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## Early texts and other sources

### Introduction

In order to demonstrate that native title has survived, the court will require that the laws and customs of the claimant society be shown not only to have survived substantially uninterrupted but also to have remained ‘traditional’<sup>1</sup> in their content. What exactly is to be understood by the use of the term ‘traditional’ has been subject to extensive debate.<sup>2</sup> Most, if not all, of the ethnography relevant to a native title inquiry will demonstrate the fact of some form of change. This is unsurprising since few anthropologists would argue for an unchanging society. It is the degree and measure of the change against customary systems that is subject to contestation. In short,

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1 ‘A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act*, “traditional” carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are “traditional” laws and customs.

Second, and no less important, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.’ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [46–47].

2 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [63–65, 78–86].

How much change is too much change for the court to decide that the law or custom in question is still ‘traditional’? Setting this thorny issue to one side, generally, the anthropologist’s task is to provide an opinion as to whether the laws and customs of the claimant society can be shown to have endured mostly intact or at least clearly developed from those customary practices likely to have characterised the society at the time of sovereignty. The duration of this continuity is that period from the date of sovereignty by the British Crown over the application area to the present. The date of sovereignty varies across Australia but can be as far back as 1788. One state at least has accepted that laws and customs are likely to have changed little between the date of legal sovereignty and the date of the settlement of the land by Europeans (Queensland Government 2003, 5). Such acceptance of a difference between legal sovereignty and what I term ‘effective sovereignty’ is helpful in that it advances the date, sometimes by many decades, of that time judged to be the benchmark of the incidence of a customary system.

## Early texts and later difficulties

Reconstruction of an ethnography from early texts (sometimes labelled as a ‘sovereignty report’) can provide a basis for assessing how much the contemporary claimant society has changed. Thus, contemporary laws and customs can be compared with those recorded at some earlier time – perhaps relatively close to sovereignty. If the accounts are congruent, at least to some extent or in relation to some laws and practices, this may provide support for the conclusion that enough of the society’s laws and customs have survived to enable the court to recognise the existence of native title. The laws and customs can then be said to be ‘radicular’; that is, they are rooted in or founded upon consuetude or the customary ways that things were done or beliefs held at or about sovereignty.<sup>3</sup> This ‘before and after’ equation and the legal calculations and judgments made in this regard are complex and sometimes obscure and are not a matter for anthropology or anthropologists. But, however regarded, the examination of the foundation ethnography remains a central component in the native title process.

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3 For the reasons given earlier, “traditional” does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs.’ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 [79].

Establishing the likely system of laws and customs relevant to claimants is hedged about with many difficulties. One of the reasons for this is that the quality and reliability of the early accounts is immensely variable. The manner whereby the data were collected, the selectivity exercised by those who did so, their preoccupations, predilections and perhaps, most importantly, their prejudices and assumptions, make the data difficult to judge in terms of its overall reliability. Many of the early accounts are impossible to assess with respect to specific issues that might affect their reliability because there is no account of the collectors, or of their preoccupations, assumptions and prejudices.

Generally, there are no ethnographic records dating from a time prior to the date of effective sovereignty. Consequently, the only way to proceed is to extrapolate and make an inference back in time from the records of early colonial writers. These include diarists and settlers or correspondents who provided data from the frontier to collectors such as Curr and Howitt. The reports from the Cambridge expedition to the Torres Strait (1898–99) provide one of the earliest sources of ethnography, although Haddon first undertook scientific research in the region in 1888 (Haddon 1901–35; also Haddon 1890). In the absence of early writers, later writers have to be relied upon. These may comprise representatives of some of the first professional anthropologists who collected ethnographic accounts in Australia, often dating from the late 1920s on. However, there are earlier accounts by professional researchers. Radcliffe-Brown, for example, collected Australian materials at the very beginning of the second decade of the twentieth century.

The materials drawn from Radcliffe-Brown, Kaberry and others reviewed in Chapter 3 serve two purposes. First, they demonstrate how early texts may be used to characterise customary systems. These can then be used for comparative purposes as a basis for expert opinions as to the continuity of systems of title to property. Data sourced from early texts have evident limitations, as the discussion in Chapter 3 illustrates. The material drawn from Radcliffe-Brown shows that his account lacked detail, was evidently incomplete and relied upon assumptions that have subsequently been shown to be defective. Consequently, the use of comparative ethnography must be a process subject to qualification and extrapolated by reference to other ethnographies that might provide a corrective to what (in terms of customary tenure) might now be regarded as the anthropological orthodoxy. A further limitation relates to applicability. Early, reliable, professional and relevant fieldwork was carried out in relatively few

locations. For areas where pertinent early ethnography is lacking, reliance must be placed on materials drawn from elsewhere to provide the basis for the expert view as to the perdurance of customary systems. Aboriginal societies were not all the same across the continent, although there were many similarities and commonalities. Given that there is likely to have been some variation across Aboriginal Australia, selection of material for comparison has to be undertaken with a view as to its defensibility on grounds of relevance to the area of the inquiry. For example, ethnographies of desert areas (e.g. Cane 2002; Myers 1986) are probably less defensible if applied to areas of coastal tropical country than if they are used for native title inquiries that relate to the more arid parts of Australia. The same would hold true for ethnographies of tropical or coastal areas that were used for comparative purposes for claims made in arid Australia. However, the researcher may have little choice if material is not readily available for the study area.

## Earliest is best?

Joseph Birdsell, whose collaboration with Norman Tindale extended from 1938 for nearly 50 years, was of the view that after 1930 there were only two small areas of Australia that were untouched by ‘the expanding frontier of colonial occupancy’ that converted ‘the Aborigines into dependent, second class human beings’ (1970, 115). Consequently, he dismissed the accounts of anthropologists studying Aboriginal Australian local organisation whose data were collected after 1930. A similar argument was made by Basil Sansom who argued that at least some later texts reflected post-sovereignty changes and no longer mirrored the system likely to have been found at the time of either sovereignty or effective sovereignty (2007, 74). He argued in relation to the Yulara case<sup>4</sup> that when judging early texts the rule was ‘earliest sources are best’ (ibid., 79). He then catalogued what he judged to be a ‘formidable’ list of ‘authorities’ who were ‘pioneer scholars of Western Desert ethnography’ whose findings allegedly contradicted the applicants’ position, as advanced by their expert anthropologist Peter Sutton (ibid., 74). It seems the judge preferred the ‘formidable authorities’ rather than the applicant’s evidence, a fact that Sansom suggests may have been a determining factor in the failure of the claim.<sup>5</sup>

4 A claim made for compensation under the *Native Title Act* in relation to the Yulara area (Ayres Rock) of Central Australia. The case is often referred to as ‘Yulara’ after the area involved or ‘Jango’ after the name of the application. See *Jango v Northern Territory of Australia* (2006) 152 FCR 150.

