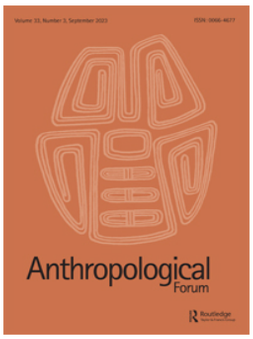

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Witness Statements as Cross-Cultural (mis)Communication? Evidence from Blue Mud Bay

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ABSTRACT

Translation, broadly defined as the articulation of the relationship between different cultural, social and legal systems, is at the heart of the anthropologist's or linguist's role as an expert witness in a native title hearing. It occurs at the level of individual lexemes, in categorising cultural concepts, and in the frame of the legal context. We exemplify the interrelationships between these by focussing on the quasi-legal use of the English word 'permission', a key concept in native title and land claim discourse. In the Blue Mud Bay case, Yolngu Matha was the first language of the witnesses, and there is no straightforward translation for this use of 'permission' in Yolngu Matha. As the 'experts' we needed to anticipate how Yolngu would understand the concept and its relevance to the court case. We first summarise our exploration of 'permission' with the claimants and show how a cross-cultural understanding of the 'legal' English concept emerged. We then focus on one of the court's main artefacts of translation—the witness statement—which must be produced or be translated into English. In our experience the witness statement is a product of a dialogical process involving the close collaboration of applicant (witness), counsel and expert. We reflect on the complexity of this process and how it operated in the Blue Mud Bay case. We conclude that translation is both possible and necessary in the conduct of native title cases. But it is not straightforward, nor should it be an unexamined process.

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Introducing Blue Mud Bay

We have been expert witnesses in a number of land rights cases. In this article our primary focus is on the roles we played between 2000 and 2005 in the Blue Mud Bay case which involved determinations under both the *Aboriginal Lands Rights (Northern Territory) Act 1976* (ALRA) and the *Native Title Act (1993)* (NTA).[1] Howard Morphy acted as anthropological expert and Frances Morphy as expert linguist but our research

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on the case was collaborative. Under the NTA, the case was centred on Yolngu rights over the sea and land of a region in the north of Blue Mud Bay. Ownership of the land down to the low water mark had in fact already been determined under the ALRA, but there was an area of ambiguity concerning who owned the column of water that forms incrementally above the beach between the low water and high water mark as the tide comes in. The case was finally determined in 2008 by the High Court in the applicants' favour—under ALRA ownership of land to the low water mark does entail continuing ownership of the land and also of the column of intertidal tidal water when the tide is in. The Court also found that possession under ALRA automatically entails exclusive native title rights under the NTA.

We are taking it as read that, in the terms first articulated by Mantziaris and Martin (2000), native title constitutes a 'recognition space' in which a process of translation takes place between two sociocultural systems. They comment: 'This process … becomes difficult, or even impossible, when the terms of the translation are incommensurable' (2000: 29). We would add that the native title recognition space can also be seen as a space where two disciplines—law and anthropology—interact in an attempt to resolve apparent cases of incommensurability so that a judgement can be achieved. While cognisant of the differential power relations between the various parties and actors in the court (see Morphy 2007, 2009) we can see in its recognition space the operation of collaborative processes that have the potential to produce positive outcomes and take account of cultural difference. There is a dialogical relationship between the interpretative and the evidence gathering role of the expert and our argument reveals how that dialogue worked out in a particular court case.

Expertise Across Disciplines and Cultures

Marilyn Strathern, in her 2004 Huxley Memorial Lecture, frames a characteristically thought-provoking and dense argument by opening with Weiner's (2002) critical reflection on 'recognition spaces' in native title, and concluding with Edmond's (2004) perspective on the limitations imposed on the anthropologist's role by the legal system in court proceedings. Edmond, she argues, is concerned to show that in court anthropologists 'have ceded interpretative space … the roles of expert witness and advocate are procedural, and not open to anthropologists to define' (2006, 204). While we have some disagreements with both Weiner's and Edmond's positions, Strathern's lecture provides an important general perspective on the role of anthropological expertise in land rights and native title cases in Australia.

Strathern uses the recognition space of the court as a springboard for an argument focused on the concepts of disciplinarity and interdisciplinarity in the creation of knowledge and on how those concepts articulate with management-led and research-led models. She notes that interdisciplinarity has been pushed increasingly as a positive concept by research councils and institutional managers, and that this has influenced their opinions on the form that the research contribution of the participating disciplines should take. Management, with its focus on particular kinds of outcomes, often sees '[c]ultural differences and differences of approach between disciplines' as inhibitors to 'the growth of cross-disciplinary research' (Strathern 2006, 197). This is because disciplines have their own internal processes of scrutiny, which create uncertainty while at the same time advancing

understanding. 'Scrutiny is second nature to the researcher or, more accurately, entails deploying a primary "nature", the researcher's disciplinary identity. Disciplines offer a powerful framework for evaluation—criticism' (Strathern 2006, 199).

In court cases the diversity of opinion among disciplinary experts, while not necessarily welcomed by the judiciary, is nonetheless acknowledged through the fact that each party to a case is able to call their own expert witnesses. We will argue contra Edmonds that in land rights and native title cases experts are active agents in the court process. Anthropologists engage in partnerships with lawyers across their respective disciplines as well as being concerned to manage areas of intra-disciplinary uncertainty. The process is far more dialogical than is often assumed, and anthropologists need to be aware of the different evidentiary conventions of the courtroom and the academy. Both the anthropologists and the lawyers who are engaged to play roles in Australian land and native title claim cases are, in effect, directing their expertise towards outcomes for which the primary constraints have been determined by an external body—Parliament (albeit as interpreted by the court system). The NTA and the ALRA, although clearly formulated, as Acts of the Commonwealth, in terms of the law of the nation state, are both framed as attempts to recognise and reconcile the rights of different sections of the nation's population—Indigenous and non-Indigenous—as far as is possible under an evolving Australian legal system. Arguably in this context the disciplines and practices of law and anthropology are subject to similar constraints.[2] The data that the expert works with are those that are accepted as evidentiary by the court. Both anthropologists and lawyers struggle over the ways in which that agreed-to evidence does or does not prove the case for the applicants.

