Native Title Hot Spots

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Determination of native title in Rubibi

Rubibi Community v Western Australia (No 7) [2006] FCA 459

Merkel J, 28 April 2006

Issues

This decision, the seventh in the series of *Rubibi* cases, involves the making of a determination of native title over the town of Broome and its surrounds in the Kimberley region of Western Australia. It also deals with (among other things) the question of the extent to which native title was extinguished.

Background

His Honour Justice Merkel had previously decided that, putting questions of extinguishment to one side, the Yawuru community possessed a native title right to exclusive possession of the area subject to their claimant application, other than in relation to inter-tidal areas where native title could only be recognised as 'non-exclusive': see *Rubibi Community v Western Australia (No 5) [*2005] FCA 1025 *(Rubibi 5)* and *Rubibi Community v Western Australia (No. 6)* [2006] FCA 82 *(Rubibi 6),* summarised in *Native Title Hot Spots* Issue 16 and Issue 18 respectively.

While agreement was reached on many of the outstanding issues, several others were left to the court to decide, including:

- the operation of a native title right to exclusive possession over areas in 'common use', such as public beaches;
- whether the native title right to take and use natural resources should expressly be limited to 'non-commercial' purposes;
- whether the 'special attachment' of clan members should be noted in the determination as an 'interest' under s. 225(c) of the *Native Title Act 1993* (Cwlth) (NTA);
- the description of the native title holders and the circumstances in which 'self-identification' was required;
- the validity of certain freehold grants, reserves and a special lease;
- whether a licence to occupy created a legally enforceable right to a grant of freehold;
- the effect on native title of certain 'improvements' to areas subject to non-exclusive pastoral leases and mining leases;
- the application of ss. 47A and 47B.

Operation of native title right to exclusive possession in 'common usage' areas

Merkel J raised with the parties 'how a [native title] right of exclusive possession might operate in a practical way in urban and other areas in common use by the general community'—at [7].

The Yawuru claimants referred the court to s. 212(2) of the NTA, which empowers the states, the territories and the Commonwealth to 'confirm' any existing access to, and public enjoyment of, waterways, beds and banks or foreshores of waterways, coastal waters, beaches or stock routes and 'areas that were public places at the end of 31 December 1993'. The State of Western Australia had

passed legislation to confirm such access: see s. 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1995 (WA) (TVA). This 'confirmation' does not extinguish native title rights and interests: s 212(3) of the NTA. The state submitted that the court's concern was 'also' addressed by extinguishment or as a result of the existence of common law rights that could be recorded as 'other interests' in the determination.

While there was no express finding on point, the court appears to have accepted these submissions. Public access to, and enjoyment of, waterways, beds and banks or foreshores of waterways, coastal waters, beaches or stock routes that 'existed' as at the date of the determination, 'so far as' it was confirmed by s. 14 of the TVA, are recognised as 'other interests' in the determination area. Common law public rights to fish and navigate in tidal waters are also are recognised as 'other interests' in the determination area.

The determination also provides that recognition of the existence of native title, whether 'exclusive' or 'non-exclusive' has 'no effect' on these 'other interests' to the extent of any inconsistency and, among other things, the doing of any activity by or under those 'other interests' prevails over the native title but does not extinguish it.

In this context, note Merkel J's views on the effect of 'common usage' on the application of ss. 47A or 47B, summarised below under the heading 'Occupation under s.47A or 47B and in areas used by the public'. As a result, recognition of 'exclusive' native title over areas in public use was limited in any case.

Exclusive possession and exploitation of natural resources

The question here was whether the determination should limit the native title right to exploit resources to non-commercial exploitation. The Yawuru claimants argued that:

- such a limitation was inconsistent with the native title right to 'exclusive possession', which entitled the native title holders to determine the purposes for which the land and waters subject to that right were to be used;
- commercial exploitation of the resources under a native title right (whether exclusive or not) was the subject of extensive regulation by government;
- paragraph 211(2)(a) of the NTA only exempted native title holders from the restrictions imposed by such regulation if the native title right was exercised for 'non-commercial communal needs'—at [8] to [9].

His Honour found that the right should be limited to non-commercial purposes, preferring the submissions of the state and the Western Australian Fishing Industry Council (WAFIC) that (among other things):

- in relation to a claim for recognition of native title under the NTA, the court is not concerned with the common law rights that might attach to a right of exclusive possession but, rather, with the rights and interests possessed under traditional laws and traditional customs;
- the evidence did not support a finding of a native title right or interest to commercially exploit resources—at [10] to [12].

