Compensation application over Yulara – Jango case

Jango v Northern Territory [2006] FCA 318

Sackville J, 31 March 2006

Issue
The application before the court in this case was a compensation application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (the NTA). The threshold issue was whether the compensation claim group could satisfy the court that, at the time the 'compensation acts' were done, the group held native title rights and interests over the area.

Background
The area covered by the compensation application (the application area), which was constituted as the Town of Yulara, included the Yulara Tourist Village, Connellan airport and various other public works. It is in the eastern part of the Western Desert in the Northern Territory. The application area was bounded on three sides by land held by the Katiti Aboriginal Land Trust, pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act). However, the application area itself could not be claimed under the Land Rights Act because it is land in a town—at [5].

The 'compensation acts' said to have extinguished native title included the grant of leasehold and freehold estates and the construction of public works between 1979 and 1992. These are described in more detail below.

There is no entitlement to compensation under the NTA unless (among other things) the group claiming that compensation can show that they held native title rights and interests at the time the compensable act was done.

The applicants asserted that they and their predecessors held native title rights and interests over the application area under the traditional laws and customs of the Western Desert bloc until it was finally extinguished by the 'compensation acts'. It was accepted that native title had been partially extinguished over the application area by the grant of two pastoral leases in the nineteenth century. Thus, if there was a compensation entitlement, it would only relate to the extinguishment of the native title rights and interests that survived the grant of the pastoral lease—at [8].

The claim was a 'group' claim and it was not asserted that the compensation claim group was a 'cohesive or discrete' community. Rather, the compensation claim group relied on the Western Desert bloc 'society', and its laws and customs, to found the existence of their native title rights and interests prior to the extinguishing events—at [8] to [9].

The respondents, in summary, submitted that the compensation claim group had failed to establish that they held native title rights and interests in the application area when the compensation acts were done because the applicants did not:

- establish that members of the compensation claim group acknowledged and observed the traditional laws and customs pleaded in the points of claim filed on their behalf;
- show that the laws and customs so pleaded were the traditional laws and traditional customs of the Western Desert Bloc—at [14].

Authorisation

The compensation application was lodged with the Native Title Registrar on 12 June 1997 under the 'old Act' i.e. before the commencement of the *Native Title Amendment Act 1998* (Cwlth) (amendment Act). Under the old Act, authorisation of the application was not required. However, the application was amended after the 'new Act' commenced and stated 'in apparent compliance' with s. 61(1) of the NTA as amended that those making the application were authorised by the compensation claim group: see s. 251B.

Justice Sackville noted that the Full Court of the Federal Court has held that, because of the relevant transitional provisions (found in Schedule 5 of the amendment Act), a claim made before the commencement of the amendment Act does not have to comply with the authorisation requirements introduced by the amendments, 'at least in the absence of a material change to the composition of the compensation claim group'. No respondent submitted that the amendment of the application had that effect. Therefore, his Honour found that no issues concerning authorisation of the application arose—at [28], referring to Justice Stone at [84] in *Bodney v Bropho* (2004) 140 FCR 77; [2004] FCAFC 226, and *De Rose v South Australia* (2003) 133 FCR 325; [2003] FCAFC 286 (Full Court in De Rose No 1) at [26] to [28], summarised in *Native Title Hot Spots* Issue 11 and Issue 8 respectively.

On this point, compare *Risk v Northern Territory* [2006] FCA 404, summarised in *Native Title Hot Spots* Issue 19, where Justice Mansfield apparently takes the opposite view i.e. an old Act application that is amended subsequent to the commencement of the amending Act must comply with the new requirements of s. 61

Chronology

While nothing turned on it, Sackville J expressed a preference for the view put by the Northern Territory (the territory) that Great Britain acquired sovereignty over the area in 1825 rather that 1824 as argued by the Commonwealth—at [108].

What eventually became the Northern Territory was annexed to the Colony of South Australia in 1863 and subsequently became part of the State of South Australia until surrendered to the Commonwealth in 1911—at [109].

European exploration of the region commenced in 1873. Various accounts of meeting with significant numbers of Aboriginal persons were given by these and later

explorers. Non-exclusive pastoral leases were granted over the application area in 1882 and 1896—see [535].

In 1920, the application area was included in a reserve for Aboriginal people. The part of the reserve that covered the application area was revoked in 1940. It was common ground that neither the grant of the second pastoral lease, nor the creation of the reserve, further extinguished native title over and above any extinguishment caused by the grant of the first pastoral lease—at [110] to [122] and [127].

Scientific, historical and anthropological studies of the area commenced in the late 1800s. Evidence indicated that, in times of drought, Aboriginal people of the Western Desert bloc migrated to areas where water was more available. Norman Tindale, Professor A P Elkin, R M Berndt and others carried out significant anthropological research in areas of the Western Desert—see, for example, [126], [130] and [135].

The national park adjacent to the application area—originally called the Ayers Rock-Mount Olga National Park—was proclaimed in 1958. By 1960, around 4,300 tourists a year were visiting the park. In about 1963, a small number of Aboriginal people started to live permanently at Uluru, initially on a public camping ground and then near the Ayers Rock Chalet. This camp remained near the chalet until about 1970 when it moved to near the base of Uluru. The number of permanent residents at that time was around 30—at [136] and [143].