Edmond's idea that the anthropologists have ceded their space is to an extent a false conceit, since at many different levels the data acquired from the witnesses for the applicants require interpretation and explication from expert witnesses before any legal arguments can be made. The value of the expert's intervention is acknowledged in the roles they are accorded in obtaining data to make the case, in working with counsel to prepare the case, in the proofing of witnesses and in the compiling of witness statements. But their expertise is also acknowledged to be relevant in the hearings themselves in different ways. A critical disciplinary approach to the data is essential, as Strathern notes, but that does not in itself constitute an argument against the usefulness and relative robustness of the data that social anthropologists can produce compared with those untrained in the discipline and unfamiliar with the cultural context of the societies in question. In native title cases kinship is only one of the areas in which anthropologists have been able to clarify the complexities of particular sociocultural systems.

A degree of discomfort with the recognition space is understandable—for example the legislation may be construed as introducing constraints that disadvantage some applicants whose particular historical circumstances make it less likely that their claim will be successful compared with other groups. The court's decision may end in a failure to recognise the justice of the applicants' case. The anthropologist, attuned to the complex and dynamic processes through which groups and individuals adapt to survive in the face of colonialism's more extreme effects, is likely to feel such failure keenly. A key pragmatic and ethical question that therefore needs to be confronted is whether the applicant's case will benefit from the expertise of the anthropologist as expert witness, particularly if the just cause of the applicants needs to be addressed by

legislative change—something that is beyond the purview of the anthropologist as expert witness.[3] However, the conceit of some anthropologists is to fail to recognise that such dynamic processes of adaptation are also recognised across disciplines, even in the relatively conservative environment of courts of law, where decisions are constrained by statute and title. In the Australian context, anthropological expertise and the testable data anthropologists have brought to the courts have been integral to changes both of the law and of outcomes of cases under land rights and native title legislation.[4] Although it is sometimes hard, anthropologists need to understand their contribution to the long game, not just to the particular case in which they may be involved.

More pragmatically, the holistic perspective of anthropology may lead the researcher to feel that they can never get too much data. Hence there is always a concern that the exception is around the corner, and in the adversarial space of the court there is always going to be a concern that the exception to the rule, if discovered, may be used to undermine the argument being put forward by the expert. This is the case even though the possibility of the exception may have been taken into consideration in their analysis.

Forensic Expertise

The distinction between forensic and expert roles in evidential processes brings into the open an implicit assumption that the evidential probity of data associated with 'scientific' evidence is distinct from that associated with social science and humanities data. This topic has been addressed in the context of Australian land rights discourse on a number of occasions by members of the judiciary, who have made explicit comparisons between data produced by scientists (biological or physical) and data produced by anthropologists, concluding that similar criteria can be applied to both. The terminological distinction between 'forensic' and 'expert' highlights the two roles of experts: providing factual data (evidence) and providing interpretations of that data, while avoiding the pitfalls of hearsay and opinion.[5] In everyday usage 'forensic' edges towards the process of recording relevant data and 'expert' towards the process of interpretation. However the boundaries between the two are acknowledged to be complex as will be seen in the case of the argument developed in this paper. Both aspects are encompassed in Holden's (2020, 2022) use of the term 'cultural expertese".

We have previously written about the distinction between the roles that we played in the cases as 'forensic' gathers of data and 'expert' analysts of the data made available to the court through ours and other peoples' research (Morphy 2006; and Morphy and Morphy 2009). In summary, we argue that:

> anthropologists carry out the kind of analyses judges are themselves required to undertake if they are to understand the Indigenous legal basis of connection to land. The role of anthropologists is to present their evidence in such a way that it can be tested in court and provide guidance on the process of interpreting the data. Their evidence must be based on anthropological knowledge and methods of analysis; yet it must simultaneously enable a judicial process in which conclusions are reached independently through the interrogation of the evidence. (Morphy 2006, 138)

This paper is concerned with the fuzzy boundaries between data and interpretation but also with the ways in which the experts and the lawyers work together to create

documents that are evidential and defensible in the context of the case at hand. When legal processes occupy intercultural spaces, as in the case of Australian land rights cases, in order to arrive and meaningful and just decisions experts need to have an eye open to the collaborative as well as the oppositional nature of the judicial process. The law and legal processes are clearly entangled with broader institutional structures of society, and thereby subject to historical change, value transformations and advances in knowledge. The employment of disciplinary experts and the independent role they are allocated in court proceedings is *a priori* evidence for that collaborative stance in the case of the Australian legal system (Rose 2022, 28).

[In]-Commensurability and Explication: A Case Study

The problem of commensurability inevitably pervades the court process as experts and others strive to make two different legal systems intelligible to one another within the constraints of the structure of one of them—Australian law. What counts as 'incommensurable'? Can the difficulties posed by incommensurability be overcome, and if they can to some degree, how could that happen? We begin by drawing a distinction between translation and explication,[6] arguing that incommensurability may thwart the former, but not the latter. The problem then becomes, essentially, strategic: how much weight should be accorded to explication, as opposed to translation? And who benefits from explication?

Issues of translation and explication are at the heart of the anthropologist's and linguist's role as expert witness and, we would argue, in assisting the applicants as witnesses to navigate the recognition space. These issues are involved at three interrelated levels—at the level of individual lexemes, in categorising cultural concepts, and in the framing of the legal context. The interrelationships between these three levels can muddy the distinction between the two processes—translation and explication—in the understanding of nearly everyone involved: the applicants, the members of the legal profession, and often the expert witnesses as well. We will exemplify these interrelationships by focusing on a key concept in native title and land claim discourse, reflected in the quasi-legal use of the English word 'permission'. This usage focuses on the 'right' of a 'traditional owner' (TO) to give consent to or withhold consent from another person to travel over or make use of the resources (either material or intangible) of the TO's estate. It is predicated on the notion that ownership, if it is to be regarded as legitimate, rests in the ability to give or withhold such consent.