5 *Jango v Northern Territory of Australia* [2006] FCA 318, [11(2)]; [223] to [224]; [258] to [259] and [499].

The ensuing anthropological debate (e.g. Burke 2007, 164; Glaskin 2007; Sackett 2007) showed that the interpretation of the pioneer scholars was not quite as straightforward as has been suggested (e.g. Glaskin 2007, 167; Sackett 2007, 173–175; Sutton 2015). It was argued that earlier writers were not answering native title questions or necessarily addressing issues that are now of significance to an adjudication of native title. While earlier accounts were written closer in time to the way things were at sovereignty, their authors may have been at some distance from the culture and world view of those they studied. As time has passed, the accumulated findings of scholars of Aboriginal Australia has added enormously to our understanding of laws, cultural practices and systems. Comprehension of systems of land ownership, for example, has become more sophisticated as concepts have broadened and research data has become more comprehensive. Judging early texts must, then, be undertaken with due regard not only to their relative position in the time-line between sovereignty and the present, but also in terms of the then prevailing orthodoxy these authors then embraced (perhaps quite uncritically), the inconsistencies in their accounts and the amount of field data they actually collected. Overall, applying these and other qualifiers to ethnography renders simple rules like ‘earliest sources are best’ particularly unhelpful and subverts the fundamental methodological rules: exercise caution, recognise context and take due account of the likely paradigms, assumptions and preconceptions of the author.

## Using early texts

In a paper I wrote that examined aspects and associated problems in relation to the use of early texts, I provided three examples of ethnography used in native title contexts (Palmer 2010a). I showed through my examination of these examples some of the difficulties and considerations that needed to be kept in mind when reconstructing foundation ethnography for native title reports. These case studies were drawn from a range of materials: accounts of the early settlers in the Swan Valley in Western Australia, Daisy Bates’s materials collected from Eucla on the Western Australian–South Australian border and Elkin’s account of totemism that was the product of his fieldwork in the west Kimberley. I found that it was the preconceptions of the writers that were largely determinative of their analyses, rather than the quality of their data or the collectors’ proximity to effective sovereignty. So, while

the earliest account was in fact the most helpful in outlining aspects of the foundation ethnography, this was largely due to the fact that the recorder and author called it as he saw it (Palmer 2010a, 89–90). Most importantly, I was also of the view that the lesson to be learnt from any reconstruction founded on early texts is that it is best understood as provisional, interpretative and in some circumstances speculative. It is usually not possible to render an account of the foundation ethnography as an unqualified representation of the laws and customs of the claimant society at sovereignty.

In order to explore these issues further, I now examine the work of two researchers whose writing and field data are sometimes used in native title research. The first is the anthropologist Phyllis Kaberry, who was one of Elkin's students and who worked in the Kimberley region of Western Australia in the period 1934 to 1936. The second is Norman Tindale, who is frequently cited in native title research as a consequence of his extensive fieldwork in many different areas of Australia over a period of many decades. Tindale has provided extensive genealogical accounts relevant to many areas of Australia, as well as ethnographic observations on a wide range of customary practices. As I will show in the latter part of this chapter, Tindale's 'tribal' legacy is not always easy to accommodate in native title matters. I delay a consideration of Tindale's genealogical records and their attendant problems for a later chapter of this book (see Chapter 9).

It is important to remember that when researching a native title claim it would be unusual to rely on just one early source. So, for example, in the case of the Kaberry materials considered below, a number of other researchers also produced data relevant to the central and south-eastern Kimberley region, including R.H. Mathews, Daisy Bates, Elkin, Tindale as well as the linguists Arthur Capell and more recently Tasaku Tsunoda. A good native title report would consult all the sources available and provide an indication of the likely foundation ethnography based on a synthesis of the materials considered. Moreover, in cases where there was an apparent inconsistency between the accounts of different authorities, these would need to be fully canvassed and, to the extent that it was possible, reconciled.<sup>6</sup>

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6 In *Jango* this was an important point as the applicant's anthropologist, Professor Sutton, advanced a different model of land ownership than Tindale had done based in part on his fieldwork undertaken in 1933. *Jango v Northern Territory of Australia* [2006] FCA 318 [476]. See also Sutton 2015.

## Phyllis Kaberry

Phyllis Kaberry made a significant contribution to the development of modern Australian Aboriginal anthropology. She carried out in-depth research over a period of many months as a participant with, and observer of, those with whom she worked. She subjected her data to the theoretical lens that developed a view as to the role of women in Aboriginal society, their relationships to men and their status as individuals. In this she sought to provide a corrective to male scholars, including Malinowski, Roheim and Warner, who had argued that women were excluded from the religious life (Toussaint 2004, xiii). In this, then, Kaberry advanced our understandings of Aboriginal society in general and of the role of women in it in particular.

Kaberry carried out her fieldwork in the Kimberley region in 1934 and then again in 1935 to 1936 (Kaberry 1939, xix).<sup>7</sup> Her first field trip included visits to Forrest River (four months), Wyndham and Beagle Bay in the west Kimberley (ibid.). In the following year she spent six months with a number of different groups in the east and central Kimberley (ibid., xix).

Kaberry observed that those with whom she worked had been in contact with Europeans 'for over forty years' (ibid., xx). However, all the older women with whom she worked would have been born prior to European settlement of the region, and some may have spent periods of their young adulthood in pre-contact conditions. While Kaberry wrote as though the beliefs and customs she recorded were a part of current practice (ibid., 215), she did report that working on pastoral properties had resulted in some changes to 'timetables' (ibid., 246, footnote 1), that European goods had changed the availability of traded items (ibid., 166, 170) and that there was greater freedom of choice over marriage partners than in pre-contact times (ibid., 111). While the impact of European settlement and the imposition of European ways was not a matter that Kaberry specifically addressed, her account stands as the best we have of

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<sup>7</sup> Kaberry's 1939 publication *Aboriginal women: sacred and profane* was republished in 2004. It is, for the most part, a facsimile edition (see Toussaint 2004, xv, footnote 5). However, the page numbering of the Prefaces, Foreword and Introduction are different to the first edition, while the balance of the page numbering appears to be the same. I here cite the work as 'Kaberry 1939', but the page references are to the 2004 edition, which is the one I used.

the likely composition of pre-contact cultural practices for this region. It is, then, a useful and indeed essential starting point for foundation ethnography for the east and central Kimberley.<sup>8</sup>

Reading Kaberry's published and unpublished works allows aspects of the laws and customs of those with whom she worked to be described. The fact that she had worked closely with those who had lived in pre-contact times, as well as her scholarly credentials, provides a sound basis for advancing the argument that her accounts are a reliable source for determining the nature of those laws and customs relevant to a native title inquiry. For the purposes of this account, these can be summarised as comprising data that reveal the significance of language and identity, customary systems of rights to country, social organisation, governance, religious beliefs and practices, and totemism. These may not necessarily be found as individual chapters or papers in Kaberry's corpus as these are headings useful for a native title report and not necessarily a focus of her anthropology. Consequently, it is necessary to work through Kaberry's published and (if available) her unpublished materials to garner data relevant to the topics selected for consideration. In what follows I examine Kaberry's account of the first of these topics ('tribes'; language and identity) in order to provide a working example of the sorts of content that might be useful when drafting foundation ethnography, as well as the conclusions and possible conundrums that might be drawn from it.