The evidence supported the view that Paddy Uluru, a Yankunytjatjara man, was the 'keeper of the rock' and the 'number one man for the area'. Paddy Uluru died in 1979 and was buried at Uluru. A report under the Land Rights Act (the Uluru Land Claim report) identified the traditional owners for the adjacent areas (other than the national park and the application area). The traditional owners for the 'Ayers Rock estate' included Nipper Winmati, Colin Nipper, Reggie Uluru, Cassidy Uluru and Ngoi Ngoi Donald, with the latter being one of those applying for compensation. Some of the Aboriginal witnesses who gave evidence for the Land Rights Act claim also gave evidence in this matter—at [133], [153] and [159].

The handback/leaseback of the national park took place in 1985. Members of the first Uluru-Kata Tjuta Board of Management included Yami Lester, Reggie Uluru, Barbara Tjikartu, Nellie Patterson and Tony Tjamiwa. In relation to the Lake Amadeus Land Rights Act claim (a related area), the Aboriginal Land Commissioner found that there were traditional owners for two small portions of the claim area but not for the rest—at [160] and [161].

The applicants' case as pleaded

The native title holders at the time of the 'compensation acts' were said to be:

> The people of the eastern Western Desert who were living at the time when all native title rights and interests were extinguished in relation to parts of the [A]pplication [Area] ("the relevant time") and who at that time met at least one of the conditions set out in paragraph B1.10 in relation to the [A]pplication [A]rea.

In their points of claim, the applicants stated that it was not 'appropriate, practicable or necessary' to identify the native title holders by a definitive list. It was sufficient for the court to set out a method for the determination of those individuals. As an alternative, the applicants sought to amend their points of claim to substitute a definitive list—at [169] to [170].

The points of claim identified the people of the Western Desert before going on to describe the people of the eastern Western Desert as:

> [A] body of persons united in and by their acknowledgment and observance of laws and customs, which at all such times has been continuously and is acknowledged and observed in its application to the eastern Western Desert, subject to adaptive change—at [172].

In the points of claim, it was pleaded that:

- pursuant to those laws and customs, the relationship between eastern Western Desert people and particular areas of land involves rights, powers, privileges, obligations and responsibilities which, collectively, define the relationship between individuals and particular areas;
- these elements of 'connection' were inalienable and indestructible;
- the body of persons having a connection with particular land had a fluctuating membership over time and the 'elements vested in any particular person will change over time';
- under the 'Indigenous' laws acknowledged and customs observed by people of the eastern Western Desert, a person holds rights and interests in relation to an area as an individual, if they fulfil at least one of the conditions set out in the pleadings in relation to the area and with others, as aggregates or sets of people, where each fulfils at least one of the conditions in relation to the area;
- under those Indigenous laws and customs, both the nature and extent of rights and interests held by a person in relation to an area and the seniority and authority of a person holding such rights and interests, relative to other such persons, are dependent on the 'closeness' of the person's connection to the area;
- closeness of connection is dependent upon the nature and extent of the conditions fulfilled by the person and on the nature and extent of the 'additional' factors set out in the pleadings that apply to the person—at [174] to [177].

The pleadings did not assert that the compensation claim group was descended from the eastern Western Desert people but, rather, that the present people of the eastern Western Desert are descended, biologically and socially, from people of the Western Desert at sovereignty. The laws and customs of the native title holders were said to be the same as those acknowledged by the eastern Western Desert people at sovereignty, subject to 'adaptive' change. The only reference to adaptive change related to an increasing number of persons who were born away from a place (going to Alice Springs and other communities to give birth) and the 'gradual decline of frequent nomadism' where adaptive changes have lead to a 'greater emphasis being placed on parental and grandparental connections to country and on long association with an area'—at [174] to [175].

In the pleadings, it was stated that a person was a native title holder for the application area if one or more of the following factors was fulfilled:

- having a 'borning place' on or in close proximity with the area;
- having a borning place, or that of a parent or grandparent, at a place on the track of a Dreaming which travels through the area, particularly if that place is upstream along the narrative site sequence and not overly distant in geographical and mythological terms;
- having kin links to the area;
- having close kin such as a parent or grandparent who died or was buried in the area;
- having given birth to a child in the area—at [178].

A 'borning place' was defined in the points of claim as:

> [A] socially recognised place of birth which may be the place where the person was born, where the baby's umbilical cord became detached, where the placenta was buried, where ritual "smoking" of the baby occurred, or the place of conception. It may not be the exact place where the event occurred but rather the closest site to the event, or even a bigger site on the same Dreaming track—at [178].

There were also the following 'additional factors' identified in the pleadings:

- taking responsibility for the area;
- having religious, sacred, ritual, practical and historical knowledge of the area, passing on that knowledge under approved circumstances, looking after sacred objects relating to those places, being actively present at ritual engagements and assertion of roles of cultural heritage protection etc.;
- personal identification with the linguistic identification of the area;
- long association with the area by occupation or use by oneself and relevant kin;
- generation or time depth of identification with the area and social interaction with others who are identified with the area;
- asserting connection with the area and, if necessary, the defence of it against denials of others, although this factor was said to be 'dependant' in the sense that a person could not successfully assert connection on this basis unless another 'factor' was satisfied—at [179].

The points of claim stated that the *Tjukurrpa* is a fundamental concept of the eastern Western Desert people. The court noted that:

> This concept explains the creation of the land and is evidenced by particular features of the landscape. Importantly, it is said to lay down the rules or principles by which people both relate to and conduct themselves in relation to land and by which they otherwise conduct themselves—at [180].

It was pleaded that the laws and customs of the people of the eastern Western Desert:

- are given normative force by the widespread commitment to the *Tjukurrpa*, and the fear of punishment or ostracism in the event of breach of the laws or customs; and

- include rules and principles for recognition of a person as the holder of rights and interests in relation to an area and for determining the nature and extent of those rights and interests—at [181].

