against these types of empiricist standards. We will see this in the next section, which explores the possibility of defending representations of Fergie's performance as a compromise between the expedited inquiry required under the HPA and the need to adhere to the norms suggested by an empiricist framework.

'Applied' anthropology: specialised knowledge and situational adequacy

The third and final example represents something of a compromise between the contingent and more constitutive registers. It suggests how a judge might have found Fergie's performance reasonable *in the circumstances*, even when weighed against the kinds of standards articulated in the previous sub-section, 'Fergie as 'anthropologist''. This response involves embracing the reasonableness standard and certain expectations drawn from what a competent anthropologist might be expected to do, while making allowances for the exceptional circumstances surrounding Fergie's participation in the ALRM submission and/or the limitations inherent in the heritage protection regime.

In this example we might retain the expectation that experts will be sceptical, balanced and objective. We might even, drawing upon *Voli*, emphasise the importance of reasonableness of performance and the need for certain professional minima. However, on this occasion the stringency of these two frameworks might be tempered by recognising the special circumstances attending the production of the Report and investing the potential readers (Tickner and Saunders) with intelligence and agency.

The events surrounding the transmission of the information to Fergie were exceptional (paras. 333, 335). They were actually precipitated by the onset of the proposed development and the peculiar features of the HPA (para. 496). Fergie was employed at short notice as a consultant anthropologist (para. 496). Her investigation and Report were *reasonable* in the

situation: 'the Fergie Report was an excellent example of *applied* anthropology in difficult circumstances.' Fergie acknowledged some of these contextual constraints in her Report (paras. 441, 496). Further, the methods and approaches relied upon by Fergie were endorsed by other anthropologists, such as Professors Morphy and Bell. According to their evidence her Report was 'based on sound anthropological methods and analysis' and 'her methodology was appropriate and consistent with proper anthropological practice' (paras. 361, 363, 442, 443, 476).

We can also moderate the extent of expert disagreement. von Doussa determined that experts who were critical of Fergie and her work were either inexpert, unreliable or, away from the pressures of litigation, held opinions that were actually consistent with her views. Maddock, for example, was not 'steeped in the knowledge of Ngarrindjeri culture' (para. 360) and during 'the course of cross-examination, many of the criticisms initially made by Professor Maddock disappeared or were significantly qualified' (para. 443). von Doussa entertained 'serious concerns about the *objectivity* of Dr Clarke' (para. 373).

It is not my intention to suggest that the approaches—described here as contingent, empiricist and applied (or contextual) empiricist—are the only ways to interpret the expert evidence, nor that one is an accurate theoretical or legal model or even superior to the others. The first and third examples suggest the possibility of defending Fergie's performance or components of it—and to some extent von Doussa did this in relation to the evidence pertaining to the genuineness of the tradition—even against some of the images of expertise mandated under stricter versions of the empiricist model. Rather, the analysis is designed to demonstrate the flexibility and implications of legal categorisation and also how different representations of law and expertise may produce dramatically different interpretations of expert performance and propriety. Representations of expertise are not neutral. It is probably fair to suggest that the second reading has broader cultural and legal resonances in relation to experts and expertise than the idea, advanced by von Doussa, of the expert as merely a professional advocate (see Turner 2001; Collins and Evans 2002). Unlike the dichotomy underlying von Doussa's advocate-expert approach, the empiricist approach proposes a radical continuity in performance across contexts and imposes a much greater standard of care. It is no coincidence that this was the model of expertise promoted by the plaintiffs. If a judge were to juxtapose the representation of Fergie's performance from the first example against the more idealised empiricist standard of anthropological expertise drawn from the second, in the normal course of Native Title or Heritage Protection litigation, questions about admissibility and evidentiary sufficiency might arise. Her evidence might be deemed *inadmissible* or *unreliable*—on the grounds that it was advocacy.

Applying some of the legal standards from Sections 4 and 5 to the evidence and von Doussa's findings we can observe how the selection and interpretation of the legal framework is inextricably linked to what counts as evidence and how it should be understood. The two approaches outlined in Sections 4 and 5 are intended to provide examples of how both narrow legal categories and practice, like the implications of a contract or the construction of the scope of a duty of care, and other definitions and representations are integral to the construction of law and fact in legal judgments. On the basis of these examples, we can observe how different conceptualisations of the relevant law and legal standards, expertise and interpretations of evidence could be used to produce quite different conclusions about the adequacy of an expert's performance.

The examples illustrate how through processes of strategic emphasis—on the discipline, the nature of expertise and professionalism, substantive legal doctrine and the relevant legal standards of admissibility or performance—judges are capable of producing and rationalising a range of findings. Typically, the expert opinions relied upon in judgments will be presented as methodologically rigorous, disinterested and reliable. They are generally presented in ways that demonstrate their consistency with the *empiricist* repertoire or a version modified to accommodate the particular exigencies and context (Edmond 1998,

2001). Conversely, the dispreferred evidence will be routinely characterised as partisan, methodologically flawed, exaggerated or simply ignored.

IMAGINED COMMUNITIES AND TROPES OF PROPRIETY

In closing, I want to reflect on four issues. Drawing upon a range of historical, sociological and anthropological studies of expertise I want to suggest that all of the models of expertise developed above possess serious theoretical and practical limitations. While critical accounts of science and expertise may come as no surprise to anthropologists, the deficiencies do have consequences for understanding expert performance, legal rationalisation and the terms on which anthropologists engage with legal institutions. The second sub-section provides several examples of how anthropologists have responded to the inquiries, litigation and findings associated with the Hindmarsh Island bridge. These examples afford some sense of the limitations to (these) anthropological accounts of law and legal processes. The third sub-section considers some of the possible legal implications of von Doussa's decision. Once again, the purpose is not to defend or criticise but to illustrate how his approach departs from the more regular use of empiricist images of expertise and how particular findings might provide material resources for future litigation. Finally, the essay concludes with some reflection about possible anthropological responses to courts, judges, litigation and its own identity.

(other) Images of expertise

The foregoing analysis featured two legally-inspired models of expertise, the expert as advocate and the expert as reasonable or objective professional and three caricatures of Fergie's performance. Now, in response, it is my intention to provide an impression of the more interesting recent empirical research on expertise to identify some of the limitations to legal and legally-oriented anthropological commentary on expertise. In the following discussion the focus on the sciences is not intended to suggest that anthropology is or could be scientific, or to pejoratively contrast anthropology with some specious model of *Science*.[38] Instead, the focus is intended to provide a hard case. For, if natural scientists experience difficulty attaining the idealised standards conventionally associated with the empiricist forum then it would be curious if the same standards were attainable or applicable, without serious qualification, to other types of specialised knowledge and expertise—especially those disciplines which study human society and culture employing more interpretative, or hermeneutic, methods.[39]

