DEFINING ANTHROPOLOGY – WHOSE PREROGATIVE?
Mary Edmunds

31 October 2001

The Hindmarsh Island case is one of a series of cases or inquiries, beginning perhaps with the Warumungu Land Claim, that have increasingly confronted not just anthropologists in Australia but the discipline of anthropology itself and what it means. The number of such cases is rising - for example, *Daniel v State of WA* (1999)[1] and the State's subpoena of all Michael Robinson's material in relation to Ngarluma and Yindijibarndi peoples; *Yorta Yorta* and the judge's criticism of particular anthropological evidence - to name just two of a number of recent ones. Hindmarsh Island, however, is the first in which an anthropologist has actually been sued for doing her job. It highlights, in a particularly lurid way, the extent to which anthropological practice has moved in this country from scrutiny largely from within the academy or the discipline to highly critical scrutiny from one of our society's fundamental institutions – the courts and the rule of law. Within this framework for accountability, the terms of scrutiny are not set by the discipline but by others. The question is then not just about anthropological practice, but about the nature and credibility of the discipline itself. None of this is new, but the judgement of von Doussa J in Hindmarsh Island addresses or raises these issues in a more comprehensive way than previous judgements.

I would like to address just a few of these issues, and the question of who is involved in defining anthropology, in terms of two questions:

1. to whom is the discipline of anthropology, and therefore are anthropologists, accountable, and
2. under what conditions can a judge make an appropriate assessment of anthropology and anthropologists?

The short answers, it seems to me, are as follows:

1. anthropology at the present time is accountable (not necessarily in this order) to:
    - the academy and the broader scholarly anthropological community, in terms of its intellectual credibility;
    - its subjects, in a dialogue about the terms of representation;
    - any employing or commissioning body; and
    - the courts, as the final arbiter of contested interests.

2. a judge can make an appropriate assessment of anthropology and anthropologists on the basis of the evidence that is presented to him or her. This demands the highest level of professional competence and representation, which in turn involves a much greater and more transparent engagement between anthropological theory and practice.

[1] Daniel v State of Western Australia [1999] FCA 1541

Some context

Anthropology itself is a site of contestation, arising from the arenas of engagement with particular groups of people – and the discipline is, after all, about people. The more contentious the social issues, the more contentious for anthropology. Hindmarsh Island is one of the most outstanding demonstrations of this. The story is a highly political one.[2] But this case exists in a broader context: anthropologists working in Thailand and Laos during the Vietnam War, in the Amazon Basin (for example, with the Yanomamo), in the Philippines under the Marcos regime (at least one anthropologist destroyed all his field notes when the military arrived at his village). A particularly relevant comparison is with the case brought for compensation after the Exxon Valdez oil spill in 1989 (Jorgensen 1995). In that case, both parties, – Alutiiq as plaintiffs and Exxon Valdez as respondent – used anthropologists to support their case. The anthropologists for the Native American residents – Stephen Braund and PJ Usher – argued that the culture of their clients had been damaged by the spill. Exxon Valdez commissioned one of the big names in North American anthropology, Paul Bohannan, who argued that, for the here and now,

1. there is no Native Alaskan culture, only American culture;
2. the important characteristics that distinguish Alaska natives from other Americans is their 'ethnicity' (ethnicity itself is trivial in that scholar's view); and
3. the important factor that makes Alaska natives similar to some Americans is their membership in the 'working class'.

Jorgensen argues that both approaches were deeply flawed, and that (1995: 2, 93):

> The theoretical constructions chosen by social scientists for the native plaintiffs and by social scientists for Exxon had real world consequences…The consequences of bad social science were grave, indeed, for Alaska's natives.

Compensation, for example, was calculated at around $20million, or about $4570 per person.[3]

I mention this case because it seems to identify the key issue for the discipline: what are the theoretical constructions that we use, and how does this relate to our practice/s? There is also a moral question, because of the consequences that flow from that choice; and, again, the question of accountability and to whom we, as anthropologists, are accountable. But, primarily, the issue is about getting the theory or theories right and ensuring that the consequent practices are enthnographically impeccable.