Section 2 of the points of claim referred to a number of other laws and customs, including those concerning who:
- has responsibility to care for areas,
- is recognised as having knowledge and authority;
- has authority to speak for an area and make decisions about its use—at [182].

There were also references to laws and customs:
- restricting access to some sites on the basis of gender, age and ritual knowledge;
- related to foraging and distribution of food;
- restriction on access to or knowledge of songs, stories and ceremonies;
- imposing sanctions on strangers who were present on, or using, the country wrongfully—at [182].

Submissions of the applicants

Among other things, the applicants submitted that Indigenous societies are not static and are 'often characterised by an ability to adapt to changing circumstances'. They referred to the recognition by the High Court that interruption to the use and enjoyment of native title rights and interests is not necessarily fatal to proof of the relevant statutory elements of definition of native title—at [193], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (Yorta Yorta) at [84] to [85], summarised in *Native Title Hots Spots* Issue 3.

The applicants relied on a report prepared by an anthropologist, Professor Peter Sutton (the Sutton Report), to support their case that:
- the Western Desert people share certain cultural characteristics;
- the Western Desert bloc has sub-regions identified by social, cultural and linguistic variations—at [194] to [195].

Law and custom

The applicants recognised that their submissions departed from their pleadings in that they did not 'slavishly follow the categorisation of their laws and customs in the pleadings' because of 'the difficulty of placing traditional laws and customs in discrete categories'. Rather, their intention was to 'identify a model that better reflects the evidence' guided by what came from The Sutton Report. Sackville J saw this as making 'a virtue out of necessity'—at [197].

In anticipation of criticism by the respondents of 'the probative force of evidence as to the actual conduct of Aboriginal people in recent times', the applicants submitted that:
- a pattern of presently observable behaviour may 'provide normative force in the form of social pressure or expectation';
- evidence of such behaviour need not be supported by 'articulated prescription';

- it was unrealistic to expect 'unwavering consistency in articulation of law and custom';
- the existence of non-conforming behaviour does not mean that there has been a substantial change in, or a breakdown of, traditional laws and custom, particularly where the society has always accepted a substantial level of choice, contestation and disputation and where the unwritten law is held in 'many people's heads'—at [197] to [199].

The applicants urged the court to accept Professor Sutton's contention that the people who belonged to the application area were a 'person set' and not a 'social group of unitary structure'. Indeed they argued that the people of the eastern Western Desert have 'never been subdivided into named landholding descent based groups'. Rather, the composition of the native title holding group (the *ngurraritja* or traditional owners plus others with native title rights and interests in the land and waters) was determined by the assertion of 'one or more relevant significant forms of connection to the application area and the manner in which such assertions are received by others'—at [202] to [206].

Basis for holding rights in country

The court noted that the laws and customs governing 'the acquisition and holding of rights and interests in country' were 'central to the controversy between the parties' in this case. The applicants adopted what they described as 'the notion of multiple and accretive factors', arguing this had been accepted by the Full Court in De Rose No 1—at [208].

The applicants' written submissions identified eleven factors as 'the principal bases for regarding any individual as having a strong connection to and rights in an area'. These factors, derived from proposition 7 in The Sutton Report and said to be 'accretive' in operation, were:

- having a borning place on or in close proximity with the area;
- having a borning place, or that of a parent or grandparent, at a place on the track of a Dreaming which travels through the area, particularly if that place is upstream along the narrative site sequence and not overly distant in geographical and mythological terms;
- having kin links to the area;
- having generation or 'time-depth' of identification with the area and history of social interaction with others who are identified with the area;
- personal identification with the linguistic identification of the area;
- having religious, sacred, ritual, practical and historical knowledge of the area, being known by the spirits and Dreamings of the area and having authority in respect of those matters, particularly in relation to a Dreaming that travels through the area or is sufficiently close to it to be of significance to the area;
- long association with the area by occupation or use by oneself and relevant kin;
- taking of responsibility for the area, including involvement in the maintenance and protection of sacred knowledge about the area and places on it, passing on that knowledge under approved circumstances, looking after sacred objects relating to those places, being actively present at ritual engagements relating to

the places, acceptance and assertion of roles of cultural heritage protection, landscape management and site custodianship;
- asserting of connection with the area and, if necessary, the defence of it against denials of others;
- giving support for asserted connections;
- having recorded supportive evidence—at [210].

The applicants 'frankly' acknowledged that their submissions concerning the composition of the native title holding group, which were based on the above factors, departed from their pleaded case. Of perhaps greatest significance was their abandonment in their submissions of the distinction between 'conditions' and 'additional factors' found in the case as pleaded on the ground that it was 'important not to over-analyse the conditions and additional factors as "categories" or regard them as being entirely discrete'—at [211] and [217].

The applicants put their case as reformulated in their written submissions. His Honour was of the view that, 'after a number of twists and turns', they 'finally' reverted to case pleaded in the points of claim i.e. under the traditional laws and customs of the Western Desert, satisfaction of one of the following four 'conditions' is a 'necessary pre-requisite to showing a person has rights and interests' in country:
- having a borning place on or in close proximity with the area;
- having a borning place, or that of a parent or grandparent, at a place on the track of a Dreaming which travels through the area, particularly if that place is upstream along the narrative site sequence and not overly distant in geographical and mythological terms;
- having kin links to the area; and
- having close kin such as a parent or grandparent who died or was buried in the area—at [398].