Most contemporary historians, sociologists and anthropologists of science (and expertise)[40] would dismiss, as empirically implausible, the existence of an historically stable, prescriptive and efficacious scientific method doctrine (Polanyi 1958; Kuhn 1962; Schuster and Yeo 1986). Formal education and socialisation into a research tradition or research institution seem to be more important to scientific practice than knowledge of philosophical formulations (Mulkay and Gilbert 1981; Pinch 1986; Collins 1986). Historical and empirical studies have been unable to locate a set of institutional commitments or professional norms consistently adhered to by experts. Rather than providing a prescriptive guide to scientific practice, norms such as disinterestedness and scepticism can be understood as a complex moral language, susceptible to strategic deployment (Mitroff 1974; Mulkay 1980; Chubin and Hackett 1990; Epstein 1996). Appeals to 'objectivity'—independence, impartiality and neutrality—rarely assist in the resolution of technical controversy (Albury 1983; Proctor 1991; Shapin 1994). Since the second world war the traditional appeal of objectivity has been compromised by the changing political economies shaping modern scientific practice and its institutional manifestations (Nowotny 2001; Mirowski and Sent 2002). Philoso-

phers, sociologists and scientists have been unable to develop criteria which can be consistently operationalised to distinguish between the scientific, the non-scientific and pseudo-scientific (Laudan 1983; Quinn 1984; Edmond and Mercer 1998). The boundaries used to distinguish between the sciences, and demarcate scientific from non-scientific activity, seem more comprehensible when understood as flexible and strategically manipulated (Gieryn 1998; Knorr-centina 1999; Galison 1996). None of the foregoing should be understood to imply that images of method, norms or peer review are irrelevant to the practice, pedagogy and rhetoric of the sciences. Rather they might instead be considered to be part of a flexible and frequently contested repertoire (Gilbert and Mulkay 1984; Potter 1996). Indeed, this converts accounts endeavouring to explain expert knowledge and progress into much more complex, political narratives, concerned with the discursive construction of the *scientific,* the *natural* and the *objective*.

Recognising that expert knowledge and practice rarely conform with pervasive ideals ought to transform our understanding of its legal appropriation and representation. By focusing on a few examples from the HIB litigation—methodology, the nature of the field and the meaning of publication—we can observe how representations of the nature of expertise, evidence and the law were strategically mobilised in von Doussa's judgment.

In the absence of a single efficacious method doctrine, experts often disagree about the appropriate method(s), tests, level of competence, adequacy of equipment, as well as the meaning of experiments or data, and whether tests, methods and techniques have been adequately performed. These types of issues frequently arise in addition to compromises forced by time constraints, ethical restrictions, resource limitations and the need to publish or respond to commercial imperatives. For those endeavouring to draw upon idealised images of science or anthropology the various discretions available during the planning, practice and interpretation of research are susceptible to ironic re-examination. The sub-sections '*Fergie as 'anthropologist'* and '*Applied' anthropology* provide examples of how judges can describe, depending on the images of expertise deployed, the same set of practices as both methodologically adequate and methodologically suspect. Where judges actually rely on evidence, however, it will, as von Doussa explained, (almost always) be presented as if it were 'based on sound [anthropological] methods and analysis'. This was how von Doussa approached the evidence about the genuineness of the women's tradition.[41]

The second example concerns judicial recourse to *the field*. Use of a field can be problematic, as work on the practices of boundary demarcation by Gieryn (1998) suggests. Boundaries around fields, disciplines, sub-fields, sub-disciplines and relative competencies are actively negotiated and re-defined. The boundaries around competence and legal entitlement are shaped, in part, by the circumstances of particular cases. Recall how Maddock's evidence was impugned on the basis that he was not 'steeped in the knowledge of Ngarrindjeri culture.' Fergie's performance was defended because of her gender, the special revelation by women presented as representative, in addition to her long friendship with Kartinyeri (Weiner 1997). Perceptions of practice and the adequacy of particular approaches or methods are shaped by the way fields and boundaries are defined. For example, Fergie's expedited reporting *may* have been a better example of applied anthropology than academic anthropology. Though the boundaries around an applied/academic dichotomy were neither clearly nor permanently defined.[42] In certain circumstances it may be difficult for anthropologists to credibly manage the line between some types of *applied* anthropological practice and partisanship. Justice Olney's *Yorta Yorta* judgment affords an example of this potential vulnerability.[43]

Chapman v Luminis also provides an indication of some of the values attributable to publication. von Doussa found against the explicit claims credited to the published literature in preference for: oral claims, the Berndt's unpublished and private research notes and some other fairly ambiguous pieces of evidentiary support. On this occasion, findings developed for quasi-legal purposes, ostensibly inconsistent with the published literature, received judi-

cial endorsement. Usually, judges tend to be quite critical of controversial claims which are unpublished, unreviewed and espoused for the first time in the courtroom.[44] Judges tend to prefer published materials, especially materials published away from litigation because they are able to credibly invest them with a degree of independence and transfer some of the responsibility for the claims onto the processes of peer review and refereeing (Edmond and Mercer 2000). This was the approach to the published literature adopted by Commissioner Stevens (1995:229–285, esp. 276–280) in the Royal Commission.

Prior to the recent reforms to the court rules and evidence law, when assessing expertise Australian judges tended to emphasis the existence of 'a field', competence or experience in the field and even, as in the case of *Voli*, reasonable performance. In an age less concerned with case management, limited resources, judicial efficiency or the threat allegedly posed by partisanship, judges were more likely to accept the findings of qualified experts, even those with quite idiosyncratic views.[45] Now, motivated by empirically questionable concerns about charlatan experts (Galanter 1998; Edmond 2004b), judges and law reformers have tended to place greater faith in more abstract and increasingly scientistic concepts and processes—such as 'knowledge', 'method', 'reliability' and even 'truth' (Wood 2001; Sperling 2000; Abadee 2000; Freckelton and Selby 1999:545–563; Freckelton et al. 1999, 2001). Typically these formulations are presented as self-evident or politically and epistemologically neutral (Edmond 2003).

Anxieties about unreliable expertise have been most conspicuous in the US, where they still have civil juries (Huber 1991; Olson 1991). Recently the US Supreme Court produced a highly abstract set of criteria for making decisions about the admissibility of expert evidence. A version of Popperian falsifiability (as testing), in conjunction with identifiable error rates, peer review and publication, and general acceptance, became the relevant framework for assessing evidentiary reliability for scientific *and* non-scientific forms of expert evidence (Edmond 2002b).[46] Our own reforms—as well as the perceived need for reform—to the FCR were influenced by international trends and foreign anxieties. They explicitly endorse concerns expressed by Lord Woolf in his report on the English civil justice system: *Access to Justice* (1996).

Rather than suggest that one theory or model of expertise should predominate, it has been my intention to explain how the models of expertise developed for particular cases or in particular decisions are highly strategic (see Kirsch 2002). They are shaped by: prevalent public registers; the standing of the profession; levels of consensus in particular fields; the *evidence*; the authority and experience of the witnesses; the social significance of the case, the preferred outcome, as well as emerging traditions around rules, procedures and substantive law. The images of expertise developed in trials are the outcome of the purposive, though contingent, efforts of a range of participants. They are not always consistent with claims made by individual experts or even broader *communities* of experts (Edmond 2001; Edmond 2004a).

Flexibility in the representation of expertise and the prevalence of highly idealised images of expertise exploited by lawyers, experts and judges enable performances and approaches to be extolled *and* deprecated (often simultaneously). Consequently, in adversarial litigation, there will always be scope for lawyers, the media, judges, and the profession to create expert *heroes* and *villains*.[47] Whether the 'heroes' and 'villains' of the judgment should retain those ascriptions within the profession is a more complex question, to which we will now attend.

Anthropological accounts of the Hindmarsh Island Bridge litigation

Having devoted considerable attention to legally sensitive characterisations of anthropology and law, in this section it is my intention to provide a brief indication of some of the ways anthropologists have described the legal findings and processes associated with the Hindmarsh Island Bridge litigation.