Therefore, the native title right to take and use resources was determined to be for 'personal, domestic or non-commercial communal purposes' only—at [12].

Clan's 'special attachment' is not 'other interest' under s. 225(c)

In *Rubibi 5* at [223] and [375], the court recognised that clan members had 'special attachments to specific areas' but concluded that any such attachment did not give rise to a native title right or interest. One of the Yawuru clans, the Walman Yawuru, sought to have that 'special attachment' recognised in the determination of native title as an 'other interest' for the purposes of s. 225(c).

Merkel J refused to do so:

> The only 'rights' or 'interests' the Walman Yawuru clan members may have in relation to the Yawuru claim area are those held in any capacity they may have as members of the Yawuru community. Those rights and interests are the native title rights and interests…set out in the determination pursuant to s 225(b) and…not 'other interests'…pursuant to s 225(c)—at [13].

Criteria for membership of native title holding community

In relation to the description of the native title holders, his Honour was satisfied that (among other things):

- where a person, descended from an apical ancestor, had two Yawuru parents, the criteria of self-identification or general community acceptance was not required to show membership of the native title holding community;
- where only one parent of a descendant was Yawuru, the criterion of self-identification must be satisfied; and
- people who were not descendants of an apical ancestor may also be members of the native title holding community (e.g. via adoption or having a long term physical association with and cultural responsibilities for it) provided that the criteria of self-identification and general community acceptance were satisfied—at [16].

The Walman Yawuru submitted that the criterion of general community acceptance should also apply where only one parent was Yawuru. While Merkel J admitted to being 'troubled' by whether that criterion should apply in those circumstances, it was decided that it should not because 'general community acceptance' was not required by the Yawuru community's traditional law and custom. On what it means to 'self identify', his Honour emphasised that:

The genuineness of self-identification is to be determined by reference to all relevant facts, which can include past conduct in relation to self-identification—at [17].

The Walman Yawuru also claimed the evidence did not justify incorporation of a person having high cultural knowledge and responsibilities. The court was satisfied that it was justified on the evidence while acknowledging that it would only be activated 'rarely' because the person in question must:

- be closely associated with the area;
- have the requisite knowledge and responsibilities;
- self-identify as a member of the Yawuru community;
- be generally accepted by other members of that community as a Yawuru person—at [18].

Validity of freehold grants

A question of the validity of grants of freehold title to 140 lots at Cable Beach in Broome arose because the grants were made after 1 January 1994 (when the NTA commenced) without the future act processes, applicable under the NTA at the time, being followed. It appeared that houses had been built on the blocks concerned. None of those who held the freehold had been informed of the likelihood that their rights were subject to the rights and interests of the native title holders.

His Honour noted that this 'extraordinary situation' apparently came about because the legislation the state relied on at the time to ensure the validity of the grants, the *Land (Titles and Traditional Usage) Act 1993* (WA), was later held to be invalid: see *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373; [1995] HCA 47.

The reason, given by the Commonwealth for the failure to notify, was that the area subject to these freehold grants was excluded from the area covered by the Yawuru claimants' application. Therefore, the court could not make a determination of native title in relation to that area and so there was no need to notify those holding the freehold title.

In the event, the court found that this was correct i.e. on a proper construction of their application, the Yawuru claimants did not claim the 'relevant freehold lots' and the 'standard' form of excluding only 'valid' freehold did not have the consequence of 'some kind of implicit inclusion…of invalid freehold grants that do not extinguish native title'. Therefore, it was found that the 140 lots could not be the subject of the native title determination 'in the present matter'—at [27] and [29].

However, it was noted that that this would not 'make the problem disappear' because, even if the area affected by the freehold grants was not 'technically' covered by the application, it was not 'relevantly distinguishable' from the areas that surrounded it, where native title was recognised—at [23].

As Merkel J noted:

> Plainly, the situation is one that will have to be resolved between owners of the freeholds, the State and the native title holders. One likely method of resolution is an indigenous land use agreement under which the native title holders may relinquish their native title rights and interests on appropriate terms—at [22].

Since the area concerned was not included in the application, it is not subject to the determination. However, his Honour considered the question of validity in any case.

The parties accepted that, if the grants were invalid to some extent, they had not been validated by subsequent amendments to the NTA. Therefore, the question of validity turned on the relevant future act provisions of the old Act i.e. the NTA as it stood before the commencement of the *Native Title Amendment Act 1998* (Cwlth).