### Kaberry on 'tribes' and language groups

Kaberry uses the term 'tribe' throughout her writing, apparently regarding it as a term of some utility for the numerous language groups present in the areas wherein she worked: Lunga (or Kidja), Djaru, Walmanjari (Wolmeri), Kunian, Malngin and Nyikina being some of the ones that figure in her accounts. She defined the tribe as 'a territorial, linguistic, and cultural unit' (1939, 184) but qualified the definition by adding that 'affinities with neighbouring people are recognised to exist in language, kinship, totemism and local organisation' (*ibid.*). Thus, its integrity as a unit was, by this account, limited to matters of territory. Consistent with this view, Kaberry published a 'language map' in an article (1937, 94) showing her understanding of how the speakers of different languages were distributed across the landscape. Kaberry's field data did not reveal

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8 Toussaint notes that Kaberry has been used in 'several Kimberley native title claims' and has been important as providing a 'contextual threshold on how rights in land existed in the past' (2004, xiv).

that the 'tribe' had any political structure (Kaberry 1939, 178), which calls into question how it was in any sense a corporate land-holding body. Kaberry's anthropology had not at this date benefitted from the work of later writers who understood the local group to be the territorial unit – although members of local groups spoke and identified with a principal language and as a consequence the country wherein they exercised rights was also identified with that language (see discussion in Chapter 2).

Kaberry considered that 'tribal' areas were bounded, but noted that knowledge of these boundaries was the inverse of distance (1937, 92). However, she also found that the names of these 'territorial units' varied and were not exclusive. Names used appeared sometimes to depend upon the identity of the speaker. In this regard she wrote:

Many of the tribes are known by two or more names. The Wolmeri of Christmas Creek are called Wolmadjer by the Nyul-Nyul and Kunian; the Mulbera are also called Wandjira, and the Waneiga of Tanami are called the Ngambudjugara. The general term for the tribe at Moola Bulla is Lunga, whilst the alternative– Kidja– is more frequently heard at Violet Valley and Bedford, ninety miles to the north. The Punaba on the west, and the Djaru on the east, sometimes refer to the Lunga as Burnana or Baiambal. The Lunga themselves often say: 'We got him Djerag' translated as 'We got him language.'... Finally, the Kidja word 'to talk' is *djerag*. With tribal egoism they identify their own language with language in general. (ibid., 92)

Despite Kaberry's resolution of the origins of the term Djerag, she was unable with confidence to articulate the difference between Djerag, Kidja, Lunga and Kuluwarin (see McGregor 1988, 97), except to imply, perhaps, that they were all dialects of Kidja.

Now Professor Elkin has referred to the tribe at Turkey Creek and to the north of it as the Djerag, and from evidence I collected I am inclined to think that it is only a dialect of the Lunga. The Kidja at Bedford said that the natives at Violet Valley and Turkey Creek spoke Djerag, and that Djerag, Kidja, and Lunga 'all box up together.' Actually Violet Valley and Turkey Creek are strongholds of the Kidja natives. Again, the Ivanhoe natives to the east told me that at Alice Downs, Lyssadel and at Goose Hill (just out of Wyndham) the natives spoke Djerag or Kuluwarin. I collected genealogies from Kuluwarin men and women at Ivanhoe, and the kinship terms and totems were all Kidja words. (Kaberry 1937, 92)

Kaberry also recorded that sometimes a single name 'embraces a group of tribes' (ibid., 93).

Kaberry was interested to understand how the Aboriginal people with whom she worked understood language difference. While some languages were regarded as being similar or mutually intelligible, in other cases she found there to be a substantial difference between language groups. She thought that this might have been based on the degree of intelligibility (or lack of intelligibility) of their respective languages. In this regard she wrote in a paper:

The Blacks themselves tend to group certain languages together. The Lunga at Moola Bulla say of the Djaru language: 'We talk-talk him little bit, we "hear" him,' using 'hear' more or less as a synonym for 'understand.' Even when they cannot speak the language, they can sometimes understand the gist of what is being said at an intertribal meeting. Speaking of more distantly situated tribes the Lunga declare with finality: 'We can't hear him.' Probably the chief factors there are contiguity and familiarity, due both to intermarriage and frequent meetings for initiation rites. (*ibid.*, 91)

However, Kaberry found that 'contiguity' (that is, being in contact or proximate) was not always a determinant of mutual intelligibility between members of neighbouring language groups:

But there are at least two examples of neighbouring tribes who both recognize a complete cleavage between their respective languages. This is true of the Lunga or Kidja tribe which extends from Moola Bulla north to the east side of the Durack Range and of the Wula tribe, whose territory extends from the western side of the Durack Range out towards the coast north of the Leopolds. (*ibid.*, 91)

She remarked that people were proud of their language and country, having some contempt for those who had a different kinship system (1939, 184–185). But while Kaberry found language to provide a basis for recognition of social difference or similarity, she also found that the manner whereby identity was asserted and commonalities pressed to depend on factors other than language and consequently to be complex and at times ambiguous. For example, she notes that the Wula and the Lunga, although having a 'complete cleavage between their respective languages', attended initiation rituals together, while the Lunga were in the process of adopting the Wula subsection system (Kaberry 1937, 91). Yet the Wula were 'formerly linked culturally with the Forrest River tribes; and in fact the more western branch of the Wula still have moieties without subsections' (*ibid.*). Similarly, Kaberry distinguished the Kunian and Nyikina linguistically and considered their different kinship systems as a basis for their being considered as quite separate

(*ibid.*). In contradistinction she then added that another language group, the Punaba, were considered by members of the Walmanjari group to have commonalities with the Wula, ‘though actually the social system differs’ (*ibid.*).

Kaberry also provides a more generalised statement of the relationship between five language groups:

The Wolmeri, Djaru, Kunian, Lunga and Malngin tribes form a group, where comprehension seems to be due to contiguity and a gradual infiltration of words from one tribe into the other. The Djaru and Lunga hold certain terms in common, and frequently meet in the region of Halls Creek, which is a melting pot for both tribes. (*ibid.*, 91)

Extracted data from Kaberry’s writing regarding the social, cultural and linguistic commonalities of ‘tribes’ are summarised in Table 7.1.