Perhaps the most conspicuous and problematic recourse to *law* occurs when anthropologists simply endorse legal findings and processes. In these instances (flexibly demarcated) boundaries between anthropology and law are subtly effaced. Works by Ron Brunton afford examples of this tendency. In his numerous comment(arie)s on the events surrounding the construction of the Hindmarsh Island Bridge, Brunton invests the Royal Commission with considerable authority, implying that the findings are highly relevant, even decisive, for understanding the anthropological debates associated with the case. Accordingly:

> The Royal Commission *identified* many other major inconsistencies and defects in the research and arguments of Fergie and the other supporters of women's business. The transcripts also *show* that Fergie, her counsel, and other 'proponent' anthropologists seriously misrepresented the texts in attempts to suggest that the existing literature does contain hints of secret-sacred Ngarrindjeri traditions. (Brunton 1996:6 italics added)

And,

> *Despite the overwhelming evidence* of cynical fabrication that the Royal Commission *revealed*, many anthropologists seem desperate to grasp at any straw that might allow them to go on believing that the proponents' claims were justified. (Brunton 1999:17 italics added)

This tendency is repeated when, commenting on an article by James Weiner, Brunton informs us that Weiner wrote 'without the benefit of the Royal Commission's findings' (Brunton 1996:5–6).[48] For Brunton, the Royal Commission reinforces, or reifies, certain perspectives and facilitates the ironic treatment of approaches diverging from the Report produced by Commissioner Stevens.

In the alternative, and more typically, several anthropologists have suggested that the Report of the Royal Commission and various judgments associated with the HIB were in some capacity *flawed*. Many of these criticisms seem to be directed toward the operation of legal institutions, especially their rules, procedures, processes of evaluation and rationalisation. *Problems* with legal procedures and analysis provide these commentators with an explanation for judicial *failure*. These types of explanations are also common in miscarriage of justice cases where witnesses (usually for the accused's innocence) claim that the *real story* never emerged through the trial and its attenuated processes of fact-finding; regardless of the legal reasons for eventual acquittal (Boyd 1984, compare Edmond 1998, 2002c).

In this vein, anthropologists have criticised the Royal Commission and the Commissioner's findings. Fergie (1996b), for example, was critical of the procedures and assessment of the evidence. Hemming (1996) suggested that science-based (or empiricist) readings, attributions of interest and reliance on experts who could be characterised as disinterested, such as Clarke and Jones, were all inappropriate. Other commentators expressed concern at the apparent judicial reluctance to *properly* understand or *accommodate* anthropology. Here accommodation means something akin to understanding the evidence or accepting anthropological knowledge on its own terms. This 'failure' was acknowledged by Lucas.

> It is a failure to impress on institutions, both curatorial and legal, a broader understanding of what anthropology is as a discipline and to have that understanding count. (Lucas 1996)

However, the nature of the 'broader understanding' and its value in legal disputes awaits further elaboration. For Lucas (1996:50), the Royal Commission was unwilling to:

'acknowledge that methodology and interpretation could be the subject of vigorous anthropological debate.' On this occasion Lucas (1996:46, 50) draws the professional boundaries loosely to recognise diversity and accommodate professional divergence. This position sits awkwardly with an earlier and somewhat firmer contention that: 'an anthropologist's relationship with informants is the crux of anthropological knowledge, just as it is often the only measure of veracity'.

Given the anxieties about being misunderstood, interestingly many of these anthropological accounts provide limited sensitivity to the peculiar institutional and procedural arrangements associated with trials and public inquiries (Wynne 1982; Wootten 2003). Additionally, commentators tend to portray an image of anthropology and anthropological knowledge that is more tractable and potentially more valuable than they might actually be capable of providing. The underlying impression is that anthropology is in some way coherent and unified, sometimes objective and even scientific. Recognising, along with Lucas, that anthropology is 'subject to multiple readings by others', for Tonkinson (1997:18, 20–21) the appropriate response is to speak 'truth, not untruth' in conjunction with the professional monitoring of consultancy work against an enforceable code of ethics.[49] In these examples Lucas emphasises the primacy of the relationship with informants and Tonkinson stresses the need for 'truth' and monitoring. Even if, for argument sake, Lucas and Tonkinson presented similar or reconcilable images of anthropological practice, this is not self-evident and each description provides fertile grounds for both legal deconstruction (especially during cross-examination) and strategic selection in judicial reconstructions—once a particular model of anthropology is embraced.

A good example of the tendency to criticise legal institutions and processes while calling for enhanced legal recognition is revealed in Weiner's comments on the Royal Commission:

> The proponent women refused to divulge restricted details concerning the women's knowledge, and in fact boycotted the Royal Commission; and this meant that no effective anthropological assessment of the claims could be made in that context. (Weiner 1997:7–8; 1999; 2002)

Weiner seems to be implying either that it was (part of) the role of the Royal Commission to make an effective anthropological assessment or, in a more ironic guise, having failed to guarantee an effective anthropological assessment the judicial findings were somehow rendered inadequate. From a legal perspective this would seem to be mistaken on both counts. Such criticisms resemble the approach previously attributed to Brunton. The major difference is that the boundaries around anthropology are erected in different locations. For Brunton the Royal Commission seems to have set the boundaries and assessed the evidence *properly*. *Authentic*, *reliable* anthropological evidence was heard and (legally) vindicated. For Weiner, the legal system's inability to provide an opportunity for *authentic* and *reliable* evidence to be heard meant that the *real* anthropological message may have been lost or misunderstood (consider Alasuutari 1999; Abercrombie and Longhurst 1998; Irwin and Wynne 1996).

Some of Weiner's concerns are shared by Merlan (2001) who lamented von Doussa equating anthropology with advocacy (see also Burke 2001):

> the judge's ruling seems to accept the idea that the anthropology involved is mere facilitation and advocacy in the sense of speaking on behalf of another, and does not seem to expect criticial investigations and assessment. (Merlan 2001:8)[50]

For Merlan, it would seem, judges need to appreciate the potential value (or values) of anthropology. Characterising anthropologists as advocates may have facilitated resolution in *Chapman* but may have simultaneously trivialised the contributions of anthropology in the

longer term. Merlan is critical of von Doussa's description of anthropology as advocacy because she believes it deprecates the discipline's more substantive offerings (see also Rummery 1995; Sutton 1995; Sullivan 2002).

In each of these examples, depending upon the use and representation of anthropological evidence, legal institutions are defended or criticised.[51] Most of the commentators exhibit frustration and concern at the legal system's apparent inability to *accommodate* anthropology. One of the difficulties with this position is that these anthropologists do not, and really could not be expected to, offer a consistent (or coherent) vision of anthropology or anthropological knowledge. Any consensual definition would be too general to offer analytical purchase in response to genuine anthropological disagreement. In anthropological accounts as well as litigation we frequently encounter different descriptions of methods, techniques, epistemologies, theoretical frameworks and so on. It is not only that the discipline of anthropology is heterogeneous that causes complications. The types of litigation, the relevant law and the exigencies of specific cases are not stable. In practice, anthropological heterogeneity, in conjunction with pervasive ideals associated with expertise such as neutrality, independence and so forth, provide judges with an extensive repertoire for undertaking fact-finding and rationalising decision making (Edmond 2004a). While anthropologists may disagree with the legal procedures and the particular outcomes, thus far they have encountered difficulty successfully challenging them at either an epistemological or political level. This might appear surprising given their claims to possess relevant specialised knowledge. Two reasons for this state of affairs include the evidence being shaped by legal procedure, strategy, standards and practices, and that evidence is rarely uncontested whether by other anthropologists, experts from other disciplines or claimants themselves.