In the Blue Mud Bay case, Yolngu Matha languages were the first language of the claimants, and there is no straightforward translation for this use of 'permission' in these languages.[7] At the level of the lexeme, then, there is incommensurability. As authors of the anthropological and linguistic reports supporting the Yolngu case, and as potential expert witnesses at the hearing, we needed to anticipate how Yolngu would understand the concept of permission and its relevance to the case, because we knew they would be asked about it. In this section of the paper we summarise our exploration of this issue with Yolngu claimants and outline how a cross-cultural understanding and explication of the 'legal' English concept emerged.

In the next section we focus on one of the court's main artefacts of cross-cultural communication—the witness statement. Such statements are prepared for the court's

benefit, to obviate the need for lengthy evidence-giving by witnesses, and thus to expedite proceedings. They are viewed as 'the words of' the witness. A statement may be converted into an affidavit, that is, a statement confirmed by oath or affirmation, as happened in the Blue Mud Bay case. Views about the role of anthropologists and linguists in compiling both the statement and the affidavit differ. We want to argue that these documents are very far from being simple translations of the words that the witnesses originally used, and although we have not worked with people who have English as their first language, we would predict that thinking of witness statements simply as 'translation' could be equally problematic in such a context. For the purposes of the court, the witness statement has to be produced in English, or be 'translated' into English. We reflect on the complexity of this process and how it operated in the Blue Mud Bay case.

Our main source of data is our own fieldnotes and journals, written up during our research for the Blue Mud Bay claim. We use these here not so much as a source of information about Yolngu society and native title rights but initially for what they tell us about Yolngu use of and understanding of English concepts.[8] Our focus is on Yolngu speaking in English, and on Yolngu translating from Yolngu Matha into English. Our reason for this, initially, is to reveal where parallels emerge between Yolngu concepts and English vocabulary, and which kinds of words are straightforward to translate and unambiguous—both ways. Which English words come up regularly and comfortably in Yolngu discourse about the relationship of people to country, and have an agreed meaning for Yolngu? How do those meanings correspond to their meanings to English speakers? And which 'native title' English words are absent from Yolngu discourse? Are they translatable in any simple sense? How do Yolngu talk in English about rights in land and how does that relate to the key English words used in the court hearing?

'Permission'

Permission is a prime example of a word that occurs frequently in native title cases, but which very rarely occurs in Yolngu discourse about Yolngu relationships to country. Where it does occur, it is most frequently in response to questions posed by English speakers (such as lawyers, or enquiring anthropologists), or in dealings with outsiders —in, for example, supporting the existence of a permit system for entry into ALRA land, or asking outsiders if they 'have a permit'.

Yolngu have clear understanding of the use of 'permit' and 'permission' in dealings with the outside world through the ALRA provisions. But do they 'translate' these concepts into the Yolngu relational world? We were concerned that they might not, and that if we did not engage in a process of explication then inconsistencies (as perceived by the legal profession) might arise in the context of court hearings, where the focus is on the Yolngu system of 'rights', and its application to other Yolngu. We suspected that when Yolngu think and talk about such matters to one another the Anglo concept of permission does not really apply; it is essentially untranslatable or, rather, irrelevant, and that people do not actually ask for 'permission' very often.[9] Our suspicions were confirmed when we asked the late Dr Gawirrin̲ Gumana, the named applicant in the case, if Yolngu had to ask for

permission to enter another clan's country. He, whose command of English was extremely good, replied as follows:

> They must ask us for permission,
>
> or let us know after, or send us some turtle – they could send food by plane, or they would give it to us if we saw them.
>
> They can camp there, we are countrymen – sometimes they ring me up [to let me know they are going], sometimes they don't. In the past we lived together, moving.

This is a 'rhetorical move' typical of sophisticated Yolngu rhetoric directed to English-speaking outsiders:

(a). I hear your non-Yolngu premise, and first I give you the answer you will understand (and want to hear).
(b). But now I'm going to tell you (if you have ears to listen) how it works in the Yolngu way. We proceed from a different premise.

The trouble is, such rhetoric is likely to be misinterpreted in the context of the court as inconsistency at best and contradiction at worst.

The processes of translation and explication involve the identification of implicit cross-cultural concepts or categories.[10] In looking to *translate* we look for the nearest equivalent lexemes or concepts. Individuals who are competent speakers of two languages do this intuitively, and move effortlessly between vocabulary substitution and higher-order conceptual, categorical, and syntactic substitutions. The latter is necessary because there are most often no simple equivalents, and this may reflect a different system of organising knowledge about the world. This is evident even in the case of what seem at first glance to be words that refer to concrete concepts—'things'. For example and English speaker might ask a Yolngu person: 'What is your word for shark?' and struggle to understand the response, until the realisation dawns: 'Oh Yolngu have more than one word for shark, and there are many different kinds of shark, which they classify as *maranydjalk* together with what we call stingray, and Yolngu recognise distinctions that we do not', and so on.

Yolngu are, perforce, partial speakers of English. There are some English words that they use regularly, both among themselves these days, and to outsiders, that seem to capture useful analogies. The translation of the word *ringgitj* is a very good example. One referent of *ringgitj* is a place in a clan's estate where members of other clans each have their own place to camp near an important ceremonial ground. This is where you should go to as a member of your clan when you come for the ceremony. Your *ringgitj* is your own place within the other clan's estate; you control that place. Yolngu routinely use the English word 'embassy' to refer to such *ringgitj* places. For English-speaking outsiders this is a helpful analogy, and this use of 'embassy' certainly bears a family resemblance to the use of the English term in diplomatic contexts—it even carries a sense of diplomatic immunity. While any detailed exploration of the concept will soon show that *ringgitj* and embassy are very different things, there are senses in which they are the closest equivalents. The analogy 'makes do', in most contexts of interaction between Yolngu and English-speaking outsiders.