However, it appeared that a person satisfying at least one of the 'additional factors' could also acquire rights and interests in land. Sackville J concluded that what the applicants appeared to be saying (via counsel's final oral submission) was that the 'additional factors' only become relevant when a connection to land has been established by reason of a claim satisfying at least one of the four primary conditions. Thus, they were only relevant to a person's 'closeness' of connection to the land—at [218] to [220].

In oral submissions, counsel for the applicants identified the debate as one 'between the level of flexibility which we are told was not there at sovereignty and between the flexibility which appears to be here today'—see [221].

The applicants rejected the view that rights and interests in land for the people of the eastern Western Desert bloc were governed by a patrilineal system of land tenure—at [223].

His Honour noted that:

> The important point for present purposes is that the applicants accept that, if the evidence supports the proposition that the traditional laws and customs of the eastern Western Desert adopt a patrilineal model of land tenure, their claims cannot succeed. This is despite the fact that some members of the compensation claim groups [sic] might well be able to establish that they hold rights and interests in the Application Area in accordance with a patrilineal model of land tenure, as expounded by Tindale. [Counsel for the applicants] Mr Basten acknowledged in final submissions that not only did the applicants not run their case in this way, but the effect of the evidence is that the indigenous witnesses do not claim rights to country on the basis of a patrilineal model—at [224].

The compensation claim group

On the last day of the trial, the applicants sought to amend the description of the native title holders at the time the compensation acts were done (thus providing what they described as 'an exhaustive statement of the membership of the compensation claim group') despite the fact that in their points of claim, it was argued that it was not appropriate to provide a definitive list of individuals. His Honour agreed to the late amendments, interpreting it as 'putting an alternative to the applicants' preferred position'—at [226] to [239].

The Commonwealth's arguments

In summary, the Commonwealth argued that:

- the concept of a Western Desert cultural bloc is not an Aboriginal construct;
- the evidence did not support the concept of an eastern Western Desert;
- even if the Western Desert society did exist, it had fractured;
- the laws and customs under which the compensation claim group were said to have rights and interests were not traditional laws and customs within the meaning of s. 223(1);
- even if it was established that the applicants observe the traditional laws and customs of the Western Desert, they had not shown that members of the compensation claim group had any connection by those laws and customs with the application area—at [253] to [260].

In relation to the fourth point, the Commonwealth, in effect, argued that the experts had merely undertaken a statistical analysis of the recently observable patterns of behaviour rather than describing the normative principles derived from traditional law and custom—at [257].

The Northern Territory's arguments

The Northern Territory (the territory) generally adopted the Commonwealth's submissions. Although the territory did not dispute the view that the 'Western Desert comprises a cultural bloc of people speaking mutually intelligible dialects and adhering to broadly similar beliefs and customs', it argued that there was no evidence 'that the laws and customs of the Western Desert allow people to acquire rights and interests in land by multiple pathways' as identified by the applicants—at [269].

At the heart of the territory's position was a view that the applicants had failed to address the right question i.e. the elements of s. 223(1)(a) and (b) of the NTA. Rather, it was argued:

- they had produced an 'anthropological model' which described the social behaviour of people in the region as compared with the application area;
- the actual behaviour of people, as described in the reports, was of little assistance to the court;
- it may amount to descriptive rules but did not constitute legal norms which people were bound to follow—at [264] and [265].

In relation to the evidence of the Aboriginal witnesses, the territory submitted that:

- it showed a 'chaotic' set of practices which were not governed by a set of rules;
- the witnesses were not asked to identify the rules relating to interests in land and who holds those interests—at [266].

Overview of the applicants' evidence

Twenty four 'main' Aboriginal witnesses gave evidence. The main non-indigenous witness was Professor Sutton. The majority of Aboriginal witnesses gave oral evidence with the assistance of a translator. In relation to their evidence, the applicants submitted that:

- 'account should be taken of the cultural barriers to effective communication in a courtroom setting';
- some evidence given by Aboriginal witnesses that was unfavourable to the applicants' case should be disregarded where it is tainted by misunderstanding or poor communications—at [272], [294], [297].

His Honour was of the view that:

> Acknowledging the need to take account of barriers to communication in assessing evidence is one thing. Disregarding the evidence of indigenous [sic] witnesses unfavourable to the applicants' case because of what is said to be the phenomenon of 'gratuitous concurrence' is quite another. Of course, if I am satisfied from my own observations or from the evidence as a whole that a particular witness has not understood questions, or has incorrectly assented to propositions put to him or her, I would regard the evidence on that topic as of little or no probative value—at [298].

While evidence from Aboriginal witnesses provided the most important evidence in native title cases, his Honour was of the view that expert anthropological evidence could, in certain circumstances, supplement the evidence given by those witnesses—at [291] to [292].

The Sutton Report

In relation to the Sutton Report, his Honour was of the view that there were a number of difficulties with it which affected the 'cogency of certain conclusions reached by Professor Sutton' for the purposes of a native title hearing. In summary these were:

- Professor Sutton was not an expert in the traditional laws and customs of the Western Desert region—his role was to acquire knowledge so that he could express an opinion on the relevant issues;
- the field work designed to gather information from Aboriginal informants was done in a litigation context and there were also difficulties in undertaking the field work and obtaining reliable information e.g. there were difficulties in obtaining a reliable interpreter;
- Professor Sutton 'played an active part in formulating and preparing the applicants' case and ...this participation influenced both the way in which the case was presented and Professor Sutton's approach to giving evidence'. (His Honour noted that he did not doubt the sincerity of Professor Sutton's claim 'to have been at pains to maintain his independence while conducting the field work and preparing reports');
- the distinction between 'normative' behaviour in an anthropological and a native title context and Professor Sutton's use of it in the former context (as including 'average or typical' behaviour) rather than the way it is used in law reduced the usefulness of his analysis in a native title context—at [316] to [328].

