8. Apocalypse *Yulara*? The emergence of a judicial discourse of 'junk' anthropology

Joining the bruised anthropologists mentioned in the beginning of this book was a battered Peter Sutton, one of the most senior applied anthropologists working in Australia. He was the principal expert witness for the Western Desert applicants in the *Yulara* case and the focus of particularly unrelenting criticism by the trial judge, Justice Sackville.[1] In effect, Sackville blamed Sutton and the applicants' lawyers for what he found to be an unsustainable formulation of the case. To the surprise of many who assumed the applicants to be among the most traditionally orientated Aboriginal people in Australia, the judge decided that the evidence did not support the acknowledgment and observance of the set of laws and customs pleaded in the case. He pointedly suggested that the case might have succeeded had it been formulated in a different way. In a final crushing blow, the judge found that Sutton, a leading anthropologist and champion of strict professionalism in applied anthropology, had himself been biased.

Another participant, Basil Sansom, the anthropologist assisting the Northern Territory Government, published a cantankerous warning about the implications of the case for future expert anthropologists (Sansom 2007). His paper provoked a lengthy response from Sutton (2007) and a briefer one from John Morton (2007), who had been engaged by the Commonwealth to review the first version of Sutton's report.[2] Before attempting some evaluation of this interchange, the background of the case will be outlined.

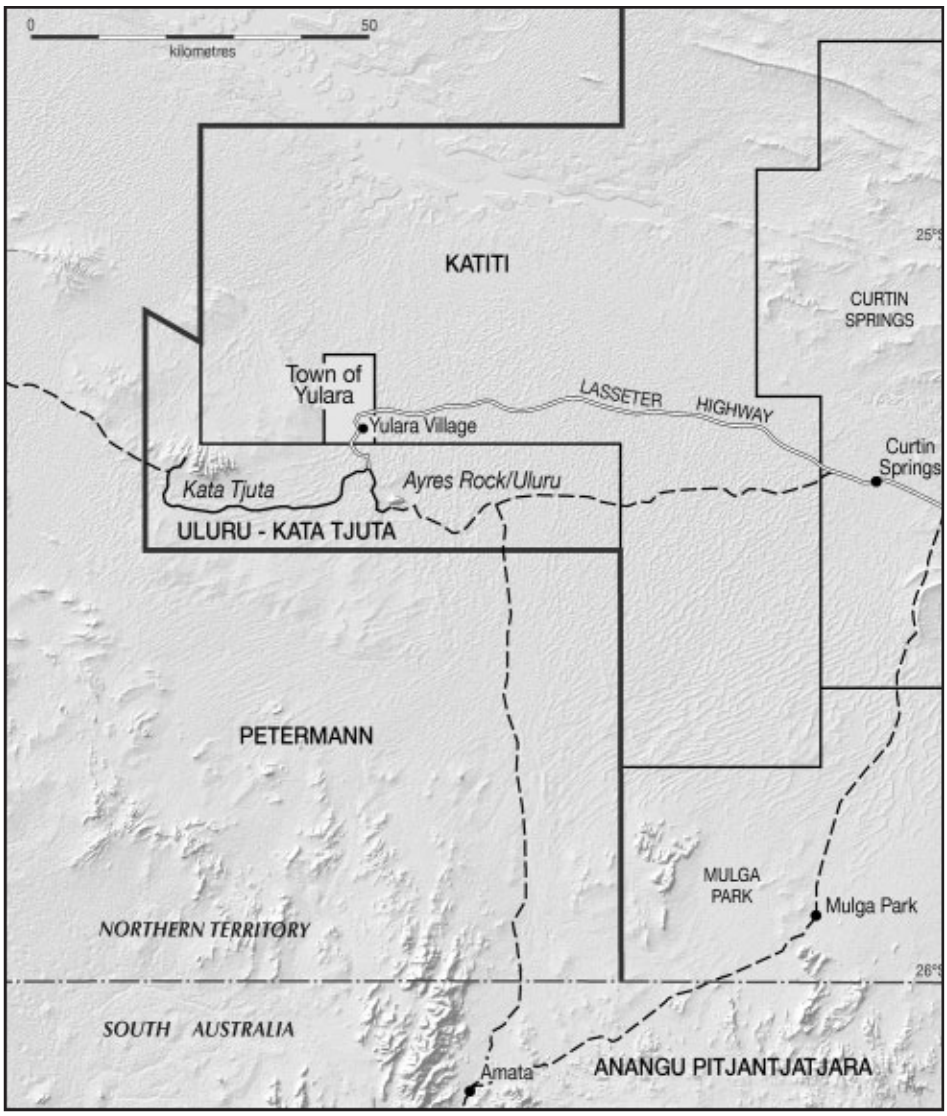
Background

The claim by Yankunyatjatjara and Pitjantjatjara people for compensation for the extinguishment of native title rights was initiated in 1997 under the *Native Title Act* 1993. It related to a relatively small area of land, —104 sq km—which had been excluded from the much larger area of Aboriginal Land held by the Katiti Aboriginal Land Trust. The excluded land was on the northern border of Uluru National Park, also Aboriginal Land, and had been declared a town. As such it was excluded from claim under the *Land Rights Act*. It was the site

1 *Jango v Northern Territory of Australia* (No. 2) [2004] FCA 1004 (3 August 2004).

2 I also provided a comment on Sansom's paper (Burke 2007), as did Katie Glaskin (2007); Ian Keen (2007); and Lee Sackett (2007).

of the new town of Yulara, proclaimed in 1976, which essentially comprised accommodation and associated facilities for tourists visiting Uluru (Ayers Rock) and Kata Tjuta (the Olgas).