There are other English words that 'make do' in the contemporary context, including in discourse in the native title court. A lot of these words apply widely across Indigenous Australia. The Yolngu word *rom* is always translated as Law—by Yolngu and their English-speaking interlocutors alike. In a sympathetic environment, such analogies can be reinforced. This does not mean that either party mistakes the one for the other, but that they note, in effect, the family resemblance between *rom* and law.

So why is 'permission', a central concept in native title quasi-legalese, not one of these words that the Yolngu have theorised in the same way as *ringgitj*—embassy, or *rom*—Law? In speaking about a Yolngu context, 'permission' is largely absent. In relation to external relations with non-Yolngu, it is centrally present. The bottom line is: Europeans came without permission, even though permission appears to regulate European lives. They came *dhä-munyguma*, 'obliterating/extinguishing the voice [of the land]', in the words of the late Wakuthi Marawili.

In our research for Blue Mud Bay, we were based at the community of Yilpara (also known as Baniyala). Wakuthi was the senior leader of the community, an extraordinary man. Very old, blind, largely immobilised by infirmity, but still with immense power and presence, he possessed a phenomenal memory and an inexhaustible store of knowledge. He knew everything that was going on, including what we were up to. We used to make a collection of all the questions that nobody else could answer and have a final session with him at the end of each fieldwork trip. It always started slowly and a bit formally, but once he got into his stride he was unstoppable (and we and his relatives had to spend many hours thereafter transcribing and translating what he had said). Here are his thoughts, translated into English, on the subject of land and belonging:

> Of course the land belonged to the Yolngu, of course it belongs to the Yolngu. They didn't know about the white men. In between came the Macassans … We only called them *bunggawa* ['boss'] because … we were workers with them on trepang and turtle shell. They were only foreigners, but we belong to this country. We were really the *bunggawa* for this land, they just came in. This land belongs to Yolngu. The land is *märi–gutharr*a, was before and always will be.[11]

> *Waku* [children of women of the clan] – where his mother come from … look after the *ngändi* [mothers]. Most important *waku* come from the eldest mother. *Waku* also have ceremonial responsibilities for other clans with the same *wangarr* (ancestral inheritance) as their *ngäṇḍi* clan. The land, the *waku* also remains forever. People go on and off. The land remains, the Yolngu people go on and off [ie. Individuals are born, live and die].

> Balanda [white people] walked all over us, coming in as if they owned the place. Pushing us away from the land. *Dhä-munyguma*. Land has a voice [its people] and land also has a pattern.

Wakuthi's eldest son Djambawa, a key witness in the Blue Mud Bay case, explained 'pattern' this way (in English):

> The patterns are to make the people who came from that country look like people from that country, something given from those *wangarr*, telling everyone 'we are the Maḏarrpa' [clan]'.

Our notebooks are dense with statements such as these about the intrinsic and enduring relationship of people to land. For example, on the day before the hearings Howard went to see a leader of a clan linked to a small area of the Blue Mud Bay claim. His journal records:

> In the afternoon [I] went to see X.[12] I said I wanted to make sure that the Gälpu group that he is the senior member of was happy to be included. He said they had to be included as their country was Garrimala (in the claim area). That the freshwater from Gälpu and Djarrwark country and the quiet snake [Olive Python] flowed from there and mixed in with the Dhaḻwangu and Maḏarrpa waters lower down at Yakutja. He also had a *ringgitj* place 'you know, like embassy' on Blue Mud Bay itself. He stressed it was his country and he could live there if he wanted to, and no one could stop him doing the paintings for that country. This was how it had always been.
>
> He said it was important to get their law respected. He drew a contrast between the English and the Macassans. The Macassans understood that Yolngu had their own Parliament [another analogy] and laws and leadership – they did not put up their own flags and try to take over the country like Captain Cook.

These notes provide an example of the routine ways in which English terms are used in Yolngu discourse, but also show the relational nature of Yolngu rights. On the one hand, people stress the enduring relationship between groups and land, manifest in the sounds and patterns of the land. On the other hand, they stress the interrelationships between clans and kin and the reciprocal nature of their rights and responsibilities.

To be kin entails sharing resources; in the words of a senior Manggalili woman (A): 'Same fish at Yilpara as Djarrakpi, we are *märi-gutharra maṇḏa* [MM(B)-(ZDD) us two]. We share with our family there'. Rather than talking of 'permission', people emphasise looking after family, showing people where they can go, and updating them on events that may affect access to places such as a recent death, a potential ritual transgression, or the presence of dangerous crocodile. A (quoted above) emphasises the importance of joint responsibility for place: 'We stayed here now so that we could mind the water together as *märi* and *gutharra*'. The premise on which Yolngu base their relationship to their own and to others' country is one of mutual responsibility and reciprocity between kin. This is further illustrated in statements by two senior women:

> When people come [to visit] they will come and sit with us so we can show them where to go and where not to go. (B)[13]
>
> When someone in our *gutharra* clan dies, we don't eat *yambirrku*.[14] We would not go hunting in our *gutharra*'s country at that time. After we have eaten *yambirrku* in the Yingapungapu, one or two weeks after the burial, then the land and sea is free. (A)

A corollary of this sense of mutual responsibility is that a person might ask someone to act on their behalf to carry a message or to perform a ceremony that opens up an area of land recently closed: 'in opening the country you might ask someone to open it up for you [by burning] if you knew that the person was going there'. (B)

In order to exercise such 'rights' in or responsibilities to others' country people have to be of an appropriate kin category, but the overlapping and extended nature of Yolngu kindreds means that in the case of any group of people their rights are likely to extend across large sections of the Yolngu world. As Wakuthi notes: '*Waku* have ceremonial responsibility for clans with the same *wangarr*'. Which is to say that the children of the women of a clan have responsibility as *djunggayi* ('caretakers') not just in the ceremonies of their own mother's clan but also with respect to any other clan that shares the same set of ancestral beings. Y, a senior man of the Djapu clan explained that: 'For

Waṉḏawuy [his own clan country] we would consult Djambarrpuyngu and Munyuku, *gutharra* and *waku*'. He also stated that ties of *gurruṯu* (kinship) extend to distant places within the Yolngu-speaking area: 'Milingimbi, Raymangirr, Ramingining – we can go there because of *guruṯu*'.[15]

The English word permission is premised on the idea of exclusion. The Yolngu system of *rom*, on the other hand, operates on the premise of enduring processes of embedded relationality between countries, and between individuals and groups, and is oriented towards inclusion rather than exclusion.