Of significance was the analysis in the report of the difference between the views of the old people as opposed to those of the younger generation. Professor Sutton characterised it as a 'movement of emphasis from a clear primacy being given to birthplace to more [of] a constellation approach, including birthplace'. The question then was whether such a 'shift' was consistent with the traditional norm or reflected a new construct or norm—at [331] to [334].

Reasoning on the Western Desert bloc

His Honour rejected the Commonwealth's submission that the Western Desert bloc was solely an anthropological concept and concluded that the evidence supported the view that it can be regarded as a society for the purposes of s. 223(1). The question then was whether there had been continuity of that society, at least until the compensation acts were done. After reviewing the evidence, Sackville J held that:

- the Western Desert bloc had existed as society at all times since sovereignty;
- some members of that society have acknowledged and observed its laws and customs in the eastern Western Desert, including the area around Uluru and Kata Tjuta—at [364].

His Honour emphasised that this finding did not address a number of critical issues in relation to the application, namely:

- whether the members of the compensation claim group acknowledged and observed the laws and customs identified in the pleadings;
- if so, could those laws and customs be described as normative in the sense required by s. 223; and
- whether those laws and customs were traditional laws and customs of the people of the Western Desert bloc within the meaning of s. 223—at [366] and [391].

His Honour found it unnecessary to determine the second point—at [397].

Lack of congruence between laws and customs pleaded and those described in evidence

As noted earlier, the applicants finally settled on the primacy of the four conditions pleaded in their points of claim as being determinative of who held rights and interests in land. However, Sackville J noted the lack of congruence between the pleaded case and the way in which the applicants presented their evidence and submissions—at [399] to [401].

Indeed, the evidence of the Aboriginal witnesses, in relation to the laws and customs relevant to rights and interests in land, did not 'correspond to the case pleaded by the applicants', according to his Honour. Nor did it correspond to the combination of conditions set out by Professor Sutton. According to the court, the applicants appeared to have assumed that the laws and customs of the group could 'be pieced together like a mosaic, using elements from the evidence of individual witnesses'—at [405] to [406].

This lack of correspondence between the evidence of the Aboriginal witnesses and the way the applicants presented their case did little to support the applicants' claim that the members of the compensation claim group followed a particular set of normative laws and customs and that those laws and customs could be described as traditional—at [408] and the examples given at [409] to [439] and [448], where Sackville J illustrates some of the more 'significant variations' in the evidence of the Aboriginal witnesses.

The court was of the view that the evidence of these witnesses did not reveal a consistent pattern of observance of traditional laws and customs in relation to interests in land. Therefore, his Honour concluded that:

> [E]ven if a reasonably flexible interpretation of the pleadings is adopted, the applicants face very serious difficulties in making out their case. The most fundamental problem is that the evidence does not reveal a consistent pattern of observance and acknowledgement of laws and customs, or even practices, relating to rights and interests in land. Consequently, the evidence falls short of establishing the existence of a body of laws and customs relating to rights and interests in land that was acknowledged and recognised by members of the Western Desert bloc at the relevant time or times. A second major difficulty is that the evidence of virtually none of the senior Aboriginal witnesses supports the distinction between 'conditions' and 'additional factors' underpinning the applicants' pleaded case—at [446].

His Honour stressed that his findings do not necessarily imply that none of the Aboriginal witnesses are *ngurraritja* for sites in the area under the laws and customs observed by them. Further, his Honour said that:

> If most witnesses gave evidence broadly compatible with the pleaded case, it perhaps would be open to disregard minority or idiosyncratic views or practices. But this is not the state of the evidence. It reflects such a variety of opinions, practices and assertions that it cannot be taken as establishing that the indigenous [sic] witnesses or members of the compensation claim group observed and acknowledged at the relevant times laws and customs of the Western Desert bloc as pleaded ... .

> ... I stress that I was not invited to pick and choose among the laws and customs relied on by the applicants ... . **My finding is that the applicants have not made out the particular case on law and custom that they have chosen to plead and to press in their final submissions**.
>
> I have commented that some of the evidence relating to the laws and customs of the Western Desert appeared to me to be self-serving. This does not necessarily mean that the people who gave evidence of this kind lack a genuine belief in the validity or legitimacy of the 'laws' and 'customs' that they identified, or the claims that they advanced. But ... the evidence as a whole does not support the applicants' contention that the laws and customs acknowledged and observed by the indigenous [sic] witnesses, or the compensation claim group, correspond in substance to those identified in the Points of Claim—at [449] to [451], emphasis in original.

Were laws and customs traditional?

Given this finding, Sackville J did not have to decide whether any of the laws and customs acknowledged and observed by the compensation claim group were traditional but felt bound to do so because the respondents had raised the issue. This was done on the assumption that, contrary to the earlier finding, the applicants had shown that the compensation claim group acknowledged and observed the laws and customs as pleaded—at [453].

The court noted that:

- if laws and customs had expanded or altered over time such that they can no longer be said to be founded on the laws and customs which existed at sovereignty, then they could not be described as 'traditional';
- determining whether or not this was the case is a matter of fact and degree—at [461].