Map 8.1 Yulara location map

Even before the completion of the hearing of the evidence, there were signs that the anthropologists called as expert witnesses by the applicants were not going to have an easy ride. In a preliminary ruling on the evidence, much of the anthropologist's report, authored principally by Sutton, was held inadmissible for not conforming to the rules of evidence and had to be completely rewritten.[3]

3 *Jango v Northern Territory of Australia* (No. 2) [2004] FCA 1004 (3 August 2004).

In essence, the rules of evidence said to be breached were the need for expert reports to distinguish between the facts on which the expert opinion is based and the expert opinions themselves, and to clearly expose the reasoning leading to the opinions. Without this style of writing, it was argued, it would be difficult for a judge to decide whether the opinions really did arise out of specialised knowledge—that is, knowledge based on a person's training, study or experience.

Whether the problems with the form of the report were as dire as indicated by the number of individual objections (more than 1000) is difficult to say. On the other hand, the fact that the applicants' counsel conceded all but one of the objections indicates that there were substantial problems. On the face of it, the judge's criticism and his seeming exasperation were directed towards the applicants' lawyers for not keeping abreast of the developing jurisprudence of expert reports in native title cases and not adequately policing the form of Sutton's report.

If the judge was exasperated, it was perhaps because of the sequence of events leading up to *Yulara*. The Commonwealth's *Evidence Act*, which applied to all Federal Court hearings, had been passed in 1995. The 1998 amendments to the *Native Title Act*, among other things, reintroduced the rules of evidence into native title hearings. There appeared to be a considerable lag in legal and anthropological practice in responding to the changed situation. In 2003, the discrepancy between practice and judicial expectations of a more open and methodical justification of expert opinions became explicit when several expert reports in a native title claim in Western Australia were not admitted into evidence.[4] Coincidentally, soon after that decision, the Chief Justice of the Federal Court issued guidelines for all expert witnesses.[5] The guidelines codified the duty of the expert to the court rather than the party calling them, the need to identify the factual premises of the opinion, and the need to explain the reasoning processes leading to the opinion and warned against involvement in the formulation of the case of a party. The period covered by these developments overlaps with the commencement of Sutton's research for the Yulara claim.

One particular comment in the judge's preliminary decision on the form of Sutton's report must have sounded alarm bells among the applicants' lawyers for its apparent lack of appreciation of applied anthropology. The judge expressed his concern at what he described as unnecessary duplication of anthropologists interviewing claimants for the expert report and the lawyers taking witness statements from the same claimants.[6]

4 *Harrington-Smith v Western Australia* (No. 7) [2003] FCA 893.
5 The *Guidelines for Expert Witnesses* were first issued in September 2003 and revised in March 2004.
6 *Jango v Northern Territory of Australia* (No. 2) [2004] FCA 1004 (3 August 2004), para. 15.

Perhaps emboldened by the success of their challenge to the form of the anthropologists' report, lawyers for the Northern Territory later made a rather dramatic challenge to Sutton's report.[7] They argued that because his report contained a broader idea of the native title holders than many of the Aboriginal witnesses, his report should be ruled inadmissible because of irrelevance.[8] While rejecting this global objection and other specific objections, the judge did allow some specific objections. One was to Sutton's assertion that the town would restrict the possibility of Aboriginal people singing particular song verses while they were physically travelling along the Dreaming track. Apparently his informants did not mention this when they gave their evidence at the hearing.[9] Another of their successful objections was to Sutton's commenting on particular examples of lawyers trying to elicit testimony of customary law during the hearing. The judge allowed a general expert opinion to be given about the linguistic and cultural difficulties of Aboriginal witnesses but not a commentary on specific instances. In a familiar, and perhaps inevitable, assertion of his structurally superior position, he stated:

> Insofar as Professor Sutton comments on particular passages of evidence given at the hearing, I do not think that his comments should be admitted into evidence. The evaluation of specific evidence is the task of the trier of fact. In discharging that task, the trier of fact will have to take account of many factors, of which the difficulty of cross-cultural communications is but one. I do not think that the relevant expertise of an anthropologist extends to the evaluation of specific evidence given by particular witnesses at the hearing.[10]

The judgment

The judgment on all the substantive issues in the case was delivered on 31 March 2006.[11] Sackville's problems with the applicants' case started with confusion over what model of traditional laws and customs relating to land was being pleaded. Two different formulations of a Myers-like list of legitimate bases for an individual traditional claim to country seem to have been advanced at different stages of the hearing. One formulation emphasised four certain pathways or 'conditions' to traditional rights to land

1. birthplace near the area

7 See *Jango v Northern Territory of Australia* (No. 4) [2004] FCA 1539 (26 November 2004).
8 *Jango v Northern Territory of Australia* (No. 4) [2004] FCA 1539 (26 November 2004), paras 4–7.
9 *Jango v Northern Territory of Australia* (No. 4) [2004] FCA 1539 (26 November 2004), paras 32–5.
10 *Jango v Northern Territory of Australia* (No. 4) [2004] FCA 1539 (26 November 2004), para. 41.
11 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006).

2. birthplace on a related Dreaming track passing through the area or the birthplace of a parent or a grandparent on a related Dreaming track passing through the area
3. kin links to the area
4. the death of close kin in the area.