We can now see why permission rarely appears in the pages of our notebooks. It does not provide a productive analogy for Yolngu in their efforts to get English speakers to understand their system, and so it has not been theorised in the same way as 'embassy' or 'parliament'. Interestingly, the exception that proves the rule about the absence of permission in our fieldnotes is the occurrence of its use as an attribute of a person—very much a non-English usage—as in 'he (or she) is my permission' with reference to that person's country. In other words, this person is of such a particular relationship to me that he or she provides the surety or legitimate basis for my presence.

But in preparing for Blue Mud Bay case hearing 'permission' was nonetheless something that we decided it would be best to explore in a systematic way because of its importance in the native title 'translation space'. We anticipated that it would be considered a relevant component of witness statements and might be raised in cross-examination. In effect, we felt we needed to explicate 'permission' to Yolngu potential witnesses.

We did of course initially search through the Yolngu Matha dictionary—a useful if not comprehensive resource.[16] The absence of permission in Yolngu discourse, either talking in English or translating into English, was confirmed by an absence of any reference to it in the dictionary. We asked Yolngu if there was a word that translated 'permission'. No one could offer one. We then asked how the English word would be translated into Yolngu Matha. And we initially had to be the informants. Djambawa Marawili, son of Wakuthi, took the lead in asking us what we meant by 'permission'. And after some discussion he went through the kind of process we have outlined above. He thought about how he would go into another clan's country and how he would act, working through scales of distance. The clan estates of the set of interrelated clans centred on the north of Blue Mud Bay, known collectively as Djalkiripuyngu and networked by dense connubial relations, he treated in effect as a joint domain. The test case became the western edge of the Yolngu region, in the Cape Stewart area. Here he made links on the basis of shared *maḏayin* (sacra associated with a particular *wangarr* being), with clans whose songs were known: 'they have *bäru* (crocodile) and *nguykal* (kingfish), they have the "same" paintings'; or they were places known to have been visited by relatives in the past, and it is possible to use those people as reference points: 'they would ask me, what do you call Z, who called my father *ngapipi* (MB)?' Or you could follow the movement of bestowed names across country.[17] And then finally, after a very long conversation, came the Eureka moment: 'the closest word', Djambawa said, 'is *gurruṯu*' (kinship). Which is very appropriate, as it is a word that, we would argue, has no close equivalent in everyday English, since English-speakers by and large do not live in relationally-based universes where everyone is classified as kin. What English speakers mean by 'family' is very different to what Yolngu mean by *gurruṯu*.

To reinforce that point, and to illustrate that *gurruṯu* is fundamentally a spiritual rather than a 'blood' connection, we offer the following final vignette from Howard's notebook:

> The day before the claim hearing, we went to X community to check that D, the court interpreter, was ready, and to talk to Z, who is the sole remaining *gutharra* of the extinct M clan, whose country is in the claim area. The process of succession is ongoing and disputed.[18] This was outlined in detail in the anthropologists' report, but legal counsel wanted someone present who could give assent to the inclusion of the M clan in the claim if required. A *gutharra* is, all things being equal, the strongest candidate for this role.
>
> Unfortunately, D informed me, Z's marriage had just broken up and he had left for another community the day before. However, D also provided the solution: 'the Yolngu way is that people who were conceived from that land, whose conception spirit came from that land, also have the right to speak on its behalf. They are "*weka*-M" [gifted by M]'. And D noted further that the conception spirit of the person for whom they would be interpreting for that day happened to come from M country. As he [as a potential witness] had already instructed the NLC, and the relevant information was included in his statement, that should solve the problem. On our way back through town we encountered the person in question in the car park of the shopping centre – and he confirmed that indeed he was able to speak on behalf of M.

Witness Statements: Neither Fish nor Fowl?

The discussion above about permission provides the translational and interpretative background to the production of witness statements, which are evidentiary and subject to cross examination. The witness statement, *qua* sworn affidavit, is an interesting and problematic document, from a linguist's point of view.[19] In the Blue Mud Bay case the presiding judge, Mr Justice Selway, considered them to be a valuable tool (Selway 2005, paras 182–183):

> … in many cases it is convenient to have evidence in chief given wholly or largely by means of a prepared statement. This not only reduces the time involved in the hearing – it also assists in ensuring that the applicant's case is prepared well in advance of trial and that the respondent(s) is not taken by surprise …
>
> I accept that this may need to be qualified in relation to some witnesses who may be disadvantaged by this course, which may include some Aboriginal witnesses … However, I do not think that those disadvantages arose in this case … *Subject to potential issues arising from translation between Yolngu language and English* I do not think that the Yolngu witnesses were disadvantaged by the procedure adopted. [Emphasis added]

We would not quarrel with his Honour's concluding sentence, at least in the context of Blue Mud Bay, but we need to take up and problematise the emphasised phrase. For the process involved in the construction of a witness statement is much more complex than mere translation.

If it single-word translation were possible between Yolngu Matha and English, and we have seen that in the case of a concept like 'permission' it is not, and if we were only trading in 'layman's' English, then the process might be straightforward. But Yolngu, speaking perforce in English to the lawyer recording the statement, have to make difficult choices about how to articulate their 'laws and customs' in English. The problem is compounded if they are not fluent English speakers. And what their *lawyer*

is concerned with, above all else, is to produce a document that speaks to relevant sections of the NTA and/or ALRA.

Our intuition that the word permission would occur in witness statements proved to be correct and in some cases it occurred multiple times. The same sentence: 'To paint the designs of another clan's country without having permission to do so would be a breach of Yolngu law', or close variants of it, appears in different people's statements. It is unsurprising that the word permission was used given the centrality of the concept in native title legal discourse. The fact that the right to paint designs should be emphasised is also unsurprising. Yolngu are well known as artists; their paintings are made for sale in intercultural transactions and the issue of rights to paintings had been subject of earlier court cases concerning issues of copyright (see Mazzola 2020). But is what sense are such sentences reflective of what the witness actually said to the lawyer?