Table 7.1: Kimberley ‘tribes’ and cultural groups

	‘Tribes’	Relationship	Reference
1	Lunga and Djaru	Understand each other’s language. Participate in ritual together.	Kaberry 1937, 91
2	Lunga (Kidja) and Wula	Languages quite different. Participate in ritual together. Share aspects of social organisation.	Kaberry 1937, 91
3	Nyikina and Wula	‘Stand outside the rest of the group’.	Kaberry 1939, 184
4	Bunaba and Wula	‘Associated’. Different social organisation.	Kaberry 1937, 91
5	Forrest River tribes and Wula	‘Formerly’ linked culturally.	Kaberry 1937, 91
6	Kunian and Nyikina	Different language. Different social organisation.	Kaberry 1937, 91
7	Wolmeri, Kunian, Djaru, Lunga, Djerag and Malngin	‘Form a group’ through use of shared vocabulary.	Kaberry 1937, 91

This grouping of ‘tribes’ is reflected in part in the map noted earlier found in her 1937 publication where Kaberry shows the ‘Kimberley Division’ divided into four areas: Northern, Southern, Eastern Kimberley and Daly River area, numbered I–IV respectively (Figure 7.1). Number III, ‘Eastern Kimberley’, includes the language groups (or ‘tribes’) Wolmeri, Kunian, Djaru, Lunga, Djerag and Malngin, which with the exception of the Djerag corresponds to Kaberry’s statement cited above from

Kaberry's 1937 account (91). Kaberry's assemblage of language groups or tribes on her map reflected her views that members of some different language groups could be placed together on the basis of commonalities of language, laws, culture, beliefs and practices.

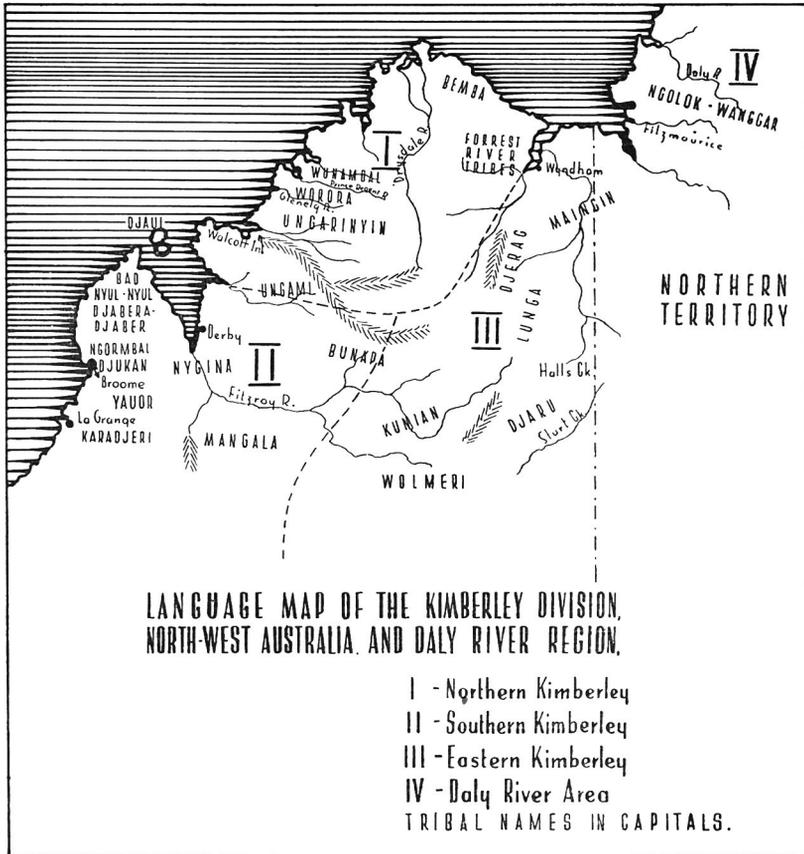


Figure 7.1: Kaberry's language map of the Kimberley

Source: Map reproduced by kind permission of Oceania Publications. *Oceania* 8.1, 1937, 94.

A comparison of the data presented in Table 7.1 with Kaberry's map (1937, 94) shows some inconsistencies in the accounts. Absent from Kaberry's map is Wula, a group she described in her text as occupying territory that 'extends from the western side of the Durack Range out towards the coast north of the Leopolds' (ibid., 91). The Durack Range is just over 60 km northwest of Turkey Creek and the Leopold Range runs some 80 kms north of Fitzroy Crossing. Mapping the Wula on to country given these geographic references yields uncertain results but

would appear to place the Wula in Kaberry's division I (North Kimberley) or division II (South Kimberley), or perhaps division III (East Kimberley) and maybe all three. In her writing, Kaberry's division I is reflected in item 5 of Table 7.1, but with the addition of Wula. Constituents of Kaberry's division II are found in items 3, 4 and 6 of Table 7.1 with the addition of Wula in items 3 and 4, while item 6 includes a name found in division III. Kaberry's division III is broadly the same as item 7 in Table 7.1.

### Kaberry's 'tribes' and language groups and native title anthropology

The term 'tribe' is common in both the early as well as much later ethnography relating to Aboriginal Australia. The term resonated with colonial notions of the primitive, evoking a small-scale territorial political unit typically with the 'chief'. A 'tribe' was to be found in pre-industrial pre-Christian societies in contrast to the nation states of England, western Europe and later north America. While anthropology, particularly in Africa, sought to render 'tribes' a tool for analysis, it remained (and remains) a troublesome term that evokes more problems than it can ever remedy. It is likely that Kaberry came to the field with the baggage of the term 'tribe', which she employed rather loosely but with some attempt at definition. In the Kimberley region, she found such an entity to have no political structure, no overall leader and to be composed of several different dialects of a single language.

Kaberry accommodated the term 'tribe' to her data by venturing the proposition that the tribe was composed of a community of speakers of a common language (or of dialects of what was understood to be the same language), whose members recognised more or less bounded land associated with that language as well as having cultural practices and beliefs in common. However, Kaberry's data on how these 'tribes' were named served to demonstrate that these language groups were not exclusively or definitively named, but appeared to have had membership and characteristics that shifted though time. Names were sometimes multiple, non-exclusive and variable over time and place. Languages themselves were internally divided, raising the question of the unity of the whole and how dialects were, in practice, differentiated from other mutually intelligible and adjacent languages.