This formulation also listed other factors that could bolster a person's claim through the four main pathways. The additional factors included

- taking responsibility for the area
- having traditional knowledge of the area
- identifying with the relevant language group
- long-term residential association with the area
- long-term association with others from the area
- the public assertion and defence of one's connection to the area.

The second formulation listed 11 similar factors without identifying four main pathways. In this formulation, the strength of a person's claim varied according to the number of factors that applied to the individual; the more factors, the stronger was the claim to be a traditional owner. This is similar to the points system referred to in Chapter 6 (p. 204).

Although the full story is not known, there appears to have been a confrontation at some stage in the case preparation over the wording of the pleadings.[12] The original pleadings, drawn up by Ross Howie, the claimants' barrister in *De Rose Hill*, seem to have used *ngurarita*, the Yankunyatjatjara/Pitjantjatjara word for traditional owner, as the umbrella concept of traditional land tenure. If the judge's account of the confrontation is correct, it seems that Sutton thought the use of *ngurarita* as an overarching concept adopted a narrow folk theory that did not accurately represent the ethnographic complexity of the actually recognised claims. In any event, there were some unusually detailed assertions in the amended pleadings that seemed to be transposed directly from the academic debate about traditional land tenure in the Western Desert:

> B1.2 The people of the Western Desert acknowledge and observe a body or system of indigenous laws and customs in relation to land and waters that does not identify country as aggregates of discrete bounded areas or 'estates'. Nor do those laws and customs identify 'clans' or other discrete bounded territorial groupings of people. Personal choice and a level of unpredictability, negotiability and contestation are features of the indigenous laws acknowledged and customs observed by the people of the Western Desert.[13]

12 I include in the word 'pleadings' the 'Points of Claim'; see the discussion of the relationship between formal pleadings and 'Points of Claim' in the Full Federal Court judgment in Jango at paragraphs 75–9.
13 Quoted in *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 171.

Justice Sackville's objections to Sutton as expert

Before examining the judge's alternative formulation, his reasons for rejecting Sutton's opinions should be outlined, for they do not all depend on inconsistency with other evidence. Sackville made four complaints about Sutton's claim to be an expert

1. although he was an expert on Aboriginal Australia generally, he was not really an expert on the Western Desert
2. he was not engaged in disinterested academic research but research for litigation
3. he was biased in favour of the applicants' case
4. he had misdirected himself on the legal doctrine of native title by adopting an anthropological understanding of 'normative system' rather than a legal one.

Initially there seems to be a contradiction in the judge accepting Sutton as a well-qualified expert anthropologist but then insisting that he was not an expert in the traditional laws and customs of the Western Desert region.[14] In practice, the way this apparent contradiction is resolved is that while Sutton's opinions were regarded as evidence under the rules of expert evidence, the weight given to them, or, in Sackville's words, 'the cogency of certain conclusions', could be diminished.[15]

The strategic redefining of fields of scientific expertise as a means of judges coming to a predetermined conclusion has been part of the sceptical critique of the judicial reception of scientific expert evidence.[16] I have distanced myself from this form of analysis because it seems to assume a strong and unvarying instrumental approach to judging in all cases. Its proponents actually deny that they take a strong view, or indeed any view, of the judge's intention, seeing it more as a logical or literary necessity given the inherent difficulties of certain expert evidence for a particular result.[17]

In any event, there was more to Sackville's insistence on a Western Desert sub-specialisation within Australianist anthropology than discounting inconvenient evidence. Jon Willis was also called as an expert witness and he had the ideal, requisite qualifications for such a sub-specialisation (see Chapter 7). In many ways, Jon Willis's role in the *Yulara* case paralleled his role in the *De Rose Hill* case

14 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 316.
15 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 315.
16 See Edmond (2000, 2001, 2002, 2004).
17 Gary Edmond, Personal communication, 2005.

- his relatively late involvement in the preparation of the case, despite his obvious qualifications
- the very positive reception of his evidence by the judge, but the eventual sidelining of it on the basis that it was more about ceremony and ontology than traditional land tenure.

There were some mysterious tactical decisions made in the *Yulara* case that make one wonder if any of the lessons of *De Rose Hill* had been learnt. One of those lessons must surely have been that Willis, following his long-term and intimate engagement with Yankunyatjatjara and Pitjantjatjara people, had come to some surprisingly different appreciations of land tenure than consultant anthropologists working with the same people but without his intimate experience of ceremony.

In particular, Willis, approaching the issue from knowledge of ceremony and Dreaming stories, saw relatively stable clusters of sites reflecting episodes in Dreaming narratives and those clusters of sites being associated with people born on those Dreaming tracks. In other words, it could easily be interpreted as being at odds with the relatively open-ended flexibility reported by Sutton. In addition, Willis's exploration of Western Desert ontology, including the centrality of *kurunitja* (spirit essence), had the potential to explain disparate and seemingly chaotic rules of traditional land tenure under a unifying, traditional concept that did not have to press *nguraritja* into service as the unifying umbrella. Because the spirit essences of the land enliven the foetus, the significance of birthplace can be seen as fundamentally traditional not 'accidental'. Also, because the same spirits enter the growing person through the food of the land, the importance of long-term residence to traditional land tenure can be seen as a variation on the same theme, not simply some alternative factor. Willis's work explained Tonkinson's remark about 'the bonds of shared spirit and substance' being important in Western Desert traditional land tenure.