On the basis of these examples, what seems to be required is a radical legal contextualisation that gets beyond simply privileging, praising or criticising particular findings, whether those of Stevens, Mathews or von Doussa (or whoever). This requires some recognition of the distinctive procedural and institutional influences on judges as well as sensitivity to the manner in which they handle common law, statute, public policy and evidence. Without wanting to defend legal practices and procedures, too often anthropologists have seemingly discarded their formidable analytical capabilities when commenting on the legal appropriation of their expertise. Without considering legal professional and institutional obligations, they have adopted a rather myopic view which implies that legal institutions need to understand anthropology *properly* (Feldman 1980:255). Too often this presupposes the existence of non-controversial and persuasive anthropological evidence. It also reduces complex trials to *some* of their epistemic dimensions. Legally insensitive, such views tend to conflate legal methods, procedures and orientations with the methods, techniques and assumptions associated with different types of anthropological practice. They also imply the availability of simple means of interpreting and incorporating anthropological evidence. Judges should not be expected to produce universally acceptable images of anthropology or proper understandings, especially when anthropologists routinely reject their possibility or experience difficulty providing definitions capable of attracting widespread assent among their peers.

Regardless of the representations made by the various protagonists, von Doussa's decision ought to provide no more professional solace to Fergie (and others) than Steven's findings ought to sustain professional condemnation, or support for Brunton, among specialist anthropologists. While judicial findings provide important rhetorical resources in social and even professional contexts, they should not necessarily be substituted for expert opinions or used to resolve professional debates. While professional debates may spill-over into legal domains and vice-versa, we should not expect lawyers and judges to resolve them or, more importantly, mistake the concerns of lawyers and judges for those of anthropologists. Judges and lawyers are not doing anthropology or practicing in ways that are particularly

sensitive to anthropological theories, methodologies or capabilities.

Whether judges and legal institutions should be more sympathetic to the concerns of professional anthropology is a separate question.

Some legal implications

One of the consequences emerging from von Doussa's characterisation of the anthropologist as an advocate is that it is not entirely clear what standard of care Fergie owed or on what grounds that standard might have been ascertained. This is important, but not because his reading is right or wrong or lacks persuasive force. It is important because it illustrates how each decision holds potential consequences. Unfortunately for experts, notwithstanding the prevalence of various ideals of practice, to some extent the specific standards imposed (by judges) will be declared retrospectively. And, they are developed in response to actual performances. On the basis of this study, legal difficulties emerge at two levels.

The first involves, as in the HIB litigation, ascertaining the appropriate standard of care where the expert is sued, or charged with perjury or contempt. This is most conspicuous when the client, rather than a third party endeavours to sue (consider Henderson Garcia 1991). Imagine if, instead of Binalong, the ALRM had attempted to sue Fergie for negligence. Adopting von Doussa's approach, the ALRM would presumably have found it quite difficult to support an action against Fergie. Restricting ourselves to an assessment of the standard of care, according to von Doussa's reasoning, the requisite level of performance would have been that of an anthropologist employed as an advocate. Few extrinsic standards could be invoked to impugn or assess that performance. Perhaps proof of dishonesty or unethical behaviour would have invalidated Fergie's conduct. Characterising the expert as an advocate effectively insulates the expert, especially experts involved in the provision of advice, from criticism or liability.

The second difficulty concerns establishing what standard of performance is owed at a particular stage and what happens if there are contradictions in the provision of expert advice and evidence at different times and places. We can imagine an expert engaged as a consultant proffering an opinion—away from litigation—which might subsequently be repudiated during the provision of testimony in a trial on the grounds of the paramount duty (the same expert) owed to the Court. What happens to the expert initially employed as an advocate who is subsequently required to provide evidence in court? What happens when the (former) *advocate* Fergie is required to appear in court as an *expert witness* with a paramount duty to the court to explain her *advocacy*? How are we going to finesse the duties between the *partial* performance permitted outside the Court and the purported duty of *impartiality* inside? In one context the expert might (in legal terms) legitimately produce a knowledge claim or opinion inconsistent with an opinion or knowledge claim *required* in another (Maddock 1989:166–167). On the basis of the previous paragraph and the approach preferred by von Doussa, it may be difficult for the client to sue the expert, even where the expert provided poor advice and derogated from (assuming they existed) generally accepted axioms of their field.

The examples from Sections 4 through 6, and Section 7.b, illustrate how images of expertise invoked by the various protagonists—parties, lawyers, judge and anthropologists—are highly strategic, sensitive to cultural resonances as well as legal categories and possible causes of action, including anticipated appeals. For von Doussa, under the TPA *reasonableness* was satisfied by acting honestly and not misleading, liability was limited by the text of section 52 and constructions of the causal nexus. In the negligence action, once the anthropologist was characterised as an advocate the extent of any duty was severely delimited. Conversely, in the alternative examples, when emphasis was placed on reasonableness and the expert was conceived as a professional with certain basic obligations (or as

an impartial expert under the FCR) then the scope of duty was, at least potentially, more extensive. Where expertise is conceived as objective or predicated upon tangible standards then it *may* be easier to defend its apparent reliability and to extend the range of those potentially able to rely on it. This was the kind of argument advanced by the Chapmans/Binalong.

The differing (rather than completely different) images of Fergie and her role under the TPA and the negligence action provide some sense of the strategic manipulation and framing of law and expertise in order to achieve particular results. Under the TPA Fergie was a professional utilising her professional skills with no element of promotion or indirect protection of the (commercial) interests of the Ngarrindjeri people. In his treatment of the negligence action, von Doussa described Fergie as an advocate acting in the interests of the ALRM on the basis of instructions. A departure from those instructions, even to allow peer review, was conceived as inappropriate. Regardless of whether the interests were 'commercial', the judicial response was not arbitrary. It is not my intention to suggest that Fergie's activity was (or was not) undertaken in trade or commerce, or in the commercial interests of the ALRM. What I am attempting to illustrate is how the judicial descriptions of events (invariably) match the articulated legal standard, and to reflect upon how categories like trade and commerce, foreseeability, duty of care, causation or the types of damage recognised by the law are able to be mobilised, manipulated, expanded, contracted and to some extent rendered irrelevant in order to *produce* (conventionally *ascertain*) the *legal* outcome. These examples provide some indication of both degrees of judicial freedom and constraint (Kennedy 1986; Feeley and Rubin 1999). They show how judges actively manage cases, are highly strategic in their representations and reasoning but are constrained by procedures and the need to plausibly link evidence to specified legal causes of action.

Recognising these limitations, the examples help to explain how von Doussa could have adopted a range of different approaches to his assessment of the various actions. We saw how two different approaches to expertise might have been used to achieve three different outcomes. Fergie's performance could have been defended on the grounds that she was an advocate. In the alternative, it could have been defended on the grounds that it was reasonable in the circumstances or it could have been heavily criticised on the grounds that it was not reasonable when compared to what a *competent* anthropologist should have done. What is interesting is that all of these findings *might* have been used to produce the same (or a similar) *legal* result. As an advocate Fergie owed no duty to her clients' opponents and so was not liable (even if she was negligent). From the other perspectives, even if her performance was deemed unreasonable (or reasonable), other elements of the specific action, such as causation, foreseeability and the type of damage (here, pure economic loss), might have been deployed by a judge to restrict the extent of liability.[52] While images of expertise and interpretations of evidence permit considerable discretion in framing and pursuing legal causes of action they will not always be determinative. Images and interpretations of expertise are integrated with interpretations of law, and combined with other features of the litigation. These complex interactions can make it difficult for anthropologists to know how to act or effectively criticise judges—especially on purely epistemological grounds. The combination of law, procedure and evidence, including expert evidence, transforms judging into a complex activity and simultaneously operates to insulate judgments from (isolated) exogenous critique (Edmond 2004a; Hilgartner 1990).