Kaberry's data relating to language use is more satisfactory. Kaberry established that in the area of the Kimberley where she worked there were distinct language-speaking groups whose members sustained substantial mutual intelligibility with proximate and near proximate neighbours, but which generally lessened with distance. But Kaberry understood that language was not the only means whereby social intercourse could be organised and cultural bonds were evoked for the purpose of trade, ritual and finding marriage partners. Cultural similarities and dissimilarities were the stuff that bound or separated groups into those who shared commonalities and could be grouped as divisions on her map, or as different societies whose commonalities could and often did transcend language group boundaries. While Kaberry's field data and her conclusions in this regard are, in my view, not entirely consistent, she does conclude, without ambiguity, that the Walmanjari, Djaru, Kunian, Kidja and Malngin all formed a 'group'. Recognition of commonalities was based in practice on mutual intelligibility of language as well as social interaction and shared understandings. These conclusions leave the baggage and preconceptions of 'tribes' far behind and, freed from such constraints, provides for a sounder analysis.

Working through Kaberry's ethnography is no simple matter and that perhaps is the first lesson to take from this exercise. Foundation ethnography is likely to be complex, data inconsistent and the understandings of the time in which it was written likely to cloud or colour the author's findings. Accepting this, there are some important pointers to the likely nature of the societies Kaberry studied relevant to identity, social formation and commonality.

The first of these relates to the fact that Kaberry recorded numerous language groups in the area in which she worked. Foundation ethnography recovered from Kaberry's writings can serve to show the degree to which modern naming and identity labels have survived and serve to demonstrate the radical nature of the contemporary account – or otherwise, as the case might be. Kaberry mapped language groups (if somewhat generally) on to country, and this account should find some degree of congruence in the contemporary account of those seeking recognition of native title today over the same areas of country. Some of the names Kaberry recorded may have changed. For example, in the east Kimberley the name Lunga is almost never heard in my experience, the term having been replaced by

Kidja. However, this is consistent with the apparently ephemeral nature of language names noted by Kaberry so is not inimical to the continuity argument.

The second helpful contribution that ethnography of the sort I have reviewed here may make to a native title inquiry relates to the complex issue of the native title society – a matter I discussed in an earlier chapter of this book (see Chapter 2). Kaberry's data on groups and identity reveal that those with different language identities (dialect or different language) who could understand one another perceived themselves to be of a single mind with respect to the practice of customs, rituals, their beliefs and ways of doing things. In some cases members of such a group could very well share the same single language association. However, this need not necessarily be so and group community membership could, given the acceptance of other cultural commonalities, include those who spoke another language. Members of these different language groups can, in consequence, be understood to have formed a society or community.

Again, this is a model that can be applied in native title writing to the contemporary ethnographic account. If it is evident that Kaberry found a certain set of people to share laws and customs in common and this is reflected in the contemporary ethnography, there is a case to be put for a continuity of the society since the time Kaberry worked in the Kimberley – and so, by inference, to the time of effective sovereignty and beyond.

## Norman Tindale<sup>9</sup>

Norman Tindale worked in many areas of rural and remote Australia over a period of more than four decades from his base at the South Australian Museum where he held his first post as an assistant entomologist in 1918. During these expeditions he recorded his observations on a wide range of subjects including entomology, botany, geology, archaeology as well as Aboriginal culture. His first trip was in 1921–22 to Groote Eylandt and the Roper River in the Northern Territory. Expeditions soon followed in 1926–27 to Cape York Peninsula and Koonibba (west coast of South

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9 Philip Jones's obituary for Norman Tindale provides an excellent account of Tindale's life, professional development and research contribution. See Jones 1995, 9–10 (downloaded from [www.anu.edu.au/linguistics/nash/aust/nbt/obituary.html](http://www.anu.edu.au/linguistics/nash/aust/nbt/obituary.html)).

Australia) in 1928. During the following decades he made numerous field trips to Central Australia, Western Australia, the Northern Territory and Queensland up until 1966.<sup>10</sup>

Tindale's voluminous and wide-ranging research interest coupled with his scrupulous attention to documenting his research findings has meant that his journals, field notes, genealogies and other published as well as unpublished works are important documents in any native title claim made to country where he worked. The sheer volume of his material and the systematic way he recorded his field data means that it must be taken into account. Moreover, some of his data were collected comparatively early and from those who in some areas at least were born prior to the date of the frontier. As the years passed, he clocked up increasingly impressive fieldwork credentials over many different areas of Aboriginal Australia.

Tindale was interested in genetics and racial characteristics, particularly as they could be related to Aboriginal people of mixed descent. It was this interest that led him to collect the many hundreds of genealogies and accompanying physiological measurements and observations that he gathered from all round Australia and which are now of such interest to researchers undertaking native title work. Tindale's field data, which he often recorded in his journals, included accounts of material culture, kinship, ritual practices, beliefs and, perhaps most significantly, what he came to call 'tribal' data. Tindale's later journals include small maps of tribal boundaries and names of what he judged to be territorial groups. These data provided the basis for his first major work on Australian tribal boundaries published in 1940. He later revised and expanded this work to produce his well-known and monumental work on tribes and boundaries in Australia that was published in 1974. Tindale's journals, in particular, are a useful source of field data relating to a whole range of cultural beliefs and practices; in native title work, it is his genealogies and his 'tribal maps' that are probably the most commonly cited and which can evoke the greatest controversy.

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10 For a complete list of the journals he wrote of these trips and other materials, see archives. samuseum.sa.gov.au/aa338/AA338-04.htm accessed 8 May 2015. For a comprehensive account of the many places where Tindale undertook his research with Aboriginal Australians, see Jones 1995, 9–10 (downloaded from [www.anu.edu.au/linguistics/nash/aust/nbt/obituary.html](http://www.anu.edu.au/linguistics/nash/aust/nbt/obituary.html)).

### Tribal mapping and ecological determinism<sup>11</sup>

Tindale's interest in Aboriginal culture was apparently spurred by his first extended period of fieldwork to Groote Eylandt in the Northern Territory where, according to one source, he gained an interest in the boundaries that delineated a group's rights to country.<sup>12</sup> Tindale was influenced by a desire to demonstrate that Aboriginal people were not 'nomads' in the sense that they might popularly have been understood to roam at random across tracts of land with no territorial possession (Jones 1995, 3).<sup>13</sup> Boundaries and the tribes that sustained them indicated, in his view, 'that Australian wanderings are at present and have long been restricted within specific territorial limits' (Tindale 1974, 10). Tindale understood tribes as a fundamental and determining unit of social and territorial organisation in Aboriginal Australia and his ideas in this regard appear to have been carried through his extensive periods of fieldwork in Aboriginal Australia and to have informed his data analyses and subsequent writing accordingly.