Sackville's next complaint—about research for litigation—entirely fulfils the rather dark predictions I made in the introduction of this book, first written in 2005, about the possible emergence of a 'junk anthropology' discourse among Federal Court judges as the concerns about research for litigation and 'junk science', particularly among American judges, carried over to native title cases and anthropological expertise:[18]

> It is significant, in my opinion, that the fieldwork designed to gather that information was undertaken *in the context of the very litigation in which the claims of many of the informants were formulated and assessed*. Professor Sutton did not have the opportunity to carry out fieldwork

18 For an account of the 'junk science' debate, see Black et al. (1994); and Edmond (2000).

> among peoples of the eastern Western Desert in an environment divorced from their pending claims to compensation. Much less did he have the opportunity to study and describe the traditional laws and customs of these peoples as part of what might be described as a disinterested academic endeavour. Many, if not all of Professor Sutton's informants were aware that a compensation claim was pending at the time they spoke to him and were also aware that their observations might be used for the purposes of the litigation. While I do not doubt that Prof Sutton attempted to maintain his independence from the claimants, the fact is that he undertook the fieldwork and other research for the purposes of preparing a report in support of their case and did so while the claim was pending.[19] [Emphasis in original.]

This attitude was perhaps the most dispiriting for all applied anthropologists involved in native title work. What the judge described pejoratively was also the exact and inevitable circumstance in which most anthropological research for native title claims takes place. The expert anthropologists who research a claim for the group among whom they had conducted long-term fieldwork prior to native title are the exception, not the rule.

A further blow to Sutton's applied anthropology, and the least substantiated in the judgment, was the assertion that he was not concerned to test the reliability of informants' statements:

> Despite the contradictions and disputation to which he referred and his 'strong sense' that people were sometimes 'fictionalising', Prof Sutton, understandably enough, did not see it as part of his role to make judgements as to the veracity or reliability of the information on which he acted. It is fair to say (as the Commonwealth argues) that, in effect, Prof Sutton carried out a form of parallel enquiry to that undertaken by the court, but without many of its advantages (such as the opportunity for cross-examination) and without having to make judgements as to the reliability of the information provided.[20]

The fact that the judge's knowledge of 'contradictions and disputation' came from Sutton tends to undermine the main thrust of this criticism. The image of the applied anthropologists as being professionally obliged to accept the truth of anything informants say recalls the whole Hindmarsh Island saga. Whatever was the truth behind the bad press in Hindmarsh Island, one powerful public image to emerge was that of scandalous, fabricated Aboriginal traditions being

19 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 319.
20 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 321.

accepted too readily by the naive anthropologist.[21] It meant that Sackville and the Commonwealth's counsel had a ready-made image to draw upon as a sort of 'common knowledge' about the methods of anthropology. To this image Sackville added a new characterisation of the anthropologist's native title research as a poor man's judicial hearing. In this characterisation, we see the judge minimising the value of out-of-court interviews and the difficulties faced by Aboriginal witnesses in a formal hearing.

Although I have summarised the third criticism of Sutton as bias, the judge did not use that word. He used the euphemistic and circuitous language common in some legal writing styles that might be an attempt at deftness: 'his role in the case had not been limited to that of a wholly objective expert observer and commentator.'[22]

The evidence cited for this conclusion included Sutton's involvement in redrafting the pleadings, his commentary on draft written statements collected by lawyers, advising on who would be good witnesses, suggesting questions to counsel for the applicants during the hearing and making disparaging remarks about Tindale's qualifications, which the judge labelled as 'defensiveness'.[23]

Needless to say, many of these practices of assisting the conduct of the applicants' case, which had carried over from anthropological practice in *Land Rights Act* claims, are now antithetical to best practice in native title because of the *Yulara* case. They perhaps represent a hysteresis effect, as discussed in Chapter 1—a time lag of habituated practices that do not quite match the new circumstances of the Federal Court hearings. In the new circumstances, pervasive scepticism about all experts called by one party, presenting research undertaken for the litigation, means that every opportunity must now be taken to demonstrate independence.

The questioning of Sutton's independence had particular reverberations among applied anthropologists. He was not just any anthropologist. He was one of the most experienced and highly regarded expert anthropological witnesses in Australia.[24] Within the profession, he had taken a strong public stance against advocacy and for professionalism.[25] 'If Sutton cannot project independence in a Federal Court hearing', it was lamented, 'who can?' His very resistance to the

21 See Bannister (2006); Brunton (1996); Mead (1995); Simons (2003); and South Australia Hindmarsh Island Bridge Royal Commission (1995). Later accounts by some of the key Aboriginal participants indicate that there was probably a diversity of honestly held Aboriginal views about the disputed area, rather than a simple fabrication by one group (see Rowse 2006).

22 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 326.

23 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), paras 322–5.

24 This impression is gained from talking to colleagues over a long period and to native title lawyers such as Graeme Neate, the President of the National Native Title Tribunal (Personal communication, 2003).

25 See, for example, Sutton (1995b).

initial formulation of the claim under the concept of *ngurarita*, which on the face of it indicates a very assertive independence, had been turned against him as indicating an undue alignment with the applicants' case.

The final criticism was that Sutton had adopted a non-legal interpretation of 'normative' and, in effect, neglected to prove the continuity of a normative system as required by native title legal doctrine. It was suggested that Sutton had an anthropological view of normative as average behaviour, rather than normative as the obligatory. Sutton, in his response to Sansom's commentary, denied this charge and provided a detailed refutation quoting numerous sections of his Yulara report (Sutton 2007). Sutton seems to have a point. One small but telling example is a sentence from his report that Sackville quotes against Sutton: 'The ''normative'' covers not only explicit rules but also the reflection of the assumptions of a norm, and average or typical behaviour as well as ideal norms.'[26]

A fair reading of this sentence, and the section of the report it comes from, would conclude it is primarily about implicit, obligatory norms. And in any event, why can't average behaviour, along with other evidence, also support the existence of an implicit obligatory norm? Because Sutton's report did not follow exactly the legal formulation of 'normative', it left open the possibility of a literalist misreading and rather tendentious final submissions by the Counsel for the Commonwealth that Sutton had made a fundamental legal error. Another judge might have quickly passed over such a tenuous argument. For whatever reason, however, Sackville was in a mind to accept this and other arguments put to him.