On the basis of these observations we might reflect upon why von Doussa characterised Fergie as an advocate. The fact that von Doussa endorsed a model of expertise which appears to be incongruous with some of the dominant images used in and around legal settings renders this question particularly interesting. Part of the answer may be that in characterising Fergie as an advocate von Doussa was able to selectively draw upon her evidence and opinions in his assessment of the genuineness of the tradition. Had von Doussa found Fergie's performance inadequate, regardless of whether she was found liable, it

would have been more difficult to credibly rely on the Report as support for the existence of the women's restricted knowledge. If von Doussa had found Fergie negligent far more rhetorical effort would have been required to explain subsequent reliance upon her evidence and Report. Similarly, it may have been difficult, though certainly not impossible, for von Doussa to have defended Fergie's performance as reasonable. By characterising Fergie as an advocate von Doussa was relieved from having to judge her performance in detail, yet was able to selectively appropriate her evidence and Report acknowledging some limitations, without having to accept or excuse every aspect of it, or even defend its overall adequacy.

Interestingly, where von Doussa drew upon and discussed Fergie's evidence and Report, in his assessment of the genuineness of the Aboriginal tradition, the evaluation tends to be against an implicit model of adequacy which resembles assumptions motivating the empiricist approach and/or the *Federal Court Rules*. For example, he emphasised the corroboration from other anthropologists, methodological propriety and *consistency* with the literature and available research. Implicit models of expertise are used in both the elaboration of legal standards—like advocacy or reasonableness—and the assessment of evidence—especially the relative value of apparently antagonistic anthropological opinions. Further, we might suspect that von Doussa's judgment reveals a degree of sympathy for Fergie, her sudden and professionally awkward engagement at the behest of the ALRM and her support for the proponent women, as well as the proponent women themselves (see Rowse 2000). To support such a reading we could note that the long judgment appears to be extraordinarily thorough—though certainly not invincible—in its rejection of every one of the Chapmans' numerous claims.[53] Also, notwithstanding issues of natural justice, von Doussa deprived Mrs Chapman of examining the content of the restricted women's knowledge.

These various internalist problematisations are not intended to identify *mistakes* in von Doussa's reasoning. Rather, they suggest how issues are practically managed and how legal solutions may create both opportunities and constraints for future parties and judges. Representations of expertise are contingent artifacts sensitive to the exigencies of the case as well as the plausibility of images and evidence drawn from broader social discourses. Largely restricted to the case, the issues and evidence brought before them, judges endeavour to produce contextually coherent and socio-legally plausible rationalisations. Institutional and professional conservatism are just some of the means of managing the interpretative discretions (potentially) available to (senior) members of the judiciary.

Going (for) native title?

When anthropologists enter legal domains they necessarily cede control of the interpretative space and some of the meaning of their profession, specialised knowledge and expertise (Wynne 1989). Even in Native Title and Heritage Protection litigation, anthropology provides *merely one* of a range of cultural (here evidentiary) resources available for judicial rationalisation. The centrality of the judge in both legal interpretation and fact construction, in combination with the ability to produce the official (and authoritative) account—the judgment—privileges judicial perspectives. It also weaves *the legal* and *the factual* into a complex tapestry. Attempts to 'disentangle' the expert evidence may not reveal very much about the whole. Judges are concerned with issues that extend beyond anthropology: such as weighing different types of evidence, justice, managing dockets, public legitimacy, accountability, future litigation and the implications of a particular decision. Legal methods—such as reference to statutes or common law traditions, rules of evidence, strategically inscribed models of expertise, legal categories such as the scope of duty, proximity or misleading and deceptive conduct, the type of loss suffered, burdens of proof, evidentiary hierarchies, emphasising conflict between different types of expertise and knowledge—enable

judges to selectively incorporate and modulate the influence of expert (here anthropological) evidence.[54]

As we have seen, in legal settings anthropologists are vulnerable to the retrospective findings, institutional sensibilities, socialisation and local needs of judges.[55] While my reconstruction of von Doussa's reasons for *preferring* advocacy—so that Fergie was not liable to the Chapmans and von Doussa was able to draw on select features of her Report without being compelled to assess her overall performance—might be mistaken or exaggerated, it does nevertheless provide an indication of how judicial interpretations and the need to rationalise decisions may take precedence over legal consistency or the concerns of anthropologists.[56] We should not forget that von Doussa was keenly sensitive to the terms of the contract in assessing Fergie's performance and that legal categories *appeared* to have priority over the evidence—even shaping what should count as relevant evidence in the TPA and negligence actions.

While there may be considerable scope for criticising and/or defending Fergie's actual performance, depending on the type of assumptions and models of expertise (or anthropology) championed, one of the major implications emerging from this article is that even if she had performed in a manner that was perceived as adequate—on any reading of the appropriate standard—this alone might not have prevented a judge from accepting, rejecting or ignoring her evidence.[57] Sometimes it will be difficult, given that judges articulate the standards and assess expert performance retrospectively, for anthropologists (and other experts) to anticipate what they should do.[58] Even in the face of shared commitments among professionals, judges have shown themselves willing to dismiss, critique and re-interpret expert evidence and performances. By way of example, recent decisions pertaining to medical negligence provide an indication of the manner in which Australian courts have not only appropriated (or strategically interpreted) other types of expert knowledge, but how that appropriation, in turn, has shaped professional practice and the legal construction of duties. Accepting a range of differences between anthropology and medicine, the example may again be more instructive than von Doussa's comparison with the legal practitioner (Palmer 1986:33).

From the early 1990s, in making assessments about medical negligence, the Australian High Court rejected its earlier reliance on consensual medical opinion (captured in a series of English cases such as *Bolam* and *Sidaway*) in preference for a standard of its own choosing.[59] In *Rogers v Whitaker* (and *Chappel v Hart* and more recently *Naxakis v Western General Hospital*), the High Court explained that in making assessments about standards of professional conduct the opinions of medical experts would be influential, but not determinative.[60] The Court, rather than the (frustrated) medical profession, would, as a matter of law, determine what was an appropriate medical warning or a satisfactory level of performance. Judges, and not experts, determine what counts as professional propriety: whether medical, architectual or anthropological and whether for the purposes of a legal proceeding or not. This last observation is significant given some of the acrimonious exchanges and uses of legal findings from both the Royal Commission and von Doussa's judgment in the Australian anthropological *community* (Anderson 1983).

In concluding, I want to encourage a little reflexivity. I want to bring to the surface some of the personal, professional and ethical implications raised by appearing in courts, accepting consultancies (or criticising those who do) or lamenting the legal reluctance to recognise and *accommodate* anthropological knowledge claims. Recognising complexities in judging, especially in the combination of law and evidence, and degrees of indeterminacy and polysemy, this article has endeavoured to provide a depth of description, analysis and comparison that tends to be missing in much of the extant literature about anthropologists as experts (in legal contexts). In undertaking this task I recognise that anthropology is neither clearly bounded nor homogeneous. Many of these issues are applicable (mutatis mutandis) to other forms of expertise, such as archaeology, history, the forensic sciences, psychol-

ogy, environmental science and very prominently law and the judiciary. This last example, notwithstanding continued adherence to versions of legalism and some kind of prescriptive judicial method.