In his published 1974 account – marking the culmination of his research into 'tribes and boundaries' – Tindale wrote that the tribe was the central feature of Aboriginal social life. He argued that 'tribal' members shared:

[a] common bond of kinship and claim to a common territory, even though the sharing in it may be the subject of restrictions on the taking of certain foods and the exploitation of some other resources may be limited without prior arrangement or permissible only by reason of the possession of specific kinship ties, for within the tribe there are sometimes distinctions between what a man may do in his own clan country, in that of his mother, and in those of his wife's people ... In Australia this larger unit has a widely recognised name, a bond of common speech, and perhaps a reputation, and even an aura of names – polite, rude, or insulting – given to it by other tribespeople who live in adjoining territories. (Tindale 1974, 30)

11 I thank Dr L. Sackett for drawing my attention to some of the materials set out in the following three paragraphs.

12 [www.samuseum.sa.gov.au/collections/information-resources/archives/tindale-dr-norman-barnett-aa-338](http://www.samuseum.sa.gov.au/collections/information-resources/archives/tindale-dr-norman-barnett-aa-338), accessed 11 May 2015.

13 'Edgar Waite [Director, SA Museum] insisted that Tindale remove tribal boundaries from a map of Groote Eylandt and the adjacent mainland being prepared for publication in the Museum's Records, maintaining that nomadic Aborigines could not occupy defined territories. Tindale realised that a new paradigm in ways of regarding and describing Aboriginal Australia was sorely needed' (Jones 1995, 3).

Tindale adopted quite uncritically the idea that boundaries were delineated by the environment. He thus asserted that rivers or hills were boundaries, seemingly with little field data to support his opinions. Based on this assumption he sought ecological distinctions in order to map groups on to country and so place 'tribes' as corporate entities within delineated territorial boundaries. Examples of Tindale's assumptions in this regard illustrate the consequential doubtful conclusions he uncritically advanced as a result.

When travelling in the Pilbara region of Western Australia, Tindale remarked that the Peawah River east of Roebourne which he crossed was 'Of course the Ngaluma-Kariara tribal boundary' (1953a, 573). Tindale wrote of the eastern boundary of the Kariyarra that it was 'At Wodgina ... Wodgina Range marks the boundary' (ibid., 249). He wrote that the Kariyarra boundary with the Yindjibarndi was 'at the Yule River' (ibid., 333). Some years later in 1966 Tindale visited the Eastern Goldfields of Western Australia during a trip from Adelaide to the southwest of Western Australia, as far north as Onslow and back via the Goldfields. On the drive from Mt Margaret to Kalgoorlie he noted in his journal:

Knowing that the boundary between the Ngurlu<sup>14</sup> tribe and the 'Kalgoorlie side' Maduwongga<sup>15</sup> tribe lay just south of Menzies, the Koara being in the mulga country we studied in more detail the relatively quick change from the universal mulga scrub of the country where we have been staying around Laverton and Leonora, to the mallee and salmon gum country to the south. (Tindale 1966, 181 and 183)

Thus changes in vegetation, often corresponding to underlying geological formations, were identified by Tindale as boundary markers. Writing of his observations of the countryside in central eastern Queensland, he wrote:

The northernmost part of Kabikabi territory south of Bundaberg was surprisingly dry looking as we passed along through low range country. Further south much of it was rainforest but now almost all of it has been replaced by crops. Formerly the whole of Kabikabi territory was said to have been rainforest in which limited areas had been opened up through Aboriginal burning, with consequent conversion to temporary woodlands of *Callitris* and *Eucalyptus*. Thus the dry forested country of their western

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14 Underneath is written 'Nguludjara ngurlu'.

15 'Maduwongga' is written over 'Kalgoorlie side'.

neighbours, the Wakawaka, was called by them *naran*, literally ‘outside’, indicating an ecological distinction they were able to make. (Tindale 1976, 24)

I have noted in an earlier chapter of this book (see Chapter 3) that the nature of territorial boundaries in customary arrangements in Aboriginal Australia was likely marked by areas of shared country as the rights of an individual often formed a palimpsest of entitlements across different country group areas. Tindale himself was told on a number of occasions that country was shared,<sup>16</sup> but this does not appear to have caused him to modify his hard-line boundaries or to have accommodated a system that evidently had greater flexibility than the one he represented on his maps. Given that ‘boundaries’ are innately problematic in this context, assuming *a priori* that they were determined by ecological factors renders the analysis flawed. It is possible that in some cases boundaries did coincide with changes to the ecology, but Tindale does not provide consistent field data to establish that this was the case in the examples cited above.

### Tribal mapping: indeterminacy of boundaries and named groups

Tindale’s published data also reflect a further complexity of his analysis. In his 1974 work Tindale explained that his aim in mapping tribal boundaries across Australia was to render them as they had been at or before the time of European settlement (Tindale 1974, 5). This attempt at reconstruction adds yet another layer of complexity to his accounts as his attempts to reconstruct boundaries retrospectively by many decades necessarily meant that he had to speculate on the former position of boundaries.

That Tindale failed to understand fundamental truths of the anthropology is illustrated by the interesting case of the Maduwongga and the Kalamayi of the Eastern Goldfields of Western Australia. In 1966, Tindale interviewed a man called Don Roundhead and his wife Nuna Roundhead at Kalgoorlie. He noted in his journal that Don was ‘of the Kala:mai tribe’ and that ‘in language terms he spoke Kabul’ so it would appear that the ‘tribal’ name was not the same as the language name – but the matter is not explained (Tindale 1966, 187). Don gained his country and ‘tribal

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16 For example, see Tindale 1953a, 581 (Kariyarra and Ngarluma boundary); Tindale 1974, 245 (Kukaja and Djaru boundary); Tindale 1974, 247 (Mangala–Nyikina boundary); Tindale 1974, 254 (Nyikina–Mangala boundary).

identity' from his father's father. Tindale reported that Kalamayi country extended from Southern Cross, east to Kalgoorlie and also northwest from Kalgoorlie to include a sweep of country that included places called Kanowna, Broad Arrow, Orabanda, Callion, Davyhurst and Goongarrie. Tindale then noted that 'It is probable therefore that the Kala:mai boundary of my map<sup>17</sup> should be placed a little further to the northeast since it seems to reflect a SW push of the Wa:ljeri or "Wanggai Junggara" to Kalgoorlie in the 1890s' (ibid., 193, 195). Tindale's comment sought to correct his earlier mapping (based on 1939 fieldwork) and to establish the pre-sovereignty arrangement of boundaries that, in this case, had been influenced by the apparent incursions of the 'Wa:ljeri' or 'Wanggai Junggara' from the northeast, so pushing the Kalamayi to the southwest.