Coherence of the body of laws and customs

Having thus discounted Sutton's expert opinion in a four-pronged attack, a critical link in the applicants' case was missing. The evidence of individual Aboriginal witnesses mentioned a number of the pleaded factors for obtaining rights to land, but the expert testimony was to provide the overview and integrate the divergent emphases into a relatively coherent whole. The judge searched the evidence of the Aboriginal witnesses in vain for an overview that would exactly match the formulation of traditional land tenure in the pleadings: four main pathways plus additional factors. The judge also noted that there was little consistent mutual recognition within the applicant group, with most witnesses nominating themselves and their close relations only, not the entire group.

26 Quoted in *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 327.

Lest he be thought unappreciative of the difficulties facing Aboriginal witnesses or to be expecting an impossibly high level of technical compliance, he repeated some balancing statements that are typically found in the judgments of trial judges and seem to be pre-emptively addressing a possible appeal court:

> I accept that Aboriginal witnesses cannot be expected to recount their laws and customs with anything like the precision that might reasonably be expected of a lawyer expounding common law principles. I also accept that the fact that there may be disagreement among witnesses as to the relevant rules and practices is not, of itself, surprising and certainly not fatal to the applicants' contentions. Understandably enough, the Aboriginal witnesses are not accustomed to conceptualising their laws and customs in a manner that enables them to respond directly and clearly to the kinds of questions asked by counsel.[27]

As well as the absence of an integrating overview from the Indigenous witnesses, Sackville was also concerned about the level of disputation about the principles of legitimate traditional claims to country and the relevance of language association:

> Some witnesses were adamant that the area was Yankunyatjatjara country. Others claimed that Pitjantjatjara or other non-Yankunyatjatjara speaking people can be and are *ngurraritja* for that country. Some said that a person can take country from either a grandfather or grandmother. Other witnesses appeared to limit the principle to male ancestors. Some supported the principle that country can be taken through a wide range of relatives and indeed claimed that a person can choose his or her country from among the various possibilities. Others recognised a more limited principle of descent and seem to reject the notion that people can choose to be *ngurraritja* for country. Some seem to accept the birth on a Tjukurrpa track travelling to or through a particular site can make a person *ngurraritja* for that site. Others disputed that proposition. Some thought that long residence, or even working in an area for a long period, is sufficient to constitute the person concerned *ngurraritja* for the area. Others denied that there is or was any such custom.[28]

In citing these examples, the judge was suggesting something even more fundamental than lack of conformity to the pleaded system of laws and customs. He found that the lack of consistency and coherence meant that the existence of a body of laws and customs—an essential prerequisite in the legal doctrine of native title—could not be established.[29]

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27 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 407. Also see paras 445–6 and 449.

28 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 448.

29 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 446.

Having reached the conclusion that the evidence did not reveal any body of laws and customs, let alone the one pleaded, it was technically not necessary for the judge to address the argument that the pleaded laws and customs were in any case not traditional. The alarm in anthropological circles might have been much more muted if he had stopped there. For there is a degree of correspondence between the judicial finding of lack of fundamental coherence of a body of laws and customs and the ethnographic archive that continually emphasised flexibility, negotiation and the significance of context.

Sutton told me that he was quite explicit in his report about the problem of flexibility. He had apparently emphasised the fundamentally biographical nature of the land tenure system and had used the term 'interest-holding set' rather than 'claimant group' to reflect continuing flexibility of identification with country.[30] It remains one of the mysteries of the case that notwithstanding their vulnerability on the central issue of demonstrating a stable, coherent body of traditional laws and customs in relation to land, those running the case decided to go ahead anyway.

Judge as amateur anthropologist

The judge, having disposed of the case on grounds that were to some extent predictable from the ethnography, went on to consider arguments that the pleaded laws and customs were in any event not traditional. Taking that extra step is not only a case of generously responding to the parties who raised the question. Dealing with it further insulated the decision from successful appeal because it provided an alternative ground for the failure of the applicants' case.

The requirement that the contemporary laws and customs relating to land must be traditional goes back to the Brennan formulation of native title in *Mabo*, and it was reinforced in *Yorta Yorta*. In legal doctrine, the critical time is the date of the assertion of British sovereignty—in the *Yulara* case, 1824 or 1825. It must be established that there was a system of traditional laws and customs operating at that time and that the contemporary laws and customs are derived more or less directly from that system, subject to allowable change. The difficulties of proving the content of the system at sovereignty are ameliorated to some extent by the acceptance of inferences drawn from the available post-contact evidence. Thus to follow the requirements of legal doctrine closely would entail a three-stage analysis. The first stage is the reconstruction of the pre-contact system of traditional laws and customs relating to land from all the available evidence. The second stage is to account for the continuity and transformation of that system over the contact period up to the present. The third stage is a description of the contemporary laws and customs and the justification of how they are derived from the pre-contact system within an acceptable degree of change.