Traditionally, commentators analysing law and science or law and other forms of expertise have tended to describe the interactions as a culture clash (Goldberg 1994; compare Edmond and Mercer 1996; Abbott 1988). We might read the concerns espoused by Fergie, Lucas, Hemming, Weiner and Merlan as examples of the legal system *distorting* anthropological knowledge (see also Wootten 1995). I tend to think that such descriptions are too cumbersome and too simplistic. Similarly, the previous sub-section suggests that appeals for increased rigor (or better methods and protocols) and improved communication are not only simplistic but incapable of resolving the perceived difficulties (Sutton 1995, 1995a; Rigsby 1995; Gellner 1988:25–26; Steward 1955; Neate 1995; Leviticus 1996).[61] In the context of native title and heritage protection litigation, the various relations, appropriations and mediations are more complex and probably better captured by the metaphor of legal colonisation—a hegemonic, though loosely bound, (legal) system coming into contact with a less powerful and even more loosely affiliated set of knowledges and practices (anthropology).[62] This metaphor introduces a poignant irony. Through its attempts to interpret and understand societies and their cultural practices, professional anthropology is now itself subject to appropriation and legal colonisation.[63] The impact of this colonisation can be detected in changes to the sources of funding, conference and research directions, employment opportunities, the creation and revision of codes of ethics, publications, collaborations and other forms of (social) capital far away from the courtroom (Ray 1955; Lewis 1995; Bell 1983–1984; Cromwell 1983–1984; Maddock 1983, 1989; Ahmed and Shore 1995; Metge 1998; Purcell 1998). It can also be seen where anthropologists make recourse to legal proceedings as forms of authority in professional practice and debates (see Section titled Some legal implications).[64]

The legal colonisation of anthropology is evidenced most graphically in the way anthropologists, and other expert witnesses, enable Aboriginal voices to be 'silenced' and marginalised.[65] While rules of evidence, in conjunction with cultural sensitivities and traditions of procedural fairness, may allow Aboriginal peoples to show a (visiting) judge their land, special sites, art, to perform dances and ceremonies or to explain their traditions and mythology, much of this contemporary legal practice seems perfunctory (Goodrich 1990). Most of the leading native title and heritage protection judgments devote considerably more space to the evidence of anthropologists, historians and archaeologists than the evidence of Aborigines. Judges, operating in the 'rationalist tradition' (see Twining 1990), appear to experience genuine difficulty comprehending and incorporating some aspects of Aboriginal *evidence*. In the case of *Ward v Western Australia,* for example, we find that the sections "Primary' evidence of applicants' (about a page in length) and 'Observance of traditional laws, customs and practices to maintain connection with prior community and with the land' (4 pages) are negligible when compared to the overview of the 'Historical evidence', 'Linguistic evidence', 'Anthropological evidence' and 'Genealogical evidence' (over 20 pages).[66]

It may be that the willingness of anthropologists to participate in unsatisfactory, or questionable, legal processes has contributed to *their* legitimacy. Reference to 'their' is deliberately ambiguous. The participation of anthropologists may have made it easier—even necessary—for judges to produce politically legitimate, if morally questionable, outcomes. At the same time, participation in and around legal and quasi-legal settings has dramatically expanded sources of employment, authority and influence for professional anthropologists. Yet, these may have come at too great a price. The ways in which many anthropologists claim that anthropological evidence has been (mis)used should encourage anthropologists to reflect on their continuing involvement in the unwieldy legal processes designed to resolve 'indigenous issues'. Anthropologists, as a profession, might be more

responsive to the terms of their colonisation. Here, I endorse the words of an eminent Australian jurist: 'the last thing I would wish to encourage in humanist witnesses is obsequiousness toward lawyers, either practitioners or judges. There are good social reasons for treating the legal system's normative and adjudicatory authority with respect, but none for endowing it with intellectual authority' (Wootten 2003:29–30). Anthropologists, and others, have an important obligation to publicly criticise legal processes if they feel their work is *misunderstood* and/or Aboriginal claimants treated unfairly. While anthropologists should not expect isolated criticisms of alleged misunderstandings or criticisms of individual anthropological performances—written primarily for other anthropologists—to have much impact or influence on legal practice, sustained and consolidated criticism of legal rules, procedures and doctrines, as well as findings, *may* find fertile ground among judges and other attentive publics.

This examination of the judicial appropriation and construction of anthropology should raise a number of pressing questions. How should we interpret not only the performances, but the demands placed upon Fergie, von Doussa and the Aboriginal women (Vachon 1983–1984; Svensson 1979)?[67] How should anthropologists manage their own skills, practices and knowledges, their obligations to themselves and others—especially indigenous Australians—in the face of legal colonisation and the retrospective analysis of anthropological performances; especially if greater rigor, protocols, ethical statements and enhanced communication are unlikely to provide viable *solutions* (Smith and Finlayson 1995:ix-xii; Sutton 1995:83, 98–99; Hancock 1996:107; Maddock 1981:100; Palmer 1986:31–32)? Who should get to decide what counts as anthropological propriety, and how should anthropologists respond to judicial definitions? Should anthropologists lobby for law reform or should they attempt to influence the outcomes of trials and appeals in more discrete ways, such as through the provision of their opinions? Should we be more collectively responsive to the implications of at least some anthropologists, lawyers, Aborigines and even judges having to actively create (politically tractable versions of) Aboriginal tradition, title and heritage? Is this avoidable, and, more importantly, is it any worse than others (just as strategically) promoting questionable images of anthropology, simplistic epistemologies and implausible models of legal practice?

At this juncture we are left with the questions: Can anthropology theorise its own appropriation? and What should anthropologists do in response to legal colonisation?

NOTES

1. Faculty of Law, University of New South Wales, Sydney 2052, Australia and Visitor, Law Program, Research School of Social Sciences, The Australian National University, Canberra 0200. Email: g.edmond@unsw.edu.au. An earlier version of this paper was presented at a forum at CAEPR, ANU in October 2001. I would like to thank Tony Connolly, Mary Edmunds, Paul Burke, Deane Fergie, Alex Riley and Arthur Glass for commenting on earlier drafts of this paper and for the perceptive comments of referees and the Editorial Board.

2. *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (21 August 2001). All references in the main text and footnotes are to paragraphs from von Doussa's judgment.
3. The paper is not intended as a defence or critique of either Deane Fergie or Justice von Doussa. See Bloor (1976) and Barnes and Bloor (1982).
4. Experts are especially vulnerable during skillful cross-examination, see Yearley (1989), Lynch (1998), Edmond (2001).
5. Similar rules and images of expertise have been promulgated in other adversarial jurisdictions, see: *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd.* [1993] 2 Lloyd's Law Reports 68, 81–82, on appeal *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd.* [1995] 1 Lloyd's Law Reports (CA) 455, 496; *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). Compare Edmond (2000:222–224; 2003).
6. FCR, Order 34.2(1)(a)–(b).
7. Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia.
8. Most of the efficiencies and benefits seem to be conferred on judges rather than parties and experts (consider Resnik 1982).