Under the old Act:

- section 22 provided that an 'impermissible future act' was invalid to the extent that it affected native title;
- section 227 provided that an act affected native title if it extinguished native title rights and interests or was otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

As the freehold grants were future acts that were not validated by any provision of the NTA, they were impermissible future acts under the old Act and appeared to be invalid to the extent that they affected native title—at [20], referring to *Neowarra v Western Australia* [2003] FCA 1402 *(Neowarra)* at [586], summarised in *Native Title Hot Spots* Issue 9.

Due to earlier acts (mostly, the creation of reserves) that extinguished 'exclusive' native title, only 'non-exclusive' native title rights and interests existed when the freehold was granted. Therefore, the grants were valid insofar as they did not affect native title. But 'they cannot have any extinguishing effect or confer rights that are inconsistent with the native title rights and interests' found to exist. Accordingly, his Honour found that any rights and interests of the freehold owners—that were not inconsistent with the non-exclusive native title rights and interests—could co-exist with the native title rights and interests—at [21].

It was found that, in principle, s. 47B might apply to the area affected by the grants. However, since those grants had no extinguishing effect on the surviving native title rights and interests, his Honour was of the view that the section would not apply because:

- there was no extinguishment to be 'disregarded' for the purposes of s. 47B; and
- in any event, the requirement in s. 47B(1)(c) for occupation by one or more members of the native title claim group when the application was made was not met—at [22].

Crown grants done after NTA commenced in exercise of a legally enforceable right are past acts

Prior to 1 January 1994, the state granted several licences to occupy under the *Land Act 1933* (WA) (Land Act) after the relevant Minister had invited applications for the purchase of the areas concerned. Each purchaser was granted a licence to occupy on payment of the first instalment of the purchase price. At some time after 1 January 1994, Crown grants were made to each licence holder. Under the licence and the relevant provisions of the Land Act, the licence holders were entitled to a Crown grant upon payment of the purchase price. The question was whether the Crown grants were past acts as defined in s. 228(3)(b)(i) of the NTA, which provides that an act that takes place after 1 January 1994 is a past act if (among other things) it takes place 'in exercise of a legally enforceable right created by...[an] act done before 1 January 1994'.

It was found that:

- the licence to occupy was not distinguishable from a terms contract under which a purchaser is entitled to possession prior to payment of the purchase price;
- the licence was expressed to be subject to the terms specified in it and also to the terms and conditions of the Land Act which included a requirement to pay the balance of the purchase price;
- the Land Act provided for a Crown grant to be made to the purchaser when the purchase price was paid and any other conditions were satisfied;
- if, as is apparent from s. 229(2)(iii) of the NTA, the legislature intended an option to purchase created prior to 1 January 1994 to be a legally enforceable right to acquire land, it must follow that a contract to purchase was also intended to constitute a legally enforceable right to acquire land;
- the licences created a legally enforceable right, albeit in equity, to the freehold grant i.e. the act that created the legally enforceable right to the freehold grant was the purchase made prior to 1 January 1994 (evidenced by the licence to occupy among other things), rather than the payment of the purchase price after 1 January 1994;
- the payment of the price and the satisfaction of any other relevant conditions merely resulted in the prior legally enforceable right crystallising into a presently enforceable right;
- accordingly, the licences were 'past acts' pursuant to s. 228(3)(b)(i) of the NTA, as were the freehold grants made after 1 January 1994 pursuant to those licences and, therefore, those Crown grants were valid—at [33] to [35].

Validity of creation of reserves

There was a dispute about whether certain reserves were valid. The largest and earliest of them, reserve 631, covered most of the town of Broome. The parties accepted that resolving the issue in relation to that reserve would also resolve the issue in relation to the later reserves.

Reserve 631 was subject to a notice in the Government Gazette dated 27 November 1883 which stated it was set aside for 'public purposes – adjoining Broome, Roebuck Bay'. As there was no evidence of the creation of the reserve apart from the gazette notice, this was accepted as a 'full and complete description' of the purpose of the reserve. The Yawuru claimants argued that the reserve was not validly created because 'public purposes' was not a purpose specified in land regulations in force at the time of Land Regulations 1882 (WA) (the land regulations).

The land regulations provided (among other things) that land could be reserved for the 'objects and purposes' in those regulations, including 'any purpose of safety, public utility, convenience, or enjoyment, or for otherwise facilitating the improvement and settlement' of the colony.