30 Peter Sutton, Interview, 8 June 2009.

One of the judge's problems with Sutton's report was that he thought it did not systematically follow the requirements of legal doctrine in this regard. Sutton seems to have evaluated the early anthropological sources as part of a discussion about traditional land tenure in general. Added to this was his problem with Sutton's alleged adoption of a non-legal interpretation of normative as average behaviour. Having discounted Sutton's evidence about the traditional nature of the contemporary laws and customs and having decided that the Indigenous evidence was of limited value in reconstructing the pre-contact era, Sackville could have chosen simply to say that there was not enough evidence about the pre-contact era.

Instead, Sackville, encouraged by similar final submissions made by Counsel for the Commonwealth, decided to treat the early anthropological sources as separate pieces of evidence and make his own evaluation of them outside anthropological expertise. This directly parallels the approach of Justice O'Loughlin in the *De Rose Hill* case, in which I noted the judicial resurrection of phantom experts.[31]

Because Justice Sackville's conclusions are at odds with what I would see as the mainstream of anthropological opinion, it is worth examining in some detail how he came to his conclusion that in the pre-contact era the principal expression of traditional land tenure in the Western Desert was small patrilineal descent groups that had rights to a particular site or cluster of sites connected with the *Tjukurrpa*.[32]

Sackville's first step was to question Sutton's critique of Berndt and Tindale. Sutton had made a rather direct assault on Tindale's conclusions, stating that they were wrong. One wonders whether it would have been sufficient and more tactful for Sutton to simply point out Tindale's reliance on the existing theorising about local organisation in the discipline of anthropology and Tindale's formal qualifications, which made him an outsider to that discipline. Sutton went even further, in what might have been a rhetorical bridge too far, by claiming that Tindale's data, upon reanalysis, did not support Tindale's own conclusions about stable patrilineal descent groups. Sutton put forward what would have been a convincing argument in the field of the academy, but it proved to be a distraction in the highly contested court case.[33]

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31 Sutton had a similar feeling and called his 2006 Norman B. Tindale Memorial Lecture 'Norman Tindale and Native Title: His Appearance in the Yulara Case'.

32 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 497.

33 I find Sutton's reanalysis of Tindale's social-history cards to be convincing as far as it goes. The focus on Tindale's cards does, however, tend to submerge methodological problems of Tindale's whole enterprise. Sometimes we are so grateful that someone was there collecting information that is still available for analysis that problems with its collection tend to be overlooked. The cards themselves project a kind of objective, methodological rigour like a survey questionnaire. But we know there were basic communication problems and it was superficial, expeditionary survey questioning when compared with the Malinowskian ideal of long-term, total-immersion fieldwork. Later research would also suggest that answers to basic questions can be highly contextual and subject to the perceived requirements of the moment. How the question of 'totem' was translated, let alone received, is difficult to imagine given the likelihood of multiple connections to different Dreamings. One unintended consequence of Sutton's detailed reanalysis might have been to reinforce the inflated empirical status of Tindale's data.

The critique of Sutton's reanalysis was the result of a very detailed deconstruction of Sutton's methodology, not by another anthropologist but by the lawyers representing the Commonwealth. It was argued that Sutton's selection of only the most complete social-data cards biased the result against Tindale's conclusions since some of the excluded cards tended to support them. Furthermore, it was argued that Tindale's conclusions could have been based on Tindale's other research, not just the social-data cards. Finally, it was argued that Sutton's rather dismissive view of Tindale was unrepresentative of the general regard in which Tindale's work was held by other anthropologists—an argument that seems to have been derived from the cross-examination of Sutton himself.[34]

Justice Sackville then arrayed against Sutton's critique of the patrilineal descent group model all the literature that seemed to support it. But it was not just the literature; the judge seemed to be treating them as equivalent expert witnesses that could be unproblematically placed on one side of a set of scales to outweigh Sutton's opinion—four professors on one side (Berndt, Munn, Tonkinson and Layton) and one professor (Sutton) on the other side—a very literal interpretation of the idea of the weight of expert opinion. Mysteriously, Sackville identified Berndt's 1959 paper as expressing the conventional view of traditional land tenure in the Western Desert. Nowhere does he explain on what basis this judgment of a disciplinary mainstream was made.

Sackville then moved on to Nancy Munn's unpublished report on her year's fieldwork at Aereyonga in 1964–65. I have not included it in my own selective review of the anthropology of Western Desert land tenure as I did not consider that she had made a substantial contribution. The judge, referring to her as a professor, did find in her fieldwork report to the Australian Institute of Aboriginal Studies references to local landowning units owning relatively discrete estates. Similarly, he refers to passages about traditional estates in Tonkinson's work. In both instances, the context of these passages that could assist in evaluating them is not mentioned. In Munn's case, a relevant context is that traditional land tenure was not a major focus of her research and in Tonkinson's case, as I pointed out in Chapter 6, there was the increasingly loud undercurrent of individual flexibility and fluidity that tended to undermine the passages quoted by the judge.

Sackville then considered the work of Robert Layton and Lee Sackett, who had conducted research among Western Desert peoples for claims under the *Land Rights Act*.[35] Again he found references to patrilineal descent groups but at no time did he avert to the pervasive influence of the descent group requirement in the definition of traditional owner in the *Land Rights Act* and Layton's own reflections on the whole process (see Chapter 6).

34 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 475.
35 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 448–93.