9. Though, see also *Report of the Hindmarsh Island Bridge Royal Commission* (1995), Mead (1995), Ryan (1996), Tehan (1996) and various accounts cited throughout this paper, including judgments from the various trials and appeals.
10. According to Merlan (2001), on the 26 June 1994 Fergie was asked to write a report. The following day Fergie put the matter for consideration to the Aboriginal women. The report was to be completed by 2 July 1994. 'The report (dated 4 July) was written between 29th June and 1 July, and couriered off on 2 July'.
11. Concerns about the late disclosure of culturally sensitive or secret information were not new. In dealing with the restricted women's knowledge von Doussa (para. 333) drew upon Wootten's (1992:31) conclusions about late disclosure in the earlier Junction Waterhole Dam case. Another case, Coronation Hill, also generated considerable controversy involving some of the anthropologists concerned with the Hindmarsh Island Bridge litigation: Maddock (1988), Brunton (1992), Keen (1992, 1993).
12. *Chapman v Tickner* (1995) 55 FCR 316.
13. *Tickner v Chapman* (1995) 57 FCR 451 especially 466D, 478A-479A, 497B-C. See Willheim (1996).
14. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
15. *Tickner v Bropho* (1993) 40 FCR 183. See also Bell (1998).
16. *Kartinyeri v The Commonwealth of Australia* (1998) 195 CLR 337.
17. Bakhtin (1968).
18. Interestingly, on another occasion the TPA was invoked by The Australian Skeptics and a professor of geology from the University of Melbourne to challenge a public lecture tour by a creationist who claimed to have found Noah's Ark. For an account, see Edmond and Mercer (1999).
19. Citing *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 602–603 and *Bank of NSW v The Commonwealth* (1948) 76 CLR 1.
20. Elsewhere, von Doussa (1987) had drawn attention to differences between experts and professionals and their respective abilities in the provision of fact and opinion evidence.
21. For von Doussa the promotion of a business was 'commercial' whereas the content of services, even service for reward, fell outside 'the central conception of trade and commerce'. See also: *Fair Trading Act* 1987 (SA) s56.
22. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, *San Sebastian Pty Ltd v The Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340 and *Tepko Pty Ltd v Water Board* (2001) 75 ALJR 775.
23. (1963) 110 CLR 74, 85.
24. von Doussa suggested that it may have been culturally inappropriate and offensive to conduct such an inquiry.
25. Compare para. 187: 'There was no element of promotion or indirect protection of commercial interests of the Ngarrindjeri people, of the ALRM, or of Luminis or Dr Fergie.'
26. Here, interests are distinguished from the 'commercial interests of the Ngarrindjeri people, or of ALRM, or of Luminis or Dr Fergie' discussed in the treatment of the TPA action.
27. These standards were recognised by von Doussa who noted that the level of accuracy required would be 'consistent with the exercise of reasonable care.'
28. The question of whether a duty exists is conventionally understood as a question of law. The content of that duty—the requisite standard of care and whether that standard was attained—is, in contrast, conventionally conceived as a question of fact.
29. This last finding shifts the focus from the performance of the expert to the competence and knowledge of the prospective readers and subtly interchanges the contractual obligation to the ALRM with the interests of the undifferentiated 'Ngarrindjeri women'.
30. Compare the practice of peer review associated with anthropological work in *Towney v Minister for Land and Water Conservation for NSW* (1997) 147 ALR 402.
31. By way of a caveat, the materials used in this section to construct a model of anthropological propriety are drawn quite eclectically from the judgment. Some of these are drawn from the Chapman's (strategic) framing. It was no coincidence that the Chapman's championed a model of expertise that was universal, method-driven and consistent with an idealised Mertonian normative ethos (Merton 1973). The more successful they were at insinuating their preferred model of expertise the more reasonable (at least legally) it was for a duty to be extended to Fergie and the others.
32. The two images developed on this occasion will not always be in conflict. For it is conceivable that an anthropologist working as a consultant advocate would meet any retrospectively developed minimal standards of reasonableness.
33. This approach is inconsistent with the assumptions underlying the *Evidence Act* and the revised *Federal Court Rules*—'An expert witness is not an advocate for a party' (para. 297, and Federal Court Guidelines).
34. For example, Tonkinson (1983–1984:187): 'Formal responsibilities (of a contractual nature) inherent in the consultant role require you to see that those who prepare and argue a claim are presenting accurate anthropological evidence, free of willfully untrue or misleading statements. … People who call themselves anthropologists ought to be professionally competent to perform this role skillfully, such that land claims based on the data they collect and organize will succeed—or at least will not suffer because of poor anthropological input.'
35. This criticism is quite common in relation to anthropologists, dating back to Professor Stanner's 'limited experience with the aboriginals of the subject land' in the case of *Milirrpum v Nabalco Pty Ltd.* (1971) 17 FLR 141, 159–160. The Federal Court Guidelines require the expert to 'make it clear when a particular question or issue falls outside his or her field of expertise'. See also: *Evidence Act* (Cth) s79.

36. To some extent Aboriginal peoples have become, through the primacy conferred on forms of Western expertise, experience and evidentiary analysis, vulnerable to the content of pre-litigation published writings. It should be noted that some anthropologists suggest that the profession has been sensitive to these issues for decades. It could be that anthropologists produce writings with findings and qualifications which resemble the litigation sensitivities of scientists investigating the dangers of certain pharmaceuticals or mobile phones. See Reir (1999) and Abraham and Lewis (2000).
37. These are consistent with claims by Oestreich Lurie (1955:357, 362): '… the applied anthropologist is … consulted for his expert and impartial opinion concerning facts of a cultural or historical nature as these are required to test the validity of various claims put forth by the Indians themselves. In his role as an objective scientist, he has no intellectual stake in the outcome or in actions taken on the basis of his information.'
38. Though, there have been debates about just how scientific anthropology is or could be. Some of those who are critical of anthropology's scientific pretensions include: Clifford and Marcus (1986), Strathern (1988); Grimshaw and Hart (1995). Though compare the older perspectives of: Lévi-Strauss (1966), Lurie (1955), Feldman (1980); Maquet (1970).
39. In making this claim it is not my intention to imply that such standards are available or would be useful for making consistent or reliable comparisons or demarcations.
40. There is, within science studies, a strong tradition of ethnographic inquiry. See, for example: Knorr (1981), Latour and Steve Woolgar (1979), Lynch (1985), Star and Grisemer (1989), Collins (1986), Callon (1986); Fujimura (1992), Rabinow (1996).
41. Even judges using the more contextually sensitive concept of *reasonableness* exhibit a tendency to view standards and practices in terms of proper methods, implying that they have clear and incontrovertible meanings which are shared across fields and disciplines.
42. For some discussion of these types of dichotomies, see Edmond (1999; 2001). Many of these difficulties, including the (scientific) status of applied anthropology, have been discussed in the wake of imperialism, colonialism and experiments such as the Fox Project and even Project Camelot. For some discussion of anthropological links to regimes of governance consider: Peterson (1990), Goldschmidt (1979), Lewis (1977), Maquet (1970:255–261), Berndt (1983–1984, 1983–1984a), Grillo (1985:4, 15, 20–24), Shore (1996), Pink (1998). For accounts of anthropological 'experiments', see Foley (1999), Horowitz (1974).
43. *Members of the Yorta Yorta Aboriginal Community v. State of Victoria* [1998] 1606 FCA, *Members of the Yorta Yorta Aboriginal Community v. State of Victoria* [2001] FCA 45, *Members of the Yorta Yorta Aboriginal Community v. State of Victoria* [2002] HCA 5. See also: Sherrott (1992), Asch and Bell (1994), Fortune (1993).
44. Elsewhere, the preparation of a report for legal or quasi-legal purposes has led judges to deprecate its value on the basis that it is 'science for litigation' or 'junk science'. For an influential polemical statement see: Huber (1991), Foster and Huber (1998). A good example is the US case of *Daubert* on remand to the Ninth Circuit Court of Appeal: *Daubert v Merrell Dow Pharmaceuticals, Inc.* 43 F.3d 1311 (1995). Compare Edmond and Mercer (1998, 1999).
45. See for example: *Adelaide Stevedoring Co. v Forst* (1940) 64 CLR 538; *Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292.
46. *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993); *Kumho Tire Co. Ltd. v Carmichael*, 526 US 137, 143 L Ed 2d 238 (1999).
47. Anthropologists before Fergie have been criticised for their roles in litigation. Middleton (1977:156) and Gumbert (1981) were both critical of performances by Berndt and Stanner in *Milirrpum*. See also Jones (1955). Edmunds (1995:6–8) suggests that anthropologists should not be accusing one another of bad ethnography or bad theory.
48. Elsewhere, Brunton (1999:15, 17) contrasts Commissioner Steven's authoritative findings with those of Fergie: 'whose consultant's report on 'women's business' was comprehensively discredited by the Royal Commission …' Another curious tendency involves criticising anthropologists and their counsel for adopting what appear to be legally sensible strategies. For example, the attempt to marginalise the 'dissident' anthropologist Clarke—who von Doussa found lacked objectivity on the basis of his conduct at the Royal Commission—because of his peculiar professional training, is subject to criticism. According to Brunton, it was a 'line of attack that was also pursued by Fergie and her counsel at the Royal Commission, who attempted to make much of the fact that Clarke's Ph.D. was jointly in geography and anthropology.' See also: Weiner (1997:8) and Hopper (1990).
49. Given their peculiar ethical sensitivities, anthropologists might endeavour to resist some of the judicial attempts to re-order their duties and obligations such as those proposed under the FCR. Ethical arguments might provide fertile grounds for contesting legal orientations or mediating participation, but they also provide resources for creative judges operating in 'the rationalist tradition'. In the Canadian case of *Delgamuukw v Attorney-General of British Columbia* [1991] 3 WWR 97, Chief Justice McEachern drew upon a code of ethics to impugn the performance of the anthropological witnesses. One was described as 'more an advocate than a witness' (249). The reasons for this description were linked to the Statement of Ethics of the American Anthropological Association which explained that 'In research, an anthropologist's *paramount* responsibility is to those he studies' (249). While the Canadian Supreme Court reversed the decision on appeal, in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, because of McEachern's inadequate response to the indigeneous oral evidence, the Supreme Court effectively endorsed McEachern's critical assessment of the anthropologists' *partisanship*.
50. Compare Merlan's claims with earlier statements by her colleague Keen (1992:8) in the debate around the mining of Coronation Hill: 'A simple distinction between 'objectivity' and 'advocacy' appears to be simplis-