To answer this we need to examine the process whereby witness statements are produced. This is exemplified in Figure 1, using the example of 'permission' vs *gurruṯu*:

In this case the witness has clearly reflected on how *gurruṯu* might articulate with the English concept 'permission' and attempts an explication. However, he also insists on the partial incommensurability of the two concepts ('that's balanda dhäruk'). In the lawyer's 'translation' of what the witness says, we see a process of enforced commensurability at work. From the lawyer's point of view, for a witness statement to be effective, it must be framed in such a way as to make Yolngu *rom* ('Law', or in legalese 'laws and customs') intelligible in terms of—in effect commensurate with—settler Australian native title law.

Over the years, as witness statements have been fashioned by lawyers across Australia, many of the words that appear in them—words like 'permission', 'speak for', 'resource', and 'connection'—have come to have particular meanings for lawyers who work in native title. Some are defined in the Act itself, and so are official legalese. Others are quasi-legalese—terms that have commonly been used by lawyers in native title cases and which are

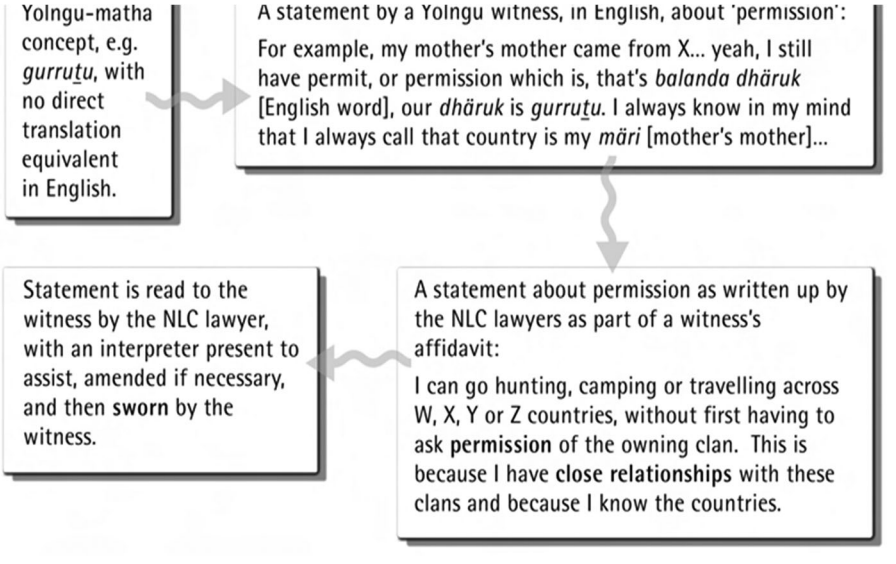

Figure 1. The 'translation' steps in the construction of a witness statement

in the process of definition as legal terms, with very particular meanings. The trouble is that many of them sound like ordinary English words. These quasi-legal meanings are not something Yolngu witnesses are privy to,[20] unless they have been alerted in advance, so a phrase like the one in the lawyer's written version—'without first having to ask permission'—could conceivably mean something very different to the Yolngu witness who produced the original statement from what it does to the lawyer who has reformulated the witness's words into 'native-title-speak'.

Having compiled the statement the lawyer will, of course, read the final version back to the witness—or the witness will be given a copy to read. But this 'new' version will be opaque to the witness in many ways, even if their command of English is good. For such a document is a hybrid. It purports to be the statement of the witness about *rom* ('laws and customs'), but it is also to a large degree an implicit statement by a lawyer about native title. It belongs fully to neither of its authors, and its meaning is inherently indeterminate.

Witness statements are long documents, often running to close to 100 paragraphs. This in itself makes it unlikely that the witness, now in the witness box in court, has a full recall of its contents. Yet in court these documents are treated, according to conventions that are never explicitly articulated, 'as if' they were the *actual words* of the witness, when everyone in the court, from the judge on down, knows that they are not. Hence the ritual nature of their adoption into the evidential record, where much less attention is paid to the witness's response that the statement is 'true and correct'—this is a formulaic exchange—than to its status as a legal document: which 'matter' it relates to, and which bits of it have or have to been accepted 'by consent' into the evidence before the court.

The trouble is that the lawyers for the respondents in the case can, as a tactical manoeuvre, when it suits them, violate the unspoken convention. They can do this because the convention has no official status in the court. They can question the witness minutely, if they so choose, about the precise meaning of a word that 'they' have used in paragraph x of their statement. In his determination in the Blue Mud Bay case Justice Selway drew attention to the one instance of this tactic that came to his notice where, in his opinion, misunderstanding was evident (Selway 2005, para 185):

> Some mention should be made of the only clear example of a potential misunderstanding of the meaning of words within the written statements. In par 40 of his written statement Mr Y said 'As the river crosses X country, the bed, banks, waters and resources of the river belong to the X'. I would normally have understood the word 'resources' to mean physical resources, such as fish. However, in his oral evidence Mr Y said that he had used the word, or at least understood it, to mean 'stories'. Given the evidence as to the spiritual and traditional significance of 'stories' the use of the word 'stories' in that context is understandable. It seems to me that this is an example of what is probably obvious – *some care needs to be taken in ensuring that a witness's evidence is not misunderstood by reason of a difference in understanding the meaning of words*. In the event this misunderstanding did not have any effect in this case. It was identified during cross examination. It also did not matter. It was clear from Mr Y's evidence that he did understand that physical resources, such as fish, within the river were 'owned' by or 'belong to' the clan over whose land the river (including the fish) was situated … [Emphasis added.]