The judge quickly dispatched Myers. Ignoring the way in which Myers' approach can be seen to synthesise and surpass previous ethnography on traditional land tenure in the Western Desert, Sackville summarily sidelines his contribution on grounds of its geographic and temporal distance from the claim area:

> However, Myers' work has been primarily among the Pintupi people of the northern Western Desert and is relatively recent, having been undertaken in the 1970s and 1980s. Professor Sutton, who acknowledges that Myers 'considered Pintupi land tenure to be an elusive matter', does not attempt in his Report to relate Myers' findings to the laws and customs of the Western Desert at the time of sovereignty or prior to the influence of European settlement.[36]

Finally, the judge dismisses Hamilton. Her discussion of tension between the centrality of place of birth and a patrilineal system ('the system as it was straining to become') he characterises as denying the existence of any settled system of land tenure and hence as being outside the mainstream of anthropology, as construed by him.[37]

The judge then blundered on to his conclusion with only a perfunctory acknowledgment of his own limitations in presenting an alternative view of anthropological opinion, the Commonwealth having failed to call its anthropologist, John Morton, and the Northern Territory having failed to call its anthropologist, Basil Sansom:

> It is not an easy task for a court to assess anthropological evidence on issues as complex and sensitive as the laws and customs of Aboriginal societies. Nonetheless, it seems to me that the weight of the anthropological evidence in this case, which includes the published work of distinguished researchers who have studied the people of the Western Desert, points clearly to a particular conclusion. This is that under the traditional laws and customs (understanding that expression in the sense required by *Yorta Yorta (HC)*) of the Western Desert bloc:
>
> - the land holding units comprised small local groups;
> - each group consisted of people principally recruited or united on the basis of common patrilineal descent; and
> - members of the group had rights and interests (to use the language of the NTA) on a particular site or a particular cluster of sites connected with the Tjukurrpa.

36 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 494.
37 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 496.

> The evidence, although more equivocal on the point, tends to suggest that the traditional laws and customs of the Western Desert also recognise that in certain circumstances a person could become a member of the local group by being born at a place of significance to the group, at least where a person's claim was acknowledged and accepted by other members of the group.
>
> For the reasons I have given, I am not persuaded by the evidence of Professor Sutton (or Ms Vaarzon-Morel), to the extent that it suggests otherwise. This does not imply that I think that further debate among anthropologists is foreclosed. On the contrary, there may well be room for further scholarly enquiry on the issues canvassed in the evidence in the present case. However, I am bound to decide factual questions on the evidence presented to me. That evidence does not dislodge or rebut the views consistently expressed by the early scholars who carried out field work among Aboriginal people in the Western Desert, including the eastern Western Desert.[38]

Explaining this appearance of the judge as his own expert anthropologist to an incredulous colleague from another regional specialisation within anthropology, my colleague wondered whether a judge would approach an expert physicist in the same way.[39] Would the judge, for example, reject the expert's preference for quantum mechanics, perhaps concluding that Newtonian physics made more sense to him and explained the facts better. This comparison is telling. Apart from highlighting the clumsy judicial dismantling of a disciplinary consensus, it shows that not all disciplines are equally immune from such meddling. I have already noted in the previous case studies how judges tend to feel no compunction in bypassing historians when they are interpreting historical documents, and that, generally speaking, they tended to be a little more wary of anthropological expertise. This kind of continuum from the humanities to the social sciences then to the physical sciences tends to confirm the intermediate position of anthropology that I asserted in Chapter 1.

In the *De Rose Hill* case, counsel for the claimants might have invited and abetted judicial dismantling of disciplinary consensus by tendering separately some of the historical anthropological sources rather than leaving them as references in an expert anthropologist's report. Reacting against the initial anthropologist's dismissiveness of the anthropological archive, the barrister Ross Howie thought that, apart from their anthropological merit, they provided wonderful evidence of traditional continuity and, as part of the overall strategy for winning the case, they deserved greater prominence. In *Yulara*, Sutton was conscientious, to

38 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), paras 497–8.

39 Don Gardner, Personal communication, 2006.

the point of obsession, about including in annexures all the source material he had considered. He thought that it would assist in demonstrating his openness and independence as an expert. Instead, Counsel for the Commonwealth railed against the difficulty of coming to grips with such a volume of material. But eventually, Counsel for the Commonwealth found in those annexures the material that he used to appeal to the judge to override Sutton's opinion about the pre-contact situation. The appeal was made through final submissions rather than a contrary expert view. The anthropologist engaged by the Commonwealth to review Sutton's report, John Morton, basically agreed with Sutton. Having refrained from calling Morton to give evidence, Counsel for the Commonwealth was free to focus exclusively on Sutton.

There are other aspects of the dismantling of a contemporary disciplinary consensus that are suggested by the judicial treatment of Tindale, particularly in *De Rose Hill*. Tindale, unlike most anthropologists, has a degree of popular recognition and approval.[40] It is interesting to note that the lawyers involved in *De Rose Hill*, especially those from South Australia representing the pastoralists and the State Government, referred to him approvingly in conversation by his nickname 'Tinny'.[41] Is it too fanciful to think that this positive public persona, the simplicity of his notion of the tribe and even his modest academic qualifications enabled him to reach over the heads of his latter-day critics to appeal directly to the lawyers and judges? It is also possible to imagine judges feeling the need to rehabilitate someone whom they think has been unfairly relegated by later, elitist academics who did not do equivalent fieldwork and who were being too clever about him. If these perceptions are real, they present a quandary for the expert anthropological witness of how to be frank about Tindale's limitations. Sutton certainly regretted his offhand remark, strategically quoted by Sackville, that Tindale's major field of expertise was insects.[42] But what is the best tightrope to walk between accurately reflecting the current disciplinary consensus about his contribution to the understanding of traditional land tenure while not appearing to be too dismissive of a sympathetically remembered public figure?