tic …' Edmunds (2001:6) appears to endorse the findings of von Doussa.

51. The more general the model of anthropology, generally the less utility in undertaking or assessing practice and knowledge. Conversely, the more detailed the model, the more fractious. In the absence of a unified anthropological perspective, and with restrictions on the amount of evidence available (or admissible), any Commissioner (or judge) was compelled to invent a legally tractable version of ethnography. While Hemming (1996) suggests that this was somehow inappropriate, on the basis of the particular image developed by the Royal Commissioner, and Merlan (2001), on the basis that von Doussa characterised Fergie as an advocate, such invention is required in every case where anthropology (or expertise) fulfils a role in legal rationalisation. On the tractability of expert knowledge, see: Ravetz (1971).
52. Questions around the scope of duty, the type of loss and whether the alleged negligence actually caused the loss were available to moderate the legal implications of Fergie's performance. If Fergie was found negligent a judge might nevertheless have found that there was no liability for the Chapmans' pure economic loss. In addition, problems with the causal nexus might also have been developed (Edmond and Mercer 2002c). Saunders learned about the restricted knowledge directly from a meeting of Ngarrindjeri women and Tickner may not have read the Report. Consequently, von Doussa was reluctant to identify a causal relationship between Fergie's Report and the plaintiffs' (alleged) loss. Finally, a judge might have derived particular images of expertise from the *Federal Court Rules* and Guidelines or the Commonwealth *Evidence Act* (1995). The idea that experts who do not testify can conduct themselves as they like, yet experts who provide evidence are expected to behave impartially and in accordance with the standards of their profession, could be presented as a highly questionable dichotomy and possibly inconsistent with the thrust of the FCR.
53. The Chapmans/Binalong appeal against von Doussa's decision was discontinued. This paper may have been useful, had they continued to contest the decision. For an early discussion of the enrolment of analysts in controversy settings, see Scott et al. (1990) and a response by Collins (1991).
54. In the controversial *Yorta Yorta* decision, the (allegedly partisan) anthropological evidence was unfavourably juxtaposed to the primacy invested in historical documents by the trial judge.
55. This vulnerability is not complete however. A classic study of resistance under intense cross-examination is provided in Lynch and Bogen's (1996) splendid account of Oliver North at the Iran-Contra hearings.
56. I have deliberately used italics and attributed agency to the judge throughout the article. In part, so as not to suggest that these things were always self-evident or pre-determined (Barnes 2000).
57. This, as I have argued (1999; 2002c) has been a feature of the judicial review of miscarriage of justice cases.
58. Anthropologists' research notes provide a good example of retrospective vulnerability. Consider: Keon-Cohen (2001), Blowes and Trigger (2000) and *Daniels v State of Western Australia* [1999] FCA 1541. The relevant law and the duties owed by experts are not always as obvious and accessible as some liberal democratic models of the rule of law might suggest. See for example: Moore (1992).
59. *Bolam v Friern Hospital*[1957] 1 WLR 582; [1957] 2 All ER 118 and *Sidaway v Bethlehem Royal Hospital* [1985] AC 871. This may have been a response to the expansion of the medical and legal professions after the Second World War.
60. *Rogers v Whitaker* (1992) 175 CLR 479, 487. See also *Naxakis v. Western General Hospital* (1999) 197 CLR 269, 285: 'a finding of medical negligence may be made even though the conduct of the defendant was in accord with a practice accepted at the time as proper by a responsible body of medical opinion.' *Chappel v Hart* (1998) 195 CLR 232.
61. Ironically, the specification of protocols, canons and standards may actually make it easier to attack the real world performances of experts. See Lynch (1998) and Edmond (2001).
62. Edmunds (1994:34) has noted 'the creeping hegemony of the legal system and the ways in which anthropological knowledge has been tailored to fit these requirements.'
63. The field of science studies has encountered similar difficulties. See the exchanges between: Scott, Richards and Martin (1990); Collins (1991), Martin, Richards and Scott (1991). There have also been debates about the extent to which judges have accommodated science studies perspectives and the extent to which science studies scholars have accommodated legal orientations: Jasanoff (1996), Edmond and Mercer (2002a, 2002b).
64. There is a considerable literature discussing the anthropological influence on legal categories and their interpretation: Kroeber (1955), Maddock (1981), Gumbert (1981), Bern and Larbaleister (1985), Hiatt (1984, 1989), Merlan (1994) and Ray (2003:108–110). Frances and Howard Morphy (1984:46) suggest, however, that 'the vast amount of data gathered by anthropologists during the preparation of land claims' might not prove especially useful because 'the information is not being gathered in a neutral context; and it is becoming increasingly clear that models of Aboriginal social organisation emerging from Land Rights cases are significantly influenced by ideological and pragmatic objectives.' Even here we find traces of objectivism and the implied assertion that non-ideological approaches to knowledge are possible. For a more legally oriented account see: Strelein (2001).
65. One of the reviewers of this article suggested that von Doussa's analogy between the lawyer and the anthropologist was appropriate because 'the anthropologist and the lawyer both represent/mediate people who are deemed to be incapable of representing themselves in the legal complexity of the courtroom.' I accept that anthropologists might prefer 'mediation' or 'translation' but those terms are controversial and elide a complicity in not hearing or better accommodating indigenous Australians.
66. (1998) 159 ALR 483, 512–544. See also *Delgamuukw v British Columbia* [1997] 3 SCR 1010.
67. A good example of debate around indigenous responses to European 'occupation' occurred between Obeyesekere (1992) and Sahlins (1995).

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