Tindale recorded his interview with the Roundheads. A transcript of the interview (Barwick 1999) reveals that Tindale sometimes had trouble hearing Aboriginal names correctly. For example, he was unable to differentiate 'Ngata' (his hearing) from 'Nyatha' which is what Nuna Roundhead is recorded as saying (ibid., 5). Tindale's 'Kabul', which he recorded as being Don's language, was in fact a mishearing of 'Kapurn':

NBT: <sup>18</sup> and what language was that?

DR: we call it Kapurn, Kapurn.

NBT: Kabul.

DR: Kapurn, that's all my ...

NBT: Say it again.

DR: Kapurn.

NBT: Kabul.

DR: Yeah. (Barwick 1999, 1)

Don Roundhead's final gratuitous concurrence allowed Tindale to run with the erroneous 'Kabul', the term that made it into his 1974 publication. The error in reporting 'Kabul' instead of Kapurn, while unfortunate, is understandable. However, in the ensuing conversation, Tindale slips from discussions about language group names (specifically, the Kapurn)

17 Presumably his 1940 published map.

18 NBT = Tindale; DR = Don Roundhead; and NR = Nuna Roundhead.

to asking the location of an individual's country. Consequently, it is not apparent whether he was eliciting information about the location of the speakers of a particular language or about their proprietary rights to country. Moreover, he found himself in possession of an additional two group names (Marlpa and Ngatjunmaya) that threw further complexity and ambiguity on his account which he sought to represent as 'tribal groups' mapped on to country. Tindale elicited place names that Don Roundhead identified as his country that were consistent with those noted above and taken from his 1966 journal (Kanowna, Broad Arrow, Orabanda, Callion and Davyhurst). But Don also told Tindale that his father's country included Norseman and Balladonia (*ibid.*, 8) but then stated that people in these places spoke 'a different lingo altogether'. At Balladonia they spoke Marlpa or Ngatjunmaya (*ibid.*). Later he stated that his father's 'run' included Fraser Range (between Balladonia and Norseman), commenting, 'yes he worked there when he was a young fella, he grew up there himself, before he met Mum' (*ibid.*, 10). It is, then, unclear from the interview whether rights to country reflect a language group territory or some other arrangement. The territory associated with the language (Kapurn) is similarly unclear as its relationship to a different (perhaps larger?) unit the Kalamayi is nowhere explained. There is confusion as to the meaning and significance of the terms collected in this interview: was the territorial group the Kabul (that is, Kapurn) or the Kalamayi and how were they differentiated? Finally, the language Marlpa or Ngatjunmaya appears to be associated with a separate area of country within which Don's father also exercised customary rights. However, the basis whereby these rights were legitimated is not established.

In his 1939 journal, Tindale wrote of the Maduwongga. He expressed the view that members of this group 'originally came from the spinifex country to the east of their present location. They drifted in at the time of the first gold rush (middle 1890s)' (Tindale 1938–39, 907). In his 1940 map, he shows the group occupying a band of country from Kalgoorlie north (1940a). Wishing to check his earlier account, Tindale asked Don and Nuna Roundhead about the Maduwongga but found that 'neither he nor she recognise Maduwongga and inferred it referred to the Maduitja of Meekatharra' (1966, 195). The discussion ran:

NBT: An old man at Norseman once told me that the Marduwongga lived at Kanowna and Kalgoorlie.

NR: Yes.

NBT: But I don't know whether he meant on the other side of Kalgoorlie, he was talking from Norseman and he was saying you know Maduwongga live north and he pointed up Kalgoorlie way.

NR: No, Martu-itja live what's a name, Wiluna side, Meekatharra side, they call them Martu. (Barwick 1999, 10–11)

Tindale did not admit Don and Nuna's information to his subsequent re-drafting of his map. He reproduced the Maduwongga group and their boundaries in his 1974 book more or less consistent with his 1940 map, apparently ignoring his own later field data both with respect to the Maduwongga and his own journal note to place the boundary of the Kalamayi 'a little further to the north east'. Inexplicably he gives the term 'Kabul (language name)' as an alternative to Maduwongga, implying that Maduwongga, Kabul and Kalamayi were one and the same, although the 1974 map has Maduwongga and Kalamayi as separate groups. Tindale added, 'Statements suggest a protohistoric<sup>19</sup> movement from the east displacing Kalamaia people west beyond Bullabulling. Their language was called ['Kabəl] and was understood as far west as Southern Cross' (1974, 246). This would suggest that the Maduwongga's pre-sovereignty country lay to the east of where Tindale places them on his 1974 map, the exact location depending on where 'spinifex country' is considered to commence but ignores the Roundheads' opinion that the Maduwongga came from further north and in the vicinity of Meekatharra or Menzies.

The basis for Tindale's conclusions about demographic movements is unclear and seemingly speculative. The unhelpful permissive passive 'statements suggest' implies that he was told this by those whom he interviewed. Older informants alive at the time of his 1939 fieldwork would have had first-hand experience as far back as the 1880s or possibly the later 1870s, which accords with the date of effective sovereignty for parts of the area being discussed. However, according to his 1939 data the group that moved southwest was the 'Wa:ljeri' or 'Wanggai Junggara', terms which are not found on his maps. Considered together, Tindale's data from 1939, 1966 and the final production of his tribal map in his 1974 publication are inconsistent and unsatisfactory. His data provide a slim basis upon which to support a conclusion that a whole 'tribe'

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19 Tindale's use of the term 'protohistoric' is arcane. Mulvaney (1975, 19–49) uses the term for that period prior to permanent European settlement of the continental land mass of Australia but following European and other peoples' discovery of the continent.

relocated from the spinifex to the west,<sup>20</sup> whatever it was called, while the names Maduwongga, Kalamayi and Kabul are ambiguous and their functions as social, territorial or linguistic units are unclear.

Table 7.2: Eastern Goldfields, WA: some 'tribal' names recorded by Tindale

Reference	Term	Standardised term	Comment
Tindale 1938–39, 905–907	Kōla:mai	Kalamayi	The language of Southern Cross; those in vicinity of Southern Cross.
Tindale 1938–39, 915	Kōla:mai	Kalamayi	Close relationship with Ngadjunma; shared kin terms.
Tindale 1939 sheet 73	Ka:lamai	Kalamayi	Golden Valley WA near Mt Jackson.
Tindale 1966 transcript, 1	Kalamaia	Kalamayi	Extended south to include Norseman and perhaps Balladonia.
Tindale 1966, 195, 196	Kalamaia	Kalamayi	Language derived from Kala = fire. Informant considered Kala:ko and Kalamaia to be the same or having same meaning.
Tindale 1966, 196	Kalamayi	Kalamayi	Boundary at Widgiemooltha but formerly not as far east.
Tindale 1974, 243	Kalamaia	Kalamayi	Southern Cross; east to Bullabulling etc.
Tindale 1966, 187	Kala:mai, Kabul	Kalamayi; Kapurun	Kala:mai name of tribe; Kabul name of language. Comment about Don Roundhead.
Tindale 1938–39, 904	Kala:ko	Kalarku	Kala:ko is the Southern Cross district. Speak Kōla:mai.
Tindale 1938–39, 987, 989	Takalako	Kalarku	Takala:ko people.
Tindale 1974, 243	Takalako	Kalarku	Alternative for Kalamaia.
Tindale 1974, 243	Kalaako	Kalarku	'Tribe' with country from Scadden to Coolgardie etc.
Tindale 1974, 243	Kalarku	Kalarku	Malba is alternative term.
Tindale 1938–39, 904	Ka:bu(d)n Tr.	Kapurun	Ka:bu(d)n Tribe called Kōla:mi.