Sutton and the ethics of predigestion

The problem with Tindale is just one aspect of the wider issue of the reformulation of the anthropological archive for native title purposes. For the purposes of my own analysis of that archive for the three main case studies, I proposed a robust academic model of deconstruction of the archive and its reconstruction in terms

40 With the possible exception of Stanner; see Hinkson and Beckett (2008).

41 Craig Elliott's comments on my draft Chapter 7, July 2005.

42 *Jango v Northern Territory of Australia* [2006] FCA 318 (31 March 2006), para. 326; Peter Sutton, Interview, 8 June 2009.

that are relevant to the legal doctrine of native title while acknowledging the indeterminacy of the key terms of the doctrine. This led me to be equivocal about whether Myers' emphasis on the individual perspective would automatically be relevant to native title doctrine, which seemed to assume stable, socio-centric groups and rules. I did acknowledge that his codification of the legitimate bases for traditional claims did approximate socio-centric rules. I was also open, however, to the possibility that earlier accounts that were incorporated into and superseded by Myers' work would be more relevant to native title because they were concerned about identifying relatively stable, socio-centric categories.

Sutton seems to have taken a slightly different view, founding his conclusions about the existence of something like a points system in the complex ethnographic facts that confronted him and which he considered could be adequately encompassed only by such a system. In effect, he de-emphasised the different explanatory purposes and analytical tools of previous researchers and emphasised apparently unmediated ethnographic facts. From this perspective it made perfect sense to Sutton to say that Tindale was wrong about traditional land tenure, rather than to say more diplomatically that Tindale was on a different explanatory mission. Furthermore, it accepts Myers' account of his own work as ethnographic in the sense of describing cultural particularities rather than being a combination of ethnographic description and a strong emphasis on the individual perspective as an analytical tool.

When Sutton read the original points of claim emphasising *ngurraritja*, he tended to see two related ethical dilemmas.[43] One was that it would result in the recognition of a smaller group of Aboriginal people than he thought had legitimate traditional claims. The second was that he felt he would have to curtail his honestly held professional view that *ngurraritja*-ship was an idealised folk theory. That he could insist upon and receive changes to the points of claim to make them more consistent with his views is a testament to his influence and the different circumstances of this case compared with *De Rose Hill*. It will be recalled that Craig Elliott, in effect, received the brief for his report in the middle of the hearing and was in no position to influence the way the case had been framed.

As the dust settles after *Yulara*, the idea that it represents the apocalyptic dismissal of applied anthropology in native title as junk anthropology seems to be receding a little. A number of contested native title hearings were decided while *Yulara* was being heard. In those cases, other judges were very appreciative

43 Peter Sutton, Interview, 8 June 2009.

of the expert anthropologists involved.[44] But this does not mean that *Yulara* was simply an aberration. In those two cases the anthropologists involved had conducted their primary fieldwork with the Aboriginal groups prior to the native title era, so the issue of research for litigation did not arise so starkly. John Morton's assessment of the significance of *Yulara* for anthropological practice is probably closest to the mark:

> [T]he problem was not with the facts, but with their reduction to a transparently convincing narrative ('clearly exposed reasoning')—in other words, a *thesis* that the court would readily accommodate within its peculiar *habitus*. I therefore remain unconvinced that, in the wake of Yulara, anthropologists need to work quickly to shed 'academic habitude' in the preparation of court reports. Rather, it seems to me that we need to refine that 'habitude', because 'forensic indigestibility' is less a matter of not distinguishing between fact and opinion and more a question of making the distinction highly explicit and coherent for legal practitioners, who demand that forensic fare be fastidiously prepared and served to them on a platter. The clearer the story, the more transparent the argument. (Morton 2007:171, emphasis in the original)[45]

44 See the *Ngarinyin* claim (*Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003)), especially paras 71–82 and 112–19; and the *Blue Mud Bay* claim (*Gumana v Northern Territory* [2005] FCA 50 (7 February 2005)), paras 167–78. In the *Blue Mud Bay* claim, Justice Selway was so impressed with Professor Howard Morphy's more than 30-year involvement with the claimants, he stated:

> For the reasons given above notwithstanding the close relationship of Professor Morphy with the claimants over many years his evidence is admissible. Indeed, that close relationship and its duration means that much of his evidence is likely to be admissible as evidence of primary fact, and not just as evidence of opinion. (Para. 168)

45 Sackville's judgment was appealed to the Full Federal Court, the bench consisting of Justices French, Finn and Mansfield. They dismissed the appeal in a joint judgment delivered on 6 July 2007 (*Jango v Northern Territory of Australia* [2007] FCA FC 101). It had been argued, in effect, that the trial judge should not be confined strictly to the case as pleaded because of the inherent difficulties of translating Aboriginal relations to land into European law. This argument was rejected as tantamount to suggesting an inquiry approach rather than the performance of a judicial function, which, as a matter of procedural fairness to opposing parties, involves carefully defining the issues to be resolved and limiting amendment of those issues once adopted (paras 75–85). The issue of whether the Indigenous witnesses had to give evidence of the totality of the system of traditional land tenure that more or less corresponded to the anthropological evidence and the pleadings was subsumed in the full court reasons under the question of whether Justice Sackville had misunderstood the applicants' case. They found that he had understood the case and pointed to Sackville's finding that there was too much variation in the Indigenous evidence to establish the system of law and custom as pleaded (paras 86–92).