Expert evidence

His Honour noted that:

- claimants in native title litigation suffer from the disadvantage that there are no 'indigenous [sic] documentary records that enable the court to ascertain the laws and customs followed by Aboriginal people at sovereignty';
- the collective memory of living people will not extend back for 170 or 180 years and so, in the 'ordinary course', anthropological evidence is adduced to establish the link between current laws and customs (or those observed in the recent past) and the laws and customs at the time of sovereignty and, in the present case, the applicants relied to a 'considerable extent' on Professor Sutton's evidence to establish that link;
- however, there was a 'serious difficulty' in relying on that evidence to show that the pleaded laws and customs were 'traditional', namely that while Professor Sutton's approach might conform to the 'anthropological method', his report did not address the question of whether the principles identified in his report (which differed from what was pleaded) were 'traditional' in a native title context;
- on the contrary, the propositions discussed in the report did not 'purport to describe behaviour conforming to long-standing norms or rules' but what was called 'average or typical behaviour as well as ideal norms';

- this analysis did not address the question, 'crucial to these proceedings', as to whether that 'behaviour' was 'in conformity with, or dictated by, the rules and norms that formed part of the traditional laws and customs of the Western Desert';
- while some adaptation of traditional laws and customs may derive from the normative system in force at the date of sovereignty, Professor Sutton accepted that his report did not consider whether the changes that had occurred in this case could be regarded as 'adaptive' in the required sense;
- although the Sutton Report touched on the question of 'continuity' and Professor Sutton recognised there had been changes from the 'ossified view' of the rules held by older people, the report did not 'systematically explore the extent to which the principles identified ... incorporate changes to the traditional laws and customs acknowledged and observed at sovereignty'—at [462] to [464].

Sackville J examined the approach taken in the Sutton Report in relation to the work of earlier anthropologists and concluded that:

> Professor Sutton's rejection of the view that the eastern Western Desert was subdivided into land-holding descent-based groups is at odds not only with Tindale's views, but with the opinions expressed by other anthropologists who worked closely with Western Desert people ... . [T]he earlier anthropologists, generally speaking, identified a system whereby local groups of people, recruited on a principle of patrilineal descent, had rights or interests in relatively bounded estates, which were largely defined by clusters of spiritually significant sites.
>
> ...
>
> Professor Sutton expresses a preference for an approach which includes within the 'normative', behaviour that is average or typical, as well as behaviour that conforms to ideal norms. This approach is much less concerned with historical continuity, in particular with whether current rules or practices can be regarded as 'traditional', than with simply describing and recording contemporary practices and 'case material'. It is perhaps therefore not surprising that Professor Sutton sees the anthropological literature in a somewhat different light than might a person considering whether current land-holding practices can fairly be regarded as conforming to the traditional laws and customs of the Western Desert—at [477] to [478].

Conclusions

While acknowledging that 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', Sackville J found that the weight of the anthropological evidence, including published work of 'distinguished researchers who have studied the people of the Western Desert', pointed 'clearly' to a conclusion that, under the traditional laws and customs of the Western Desert bloc:

- the landholding units comprised small local groups;
- each group consisted of people principally recruited or united on the basis of common patrilineal descent;
- members of the group had 'rights and interests' (in the language of s. 223) on a particular site or a particular cluster of sites connected with the *Tjukurrpa*;

- the traditional laws and customs of the Western Desert also recognised 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 the person's claim was acknowledged and accepted by other members of the group;
- the expert evidence for the applicants was not persuasive to the extent that it suggested otherwise and did 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'—at [497] to [498].

The court noted that these findings about the content of the traditional laws and customs of the Western Desert were inconsistent with the applicants' case, which:
- repudiated an emphasis on patrilineal descent as a key element in the acquisition of rights and interests in land under traditional laws and customs;
- rejected the concept of 'discrete bounded areas' or 'estates';
- asserted that 'unpredictability, negotiability and contestation' were features of the laws acknowledged and customs observed by the people of the eastern Western Desert, contrary to the anthropological literature that recognised 'estates' as an element of traditional laws and customs—at [499].

His Honour was of the view that the evidence did not support the applicants' assertion that the laws and customs of the Western Desert bloc were 'unpredictable or subject to contestation in the manner suggested by them'—at [499].

While it was true that there was a 'modest overlap' between the principles governing rights in land identified in the anthropological literature and the various 'conditions' and 'additional factors' advanced by the applicants, Sackville J was of the view that:
- the nature and scope of the conditions and additional factors go far beyond the circumscribed principles of traditional laws and customs articulated in the anthropological literature, particularly in relation to the applicants' wide-ranging proposition that 'kin links' can suffice to constitute a person as *ngurraritja* for country;
- the applicants did not contend that, if the content of the traditional laws and customs was as described by the court, those laws and customs 'contemplated the virtual abandonment of patrilineal descent' and the acceptance of an ill-defined and far-reaching 'kin links' principle identifying *ngurraritja* for country;
- there was nothing in the evidence (putting the views of applicants' experts to one side) to suggest that the pleaded criteria could be classified as 'adaptations' of traditional laws and customs;
- even if the findings as to the content of traditional laws and customs were not made, the court would not be satisfied that any laws and customs relating to rights and interests in land, that may have been acknowledged and observed by the Aboriginal witnesses, are the traditional laws and customs of the Western Desert;
- while it is appropriate to take into account the difficulties of proof inevitably confronting claimants and there is some leeway in accommodating post-

sovereignty alterations to laws and customs, the onus of proof 'remains with the applicants'—at [500] to [501].