In this comment, the judge is treating paragraph 40 of the witness statement 'as if' Mr Y had actually said or written the precise words quoted. However, 'resources' is one of those quasi-legal words that had been introduced by the lawyer in the writing-up of the

statement—a word that arguably has a precise meaning for all the lawyers in the court that is not shared by the witness. It had been introduced to gloss what the witness had originally said, as a kind of shorthand, linking the statement efficiently to a particular point of native title law. The witness had no appreciation of this, as a process. In the context of the cross-examination in which the contents of paragraph 40 were raised, his concern was to try and make sense of the word in that more immediate context of the court, since the context 'paragraph 40 of a long document which is based on words I once spoke but which was not written by me' was basically inaccessible to him. Since the place being talked about in the exchange happened to be a major ancestral site, his fixing on the meaning of 'resource' as spiritual resources (stories) was unsurprising. Discourse mediated through witness statements is full of such moments, although this is often only fully evident to the linguist sitting uncomfortably in the second row of the 'public' space.

At the end of his cross-examination of Djambawa Marawili (DM below), counsel for one of the respondent parties attempted to cast doubt on the credit of the witness statements by putting the 'as if' convention on the record. The exchange went as follows (Court Transcript 905.16–905.43):

Counsel for the Respondent (CR):	I just wanted to ask you about your affidavit … . Did somebody help you prepare that?
DM:	My statement?
CR:	Yes.
DM:	I mean, do – somebody was writing it, or - - -
CR:	Yes.
[Discussion in language between DM and the interpreter]	
DM:	Yes. There was – Howard, is it?
CR:	Professor Morphy was it? Okay, someone else … the [NLC] lawyer?
DM:	Yes [more in this vein]
CR:	… And so some of the words in those statements perhaps are not your words, maybe they're words that somebody else has put in? For example, that word 'right' … That's not your word, I gather, that's more - - -
DM:	What you mean 'right'? Rights?
CR:	Yes, there was a bit in your statement that [one of the other counsel for the respondents] was reading to you and it talked about you having a right to do something, and … all I'm asking you is, was that part of the statement written by you, or maybe that was written by, with the help of other people?
DM:	Oh, it was my language - - -
CR:	Yes.
DM:	- - - because it is new to me to speak English. I have – this is my second language.
CR:	Yes, and you're very good at it too, I must say. I wish I was as good at English as you are.
DM:	I wish I was going to speak proper English and I'm read or write - - -
CR:	No, you're very, very good.
DM:	- - - then I can do it myself.

It is fair to say that this ploy to cast doubt on the statement's accuracy was unsuccessful, and that his Honour appreciated DM's sardonic put-down of the lawyer at the time. But it is by no means clear that the ploy *ought to have been* unsuccessful. In native title proceedings a great deal of time and thought is devoted to the precise evidential status of expert reports—particularly anthropologists' reports—and this is how it should be in the Anglo-Australian judicial system, where the expert opinion must be shown to be independent, and the factual basis and methodology for their opinion must be clearly shown. But the evidential peculiarities of the witness statement have gone largely unacknowledged in the context of such proceedings, and while that remains so, this is potentially a source of disadvantage to witnesses.[21] It exposes them to the possibility of hostile cross-examination, in which they are called upon to defend or reproduce statements—said to be theirs—that are couched in language that may not be fully intelligible to them and in terms of concepts that they themselves do not subscribe to.

Conclusion

Witness statements are tools of enforced commensurability in the native title 'recognition' space, and this needs to be explicitly acknowledged. In acceding to the proposition that the witness statements are their own statements—and given the power relations inherent in the court, they cannot choose to do otherwise without jeopardising their claim—the witnesses are, perforce, acceding to this particular representation of 'their' laws and customs. The other parties to the case—the respondents and the court itself in the person of the judge—should therefore explicitly acknowledge that witness statements are prepared largely for the benefit of the expeditious running of court, not for the benefit of the witnesses. In acceding to producing witness statements in collaboration with their lawyers, the claimants are making a contribution to smoothing the path in the recognition space—a contribution that may recast their words and concepts in ways that are quite foreign to them. This is a sacrifice, and it ought to be respected as such, not exploited.

In the Yolngu case, for example, native title discourse brings two words together—English permission and Yolngu Matha *gurruṯu*. Each is central to its own legal system, and neither can be simply translated into the other language. Setting them in the frame of native title discourse requires a complex process of explication and this process reveals that, while they have something in common that allows a partial form of translation, they are simultaneously evidence of very different epistemologies at work. Indeed, returning to Marilyn Strathern's argument, close 'cross-disciplinary' collaboration between lawyers and anthropologists is essential to articulating the relationship between different, relatively autonomous, conceptual systems in the context of legal proceedings.

The demonstration of 'permission' is a basis under Australian law for defining and recognising aspects of Aboriginal 'laws and customs'—construed as the rights to use, and the rights to exclude. It is oriented towards exclusion and the creation of exclusive groups. Defining 'laws and customs' in terms of exclusion and exclusivity potentially opens up areas of conflict and the possibility of endless litigation—within or between groups subject to native title because of their indigeneity, as well as between them and the wider society. By contrast, *gurruṯu* under Yolngu *rom* is primarily a framework for bringing people together. In the Yolngu domain emphasis is laid on inclusion, on including people who recognise and respect *rom*.[22]

Yolngu *rom*, as customary law, can only be relatively autonomous[23] within the nation state to the extent to which its laws and customs are recognised in Australian legislation and jurisdiction. However the collaborative practice of experts inside and ouside the legal system can contribute to widening those areas in which the 'laws and customs' of Indigenous societies are taken into account and their rights respected. This entails a three-way discourse—between Indigenous thinkers, the 'experts' and the members of the legal profession—which aims to forge areas of mutually agreed commensurability (rather than enforced commensurability) as part of a process of continuing change. Many Yolngu are prepared to engage in such a discourse, and always have been. Looking to the wider society, they respond positively to the rhetoric of reconciliation, to the idea of 'both ways' collaboration (see Marika-Mununggiritj 1999; Morphy 2016). In doing so they are prepared to extend the scope of *gurruṯu* to include outsiders in a shared social field. The language that they favour invokes ongoing partnerships, with 'ongoing' being the operative word. Their commitment to this way of being and acting in the world has been sorely tested over the years, but has rarely wavered. Frustratingly, it will probably continue to be so tested in most domains of interaction with the encapsulating settler state, unless the settler state can change its ways and commit to the idea of commensurability as a two-way process.[24]