Issues arising from the Hindmarsh Island judgement

1. Accountability

In the judgement, this takes the form of a discussion about 'duty of care' and arises from a broader contention made by the applicants that the conduct of Professor Saunders and Dr Fergie was conduct in 'trade and commerce'. In other words, the basis of the case was

[2] In an article published in the *Current Affairs Bulletin* in 1995, Deane Fergie set out some of the South Australian political background, going back to 1977 when Binalong Pty Ltd, with directors Tom and Wendy Chapman, first purchased land on Hindmarsh Island.

[3] The judge made reference to the 'anthropological fog of 10 to 50,000 years ago' – a metaphor that offers an interesting meteorological alternative to the Australian native title image of 'tide'.

quite outside what we as anthropologists or academics might understand as relevant. Other cases that we have examined elsewhere have had at least an anthropological connection in terms of land or native title claims. The fact that this case could be brought in terms of trade and commerce illustrates the capacity of the legal system to permit a repositioning of anthropological practice within a wholly different set of expectations and definitions. The claim was rejected by the judge, but it required to be addressed in great detail. One of the particular issues discussed by the judge was the 'duty of care' (paras 276ff). His observations go to a key question that has been the subject of considerable discussion within the anthropological community and with lawyers, that is, the role of the anthropologist within the court process. The judge bases his discussion around the question of what job the anthropologist has been asked to do, and how s/he has done it. Von Doussa J makes a clear distinction between the anthropologist acting on the one hand under instructions, as an advocate, and, on the other, as an expert witness, with additional duties to the court, and sees no contradiction between the two roles. The role that he specifically excludes is 'to the opposing side in litigation':

> Para. 296 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. And 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…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.
>
> 297 …Expert witnesses, (usually members of the skilled professions), giving evidence, owe duties to the court in addition to duties owned by them to their clients under their retainers. Those additional duties may require them to bring matters adverse to the interests of their client to the attention of the court. Those duties, however, are owed to the court, not to the opposing side in the litigation…
>
> 299 To suggest that a duty of care rested on Dr Fergie to protect the interests of Binalong in the circumstances prevailing in June 1994 is not only contrary to prevailing community standards but in my opinion has no support in law…

2. Anthropology subject to external critical scrutiny and assessment

Von Doussa J. makes clear that the question of credibility and accountability relates to all those giving evidence. At a number of points of the judgement, he sets down his view of the reliability of a number of the witnesses, both anthropologists and others. He has stern things to say about the evidence of Mr and Mrs Chapman, 'Mrs Chapman in particular', and considers that 'the reliability of their evidence is seriously undermined by their lack of objectivity and a determination that at every turn they must have been right and the actions of others which impinged on their interests must have been wrong' (para. 311). Of Mrs Dorothy Wilson, he says that, 'I do not doubt Mrs Wilson's honesty, but I doubt the reliability of her present recollection' (para. 316). Of Dr Kartinyeri, he says, 'I am not persuaded that she is not a credible witness' (para. 318). In relation to the three individual respondents, the judgement reads:

> My overall impression is that each of Dr Fergie, Professor Saunders and Mr Tickner honestly and conscientiously went about their tasks in the manner which they understood was required of them. I totally reject the assertions of dishonesty or recklessness on the part of each of them (para 313).

A number of the judge's other remarks relate directly to the issue of the finding of the Royal Commission of the fabrication of women's business. One of his key findings is that:

> Upon the evidence before this Court I am not satisfied that the restricted women's knowledge was fabricated or that it was not part of genuine Aboriginal tradition (para. 12).

Among those named in the Royal Commission as responsible for or associated with the 'fabrication' were a number of anthropologists or archaeologists. Von Doussa J. rejects most of these conclusions, and finds no evidence to support the Royal Commission's findings. He excludes from any suggestion of fabrication specifically Dr Lindy Warrell (who did not give evidence to the Court) (paras 345, 350), Dr Neal Draper (paras 347-348), and Mr Steve Hemming (para. 373).

The judge refers to and gives an assessment of a number of other anthropologists who gave evidence or opinion in the case, preferring the view of Professor Morphy on the professional quality of Dr Fergie's methodology and report over Professor Maddock's (paras 376, 441-445), although he points out that:

> in the course of his cross-examination, many of the criticisms initially made by Professor Maddock disappeared or were significantly qualified…He was complimentary of Dr Fergie's review and analysis of the Berndt field notes (para. 443).