On the question of whether the laws and customs put forward by the applicants were 'traditional', his Honour noted that:

- virtually all of the Aboriginal witnesses attributed the binding force of the laws and customs they described to the *Tjukurrpa* and to the teachings of their ancestors;
- many gave evidence that the laws and customs, being handed down by ancestral beings, were unchanging and thus could not be modified by human intervention;
- these beliefs were not incompatible with adaptation of traditional laws and customs;
- if the Aboriginal witnesses' evidence 'consistently favoured a particular set of laws and customs, an inference might well be available' that the laws and customs described by the witnesses have remained substantially intact since sovereignty or that any changes were of a kind contemplated by pre-sovereignty norms;
- however, that evidence was not consistent and, accordingly, 'the force of any inference that might otherwise be available is much reduced';
- the fact that, in 'modern times', people apparently have adhered to such different versions of law and custom rather suggests that the changes that have occurred since sovereignty are not mere 'adaptations';
- the anthropological evidence at least suggested that the criteria for acquiring rights and interests in land under pre-sovereignty norms were substantially more restrictive than the laws and customs said to be currently acknowledged and observed and suggested that patrilineal descent played an important role in pre-sovereignty norms;
- it was 'significant' that Professor Sutton implicitly accepted that the 'messier realities of the case material' relating to current practices reflected norms that were different from the criteria articulated by older and more senior people;
- some of the Aboriginal witnesses' evidence seemed to support the opinions expressed by the early anthropologists e.g. that there was a close correlation between the country of a person's male forebears and the person's own country and *Tjukurrpa*, the importance of a 'borning' taking place on the father's country, that rights and interests were acquired through male ancestors and that claims through female relatives were rejected by *ngurraritja*;
- evidence of that kind was consistent with the emphasis on patrilineal descent identified in much of the earlier anthropological literature;
- the Sutton Report did not directly address the critical question and the analysis it contained did not assist the applicants to establish that the current laws and customs relating to rights and interests in land represent an adaptation of pre-sovereignty norms—at [503] to [507].

Therefore:

> [T]he evidence is simply insufficient to enable me to conclude that the laws and customs pleaded by the applicants, to the extent that they were acknowledged and observed by the Aboriginal witnesses at the relevant times, are the traditional laws and customs of the Western Desert—at [507].

Extinguishment and other matters
While his Honour did not have to consider the effect of the extinguishing acts on native title or on the right to compensation, the parties had made submissions on these points and thus his Honour dealt with those matters on the assumption that the applicants held native title to the relevant areas when the compensation acts were done.

Effect of pastoral leases
Two pastoral leases were granted in 1882 and 1896 over areas that included the application area. Both leases contained a broad reservation in favour of Aboriginal people. It was common ground that the leases were valid and did not confer a right of exclusive possession—at [535].

After reviewing the relevant case law, Sackville J concluded (speaking generally and assuming native title existed at the relevant time) that the following native title rights would have survived the grant of the leases:

- to enter and travel over all parts of the application area;
- to live on the land, camp and erect shelters;
- to hunt for and gather food and to take traditional resources of the land as may be used for sustenance and shelter;
- to gain access to and use water on the land;
- to visit, maintain and protect places of importance on the land;
- to share and exchange (but not trade) traditional resources obtained from the land; and
- to conduct ceremonies and undertake other traditional practices on the land—at [565].

Residual right to control access of Aboriginal people
The applicants accepted that any right to control the use of and access to the application area had been extinguished by the grant of the pastoral leases. However, they did not accept that the right to control access by other Aboriginal people in accordance with traditional law and custom had been extinguished.

His Honour reviewed the case law and, in particular, *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28, summarised in *Native Title Hot Spots* Issue 1, *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCFCA 110, summarised in *Native Title Hot Spots* Issue 15, and *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Group* (2005) 145 FCR 442; [2005] FCAFC 135, summarised in *Native Title Hot Spots* Issue 16. In respect of the latter case, Sackville J said that:

> [T]heir Honours seemed to accept that a determination in that form would be justifiable 'where the native title holders were found to be a subset of a society comprising the Western Desert Bloc'. Since that is the (hypothetical) position in the present case, I would conclude that any native title rights to make decisions about the use or enjoyment of the application area by Aboriginal people who are governed by the traditional laws and customs of the Western Desert bloc were not extinguished by the pastoral leases—at [571].

Tenures from 1976

While his Honour did not have to consider the acts which may have given rise to an entitlement to compensation because the members of the compensation claim group had not established that they held native title rights and interests at the time the acts were done, he nevertheless addressed the issue of the effect of those acts because the parties had argued the point before him and in case the matter goes further—at [573].

The entire application area was proclaimed as the Town of Yulara in 1976 under s. 111 of the now superseded *Crown Lands Act 1931* (NT). In 1981, notice was given of a determination made under that Act to grant to the territory an estate in fee simple over a portion of the area for the purposes of an airport (Connellan Airport). Later in that year the grant was made and registered under the now superseded Real Property Act (SA) (as amended at the time by territory law)(the RPA)—at [575].

The parties agreed that various grants, dedicated roads and road reserves created between 1979 and 1992 covered the entire application area, other than the Lasseter Highway. The relevant public works comprised the airport, the highway, the roads and bores. The construction of the public works was undertaken by, or on behalf of, the territory after 31 October 1975, the date the *Racial Discrimination Act 1975* (Cwlth) (RDA) commenced. Very generally speaking, the public works were constructed around 1980. Some of the roads were constructed between 1980 and 1992—at [578] to [589] and [591] to [601].

Freehold grants

The Commonwealth accepted that the grants did not, of themselves, extinguish native title (as they would have been invalid to some extent if native title had existed at the time the acts were done, which the Commonwealth did not accept). However, the argument put by the Commonwealth was that native title was extinguished before the NTA or the territory's *Validation (Native Title) Act* came into force as a result of the indefeasibility provisions of the RPA, which (as amended by territory law) was then in force.