Notes

1. The initial determination of the Blue Mud Bay case can be found at *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425. The determination of the Full Federal Court hearing may be found *at Gumana v Northern Territory of Australia* [2007] FCAFC 23. The High Court's determination may be found at *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29.
2. See Holcombe (2018) for discuusion of the difficulty of translating 'rights' across cultures and legal frameworks.
3. These ethical considerations are discussed in some detail by Livia Holden (2022, 671) who concludes that 'the consequences of nonengagement as expert witnesses in situations of conflict and litigation may sometimes outweigh the risks involved in engagement because anthropologists may be, in certain situations, the best suited to contribute to the protection of vulnerable groups and individuals.
4. As Rose (2022, 28) writes ' -- a collaborative and inclusive orientation, where possible, tends to advance not only the interests of disadvantaged parties via legal processes, but also advances the ethical and intellectual integrity of both social anthropology and the law, opening up pathways to more inclusive and just precedent-setting judicial decisions, and furnishing legal practitioners with more inclusive and just concepts for contribution to law reform'.
5. Justice Blackburn's commentary in the original Gove land rights case (*Milirrpum and others v Nabalco Pty Ltd (1971)* 17 FLR 141 *(Milirrpum v Nabalco)* alludes to the interesting relationship between evidence and opinion when he writes: 'Expert evidence that provides no compelling connection between facts and opinion is broadly unhelpful to the law, no matter the field of expertise, and no matter which party seeks that expertise to advance its case, whether claimant, respondent, plaintiff or defendant' (cited from Rose 2022, 32). Rose (ibid.) convincingly argues that Blackburn's reasoning provided a precedent setting judgement for the relevance of the expert evidence provided by Australian forensic social anthropologists.
6. The concept of explication has not been given the attention in merits in native title anthropology (see Morphy 2007, 2009). As Palmer (2018, 96) notes: 'In my view, a proper

explication of the complexity is a necessary part of advancing an expert view in relation to a customary system of rights to country'.

7. In the Djambarpuyŋgu legal dictionary (*Aboriginal Resource and Development Services (ARDS) 2015),* which is based on the translation of legal concepts couched in 'plain English', the idea of permission is rendered differently depending on whether permission is granted or withheld. The idea of granting permission is conveyed through the use of various forms of the verb *yoram* 'to say yes, to agree' while the idea of withheld permission is conveyed through the use of *dhä-ngänhamiriw* 'mouth-hearing-without'. In both cases the translation is predicated on the idea that someone has to do the asking first, which is precisely, as we shall see, where the problem lies. This dictionary was not available at the time of the case in question, and we never heard these two terms used in discussions of permission.
8. Elsewhere we have discussed our role in the case and the nature of the evidence that we produced (Morphy 2006, Morphy and Morphy 2009).
9. This issue indeed came up in the original Yolngu land rights case, *Milirrpum v. NABALCO.*
10. For a discussion of the concept of cross-cultural metacategories see Morphy and Morphy (2020).
11. Here Wakuthi is invoking a relationship between two clans of the same moiety that stand in a particular kin relationship to one another—MM(B) (*märi*) and (Z)DC *gutharra*—and as a consequence have particular responsibilities to each other's clan estates. This relationship is projected, in effect, from the level of relationships between individuals to the level of interclan relations; for more detail see Morphy 1997.
12. We do not use the names of people from whom we have not obtained permission to reveal their identities, except in the case of Gawirriŋ Gumana and Wakuthi Marawili. It is impossible to conceal the identities of these two former regional leaders.
13. B was a senior woman of the Munyuku clan.
14. In Manggalili mythology, *yambirrku* (blue tusk fish) is the fish whose remains were buried in a *yingapungapu*—an oval depression in the sand—by the ancestral Nyapililngu women. Thus this fish species stands, metaphorically, for the body of a deceased person whose burial ceremony will feature the creation of a Yingapungapu sand sculpture (see Morphy 2006).
15. For a comparative discussion of the owner—manager relationship see Morphy and Morphy (1984).
16. The Yolngu Matha Dictionary 2015 is available at yolngudictionary.cdu.edu.au.
17. This phenomenon, on which we have not yet published in detail, is a topic of research in an ARC-funded Discovery Project on which we are currently working: 'Placenames and Personal Names in Yolngu Society and Country Through Time' (DP200102773).
18. Which is why we have anonymised the clan concerned as well as the people involved.
19. This next section of the paper is a development of a topic first examined in two earlier publications (Morphy 2007, 2009).
20. Nor indeed might the expert witnesses be, unless they have had the opportunity to observe and analyse this process in advance of the case in point. This is, essentially, an informal process, a somewhat unexamined practice that has arisen in the context of native title hearings.
21. See also Eades, Fraser, and Heydon (2023); Holcombe (2018).
22. There are going to be cases in which Yolngu concepts such as gurruṭu are going to appear to contradict the conception of rights and permission under particular frameworks of Australian law. Mazzola (2020: xx) in his analysis of witness statements in copyright cases shows 'that the main outcome of Yolngu affidavits is a peculiar and paradoxical narrative, simultaneously constructing the ontological status of sacred artworks as an inalienable dimension of territorial cosmos and as original and individually created intellectually property objects. As seen (§ 1-2) the two conceptions are actually incompatible, since the property archetype unavoidably disrupts the cosmological connections linking artworks, people and land in Yolngu worldview.' Mazzola's article illustrates how this apparent incompatibility was reconciled in practice.

23. We have explored the concept of relative autonomy in a number of articles (Morphy and Morphy 2013 and 2017). The Federal Court in this context is operating as an intercultural space in which the relative autonomy of certain components of Yolngu law is being recognised.
24. We are grateful to the two anonymous referees who read this paper for the journal for their useful comments and suggestions, many of which we have adopted. Any remaining errors of fact or interpretation are the responsibility of the authors alone.

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