20 Movements of desert groups westward are well documented in the literature. See Christensen 1981, 60, 100–102; Stanton 1984, 60–63.

Reference	Term	Standardised term	Comment
Tindale 1939 sheet 116	Ka:bu(d)n Tr.	Kapurun	Four words in the Ka:bu(d)n language (man = ka:bun).
Tindale 1966 transcript, 1	Kabul mishearing of Kapurun	Kapurun	
Tindale 1966 transcript, 1	Kapurn	Kapurun	Southern Cross to Kalgoorlie.
Tindale 1974, 280	Kapurn	Kapurun	Alternative name for Maduwongga.
Tindale 1966, 196	Kabul	Kapurun	Country from Southern Cross to Kalgoorlie.
Tindale 1939, sheet 116	Ka:bu(d)n Tr. and Kala:mai Tr. <sup>21</sup>	Kapurun, Kalamayi	Annotation for Nellie Champion.

I have extracted Tindale's data on the Kalamayi, Ngadjunma, Malba, Kabul (i.e. Kapurun), Kala:ko and Maduwongga from Tindale's 1939 journal (1938–39), his genealogical sheets (1939b), his 1966 journal (1966) and his 1974 publication (1974). I have summarised these data in Table 7.2. The table reveals that Tindale's field data show there to be both a diversity of names and a lack of consistency or definition over their employment. This instructs that Tindale's so-called 'tribal' names with clearly delineated territorial boundaries, determined at times by ecological markers, are not a true reflection of his original field data. These names appear to represent other forms of social formation that were neither exclusively applied nor delineable as units of territory.

### Tindale's late appearances<sup>21</sup>

Tindale's 'tribal' mapping and the data upon which it was based have been subject to the attention of native title researchers because Tindale characterised these tribal groups as having a proprietary interest in land.<sup>22</sup> This is particularly evidenced by Tindale's maps which show an apparent named group in possession of a bounded country. These maps and accompanying accounts of clearly defined boundaries mask the

21 Peter Sutton has shown in a detailed and scholarly analysis the inconsistencies between Tindale's field data and some of his later views with respect to local organisation. See Sutton 2015.

22 See Christensen 1981, 75–82 who provides a critique of both Tindale and Birdsell. Christensen concludes, in part, "The only substantial evidence supporting the existence of relatively discrete "tribal" groupings in the Western Desert has been provided by Tindale and Birdsell" (ibid., 80).

complexity and variability of group names but dazzle with their rendition in fundamentally European terms of bounded blocks of land such as you might find on a land titles register. These ‘tribal’ models have a beguiling attraction to both Indigenous claimants and those who advise them and can easily come to inform native title applications and, in time, may be invested with authority. I have seen many instances of claimants turning up at meetings to press their rights to country with photocopied pages of Tindale’s map in support of their suit. Clear boundaries lead to a clear division of benefits that may devolve from winning native title rights. They work to both include and to exclude. The passion of modern native title politics is familiar enough to those who have been working with claim groups both prior to and after native title. The essential task for the native title anthropologist is to peel back the postmodern interpretations and reveal the likely nature of the foundation ethnography. This is essentially the focus of the court’s attention in seeking to determine whether the laws and customs of the claimants’ society are radical. Satisfying the present political desires, demands and aspirations of claimants is another matter.

The accounts I have provided in the analyses of the examples considered above are not meant to demonise Tindale. There can be little doubt that in some areas Tindale’s data better reflected the ethnographic reality than the examples I have subjected to scrutiny. Tindale chose a large canvass, attempting to map all ‘tribal’ groups across a whole continent. In attempting to paint the larger picture it is understandable that some of the details got lost, were obfuscated or were just plain wrong. Tindale had an idea about local organisation that led him to focus on a particular way of interpreting his data and impose his paradigm on his fieldwork findings. It is easy looking back over his magnificent corpus to judge him too harshly or to minimise his accomplishment and quiet achievements. However, in native title work, winners may be selected on the ground of the court’s acceptance or privileging of one early ethnography over another – as was clearly shown in the Jango case<sup>23</sup> and to the detriment of the applicant.<sup>24</sup> Tindale, then, needs to be thoroughly scrutinised and fully evaluated before his ethnographic account is either relied upon or rejected.

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23 *Jango v Northern Territory of Australia* [2006] FCA 318.

24 Sutton 2015, 26.

## Lessons from the ‘tribal’ literature

Language names may sometimes be helpful in establishing those who lived in a particular region and who together shared cultural commonalities through the use of a shared language. However, identity names which may evoke referents other than language are sometimes inconstant over time, the groups they identify labile and members may share cultural commonalities across different identity groups. Interpreting data from Kaberry, Tindale and many other early ethnographers on named groups and their members’ territorial associations requires identification of the significant research issue that should be addressed when seeking an understanding of customary rights to country. In coming to an understanding of how systems of rights to country worked in Aboriginal Australia, it is not the names of identity groups that are important. These were not landed entities, being rather ephemeral terms derived from language styles, characteristics of speech or geographic location. Their significance is relevant to considerations of how groups shared laws and customs together and how members of different groups interacted and forged and perpetuated commensal relationships that helped sustain their common interests and existence. In summary:

- Different sorts of aggregations of people may be named and a person may belong to more than one named group. Consequently, identity labels may not necessarily be exclusively applied.
- Language groups and other identity units are not corporations whose members are capable together of holding rights to country. In Aboriginal Australia the land-owning group was the local descent group, not the larger language speaking or ‘tribal’ group.

When it comes to understanding the system whereby rights to country were pressed and sustained, the important task is to identify the ancestors of claimants and the locales within which they are likely to have asserted customary rights as close to the time of effective sovereignty as possible. Where there is a system of the descent of rights, the task is, then, to develop an understanding of how such rights have been transmitted to subsequent generations through a process that is consistent with customary practice.

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