The Commonwealth's submission was that:

- there was no inconsistency between the RPA and s. 10(1) of the RDA because the RPA treated unregistered native title rights and interests in the same way as other unregistered interests in land brought under the RPA;
- in these circumstances, the native title holders would not be entitled to compensation since extinguishment took place independently of the NTA and the *Validation (Native Title) Act*—at [637] and [638].

His Honour was of the view that the comparison between the treatment accorded by the RPA to unregistered native title rights and interests and other unregistered interests suggested by the Commonwealth was appropriate, subject to one important qualification:

> In my view, the comparison does not require a general analysis of the operation of the indefeasibility provisions of the Real Property Act. Rather, what is required is an

> examination of their specific application to a fee simple grant of Crown land. That is the point at which the Real Property Act affects native title rights and interests that would otherwise subsist over the land—at [704], emphasis in original.

This would require:

- the effect of the indefeasibility provisions of the RPA to be considered in relation to fee simple grants of Crown land, not in relation to transactions that may take place after the land has been brought under the RPA;
- a comparison between the effect of the indefeasibility provisions on unregistered native title rights and interests over Crown land and their effect on unregistered interests acquired in accordance with the general law—at [705].

In this case, because pastoral leases had been granted over the area, it was not the case that the statutory exceptions to indefeasibility applied. (It was not resolved whether they would apply in any case where exclusive native title rights and interests existed at the time of registration under the RPA.)

His Honour was of the view that the relevant provisions of the RPA would be inconsistent with s. 10(1) of the RDA if they had the effect the Commonwealth submitted, which was to extinguish native title because the 'practical' effect:

> [W]ould be to deny the holders of native title rights and interests security and enjoyment of their title to the same extent as holders of other forms of title ultimately derived from the Crown—at [701].

His Honour concluded that, on the assumption that native title existed at the time, the freehold grants were invalid and registration of the freehold title under the RPA did not extinguish native title—at [705]. Note that these freehold grants had been subsequently validated by the *Validation (Native Title) Act*.

Public works

The court noted (among other things) that:

- this was not a case where there was an issue of inconsistency between the RDA and the Northern Territory (Self-Government) Act 1978 and the relevant regulations because the latter were also Commonwealth legislation and must be read consistently with the RDA;
- the regulations could not be read to authorise the territory to undertake public works in a manner that would be inconsistent with s. 10(1) of the RDA;
- therefore, the Northern Territory (Self-Government) Act 1978 and relevant regulations could not be construed as authorising actions that would have a greater impact on native title rights and interests, than on other forms of title, because this would result in native title holders not having the same security of enjoyment of their rights as other title holders;
- accordingly, that legislation would not be construed as authorising the construction of public works in circumstances, such as in this case, that would extinguish native title rights and interests without adequate compensation—at [724] to [725] and [733].

His Honour concluded that the public works had been undertaken in the application area without lawful authority. Therefore, the act of construction could be described as being 'invalid to any extent' for the purposes of the definition of 'past act' in s. 228 of the NTA and the analogous provisions of the *Validation (Native Title) Act*. Public works are category A past acts and would have been validated by the *Validation (Native Title) Act*—at [734] to [736].

Timing of extinguishment

To any extent that the compensation acts discussed above were invalid, they were all validated by the *Validation (Native Title) Act*. His Honour identified the following questions as arising in this case:

- which provisions had the effect of extinguishing the native title rights and interests;
- when is extinguishment taken to have occurred;
- under which provisions are native title holders entitled to compensation?

His Honour reviewed the past act and previous exclusive possession act (PEPA) provisions of the NTA and concluded that, if an act is both a past act and a PEPA, the provisions that deal with the effects of past acts do not apply because:

- subsection 23C(3) of the NTA says that where an act is a PEPA, s. 15 (which provides for the extinguishing effect of past acts) does not apply;
- section 23C provides that a PEPA extinguishes native title; and
- the extinguishment is taken to have happened when the act was done, for acts other than public works and, in the case of public works, when the construction or establishment of the public work began—at [764].

In his Honour's opinion, compensation for a past act that is, by definition, also a PEPA arises under s. 23J and not s. 17 because the effect of extinguishment is determined by s. 23C rather than s. 15—at [766] to [768].

This was relevant because the applicants had claimed, among other things, that compensation included the value of the public works and other improvements on the land done after the relevant acts had taken place (on their view, the outcome if compensation was determined under s. 17).

As his Honour stated, 'it is difficult to imagine that the compensation regime of the NTA is intended to provide windfall benefits to claimants that are implicit in the applicants' arguments'—at [772].

Note that the relevant provisions in this case are actually those found in the *Validation (Native Title) Act*. However, to the extent relevant, those provisions mirror the NTA and the outcome is the same.

Decision

Whether the compensation claim group was entitled to compensation for the 'compensation acts' was firstly dependent upon the threshold issue of whether the group had, at the time the acts were done, any native title rights and interests over

the application area. His Honour held that the members of the compensation claim group had not succeeded on that issue because they had not shown through their evidence that:

- they 'acknowledged and observed at the relevant times the laws and customs of the Western Desert Bloc as pleaded in their Points of Claim';
- 'any laws and customs relating to rights and interests in land that may have been acknowledged and observed by the Aboriginal witnesses are the traditional laws and customs of the Western Desert bloc'—at [789].

The compensation application was dismissed.