On the other hand, the judgement is unequivocal that Dr Philip Clarke is 'the originator of the fabrication theory':

> 373 On the anthropological evidence, I have serious concerns about the objectivity of Dr Clarke and the opinions he has given in evidence. His personal diaries on which he has been extensively cross-examined disclose that he is, and has from the time the s10 declaration was made been resistant to considering the possibility that his spontaneous assessment that Dr Fergie's opinion must be wrong might itself be wrong. He formed that opinion before he had read the reports of either Dr Fergie or Professor Saunders, and within hours of learning of the declaration. His diaries show that he was the originator of the fabrication theory, and that he thereafter embarked on a course to undermine and discredit Dr Fergie and her opinion, at times attributing blame for the fabrication to Dr Fergie, Mr Hemming and Dr Draper. When the Royal Commission was announced, he claims to have taken a role and provided information that influenced the course of the Royal Commission in a way that I consider lacks professional objectivity and was inappropriate. I am not satisifed that Dr Clarke has fairly and objectively considered whether the reasoning and interpretation of research materials relied upon by others may leave open the possibility that his opinion is wrong. I prefer the views of Mr Hemming, Dr Draper and Professor Bell.

There is much more in the judgement about the quality of the anthropological evidence and of the credibility of the various anthropologists involved. Despite the case being brought under the *Trade Practices Act* and the *Fair Trading Acts*, the quality of the anthropological evidence and the reliability of the anthropologists concerned was crucial to the outcome. As the judgement states in relation to the wide range of views presented as to whether 'restricted women's knowledge as disclosed by the Fergie and Saunders Reports is or could be part of genuine Aboriginal tradition' (para. 370):

> 370 To expect this Court to come up with an answer that is in any way definitive is to misunderstand the role of the Court, and in any event to expect the impossible. All the Court can and should do is to decide only that which is necessary to resolve the issues raised in the pleadings between the parties, and only on the evidence before the Court.

The scrutiny of the Court was therefore on the quality of the evidence presented. On that basis, the judge found that:

> 400 I am not satisfied on the evidence before this Court that the applicants have established on the balance of probabilities that restricted women's knowledge as revealed to Dr Fergie and Professor Saunders was not part of genuine Aboriginal tradition.

This finding is wholly at odds with the finding of fabrication of the Royal Commission, because the Royal Commission did not have all the evidence before it – indeed, it could be argued that the Commissioner should not have come to any conclusion knowing that vital evidence had been withheld. Indeed, the case in the Federal Court is the first time that all the evidence has been available for argument and assessment.

It is clear from the judge's reasons for decision that those anthropologists whose evidence he found most credible – particularly Dr Fergie's, but also Steve Hemmings' and a number of others named – withstood the most intense and stressful scrutiny over a period of several years because it was, above all, good anthropology: 'Professor Morphy considered that the Fergie Report was an excellent example of applied anthropology in difficult circumstances' (para. 441). The point that is relevant to this discussion, however, is that it is not just up to anthropologists any longer to define what constitutes good anthropology. That is always a debate that we must continue to have, but we are no longer the sole arbiters of the terms of that debate.

To return to my initial question about accountability, then, I would make some final observations. First, that the meaning of accountability is to be called to account. Those to whom we are called to account seem to me to be:

- the academy and anthropological scholarly community, with anthropology as an academic discipline subject to the testing of content and analysis (internal scrutiny);
- the subjects of our research, with whom our key engagment is the interrogating of our material and our interpretation; and
- the courts – no longer the relatively sympathetic environment of the Aboriginal Land Commissioner but an adversarial arena in which even the details of one's diary can become the subject of critical scrutiny (paras 373, 570). This is our most stern and public external scrutiny, and the costs can be shockingly high. But it is also the arena in which we can assess whether our work is sound and able to withstand such scrutiny. That is not always a fair process, as a number of our colleagues can attest. But it is one that we have to live with if we choose to work in certain fields.

As professional anthropologists, we are now accountable to all three, and that gives all three rights in how we define anthropology as our discipline.

References

Fergie, D. 1995 Whose sacred sites? Privilege in the Hindmarsh Island Bridge Debate. *Current Affairs Bulletin* 72(2) 14-22

Jorgensen, JG 1995 Ethnicity, not culture? Obfuscating social Science in the *Exxon Valdez* oil spill case. *American Indian Culture and Research Journal* 19(4) 1-124.