Merkel J considered the relevant authorities before finding that:

- the land regulation in question was in the 'broadest of terms' and extended to any purpose of public 'utility' or of 'otherwise facilitating the improvement and settlement' of the colony;
- 'public purposes – adjoining Broome, Roebuck Bay' was 'plainly' capable of being considered reasonably proportionate to the pursuit of the enabling purpose and therefore fell within the relevant regulation;
- it was a purpose that was implicitly associated with the development of the Broome township and, as such, was both directly and substantially connected to being a purpose of public 'utility' and was also capable of being characterised as a purpose facilitating the improvement and settlement of Broome in the Colony of Western Australia;
- the phrase 'public purposes' has a broad meaning;
- reserve 631 was created for one of the purposes specified in the land regulations and was validly created—at [41] to [46].

Validity of special lease

A special lease purportedly granted under s. 153 of the *Land Act 1898* (WA) for a term of five years commencing on 1 April 1930 was found to be invalid because:

- the area leased was reserved land at the time;
- the structure of *Land Act* 1898 suggested that the legislature intended that Pt III constitute a code in respect of transactions, such as leases, in respect of reserved land;
- section 153 only empowered the Governor to lease town, suburban or village lands that were not reserved lands under Pt III;
- accordingly, the Governor did not have the power under s. 153 to grant the special lease in question and so it was invalid—at [52] to [53].

Reserves where part used for public works—was native title extinguished over remainder?

The state argued that the construction of a jail and a police station on parts of the parcels of land reserved for those purposes extinguished native title in relation to the whole of the respective reserves because the state had asserted rights over the whole of the reserved area that were inconsistent with native title. It was common ground that native title was extinguished over the areas where the jail and the police station were built because these were public works.

His Honour noted what was said in *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 at [214] to [234], summarised in *Native Title Hot Spots* Issue 1 *(Ward)* on the question of extinguishment via the creation of reserve lands, including that:

- looking to the use actually made of a reserve distracts attention from the central inquiry, which is about rights created in others or asserted by the executive, not the way in which they may have been exercised;
- use of the area may suggest or demonstrate that such rights have been created or asserted but the basic inquiry is about inconsistency of rights, not inconsistency of use;
- designating land as a reserve for a public purpose was inconsistent with any native title right to decide how the land could be used but was not necessarily inconsistent with other native title rights;
- whether a native title right to use the land continued unextinguished depends on other considerations, particularly what, if any, rights in others were created by the reservation or later asserted by the executive—at [56].

These findings were said to provide the answer to the state's submission because:

- by creating the reserves in question, the executive did not create rights in others;

- the executive did assert its right to say how the reserved land could be used, which extinguished any native title right to control access to, and use of, the reserved area;
- however, that was not necessarily inconsistent with the native title holders continuing to use the land in whatever way they had, according to traditional laws and customs, been entitled to use it before its reservation;
- the exercise of the right to construct a jail or police station on part only of the reserved land was not necessarily inconsistent with native title rights and interests in the remaining part, if that part was not reasonably necessary for, or incidental to, the operation or enjoyment of the jail or police station—at [57] and see below on s. 251D.

Therefore, it was found that native title was not necessarily extinguished over the remaining areas of the respective reserves—at [59].

Use of cemetery reserves extinguished native title over area used

Note that, in accordance with the principles noted above, it was found that the exercise of rights to use a reserve as a cemetery under, for example, the *Cemeteries Act 1897* (WA), was the taking of steps authorised by the Crown that:

- created in others, or asserted, rights in relation to the land that were inconsistent with native title; and
- extinguished native title but only in respect of the areas where the rights were exercised e.g. to the extent the area was used for the conduct of burials, the digging of graves and the laying of tombstones—at [137].

Fencing a reserve for a main roads depot extinguished native title

The Main Roads Department erected a security fence around the perimeter of a reserve for the purpose of 'Depot, Main Roads Department'. After inspecting the site, his Honour concluded, in accordance with the principles noted above, that the state had asserted rights in relation to the whole of the reserve that were inconsistent with native title:

> In particular, the perimeter security fence is an assertion…, in pursuance of the reserved purpose, of..[the state's] right to exclude others from the depot. It follows that native title has been extinguished in relation to the whole of the reserve—at [150].

Vesting under Cemetery Act extinguished native title to whole reserve

Trustees had been appointed under s. 10 of the *Cemeteries Act 1897* (WA) for one of the cemetery reserves considered. That section provided (among other things) that:

- not only could trustees be appointed but, by deed of grant, the lands could be vested in the trustees of a public cemetery;
- serving the Government Gazette notice of the appointment of trustees on the Registrar of Titles resulted in the legal estate in the trust premises vesting in the trustees—at [138].

Although no deed of grant to the trustees was in evidence, Merkel J took the view that it was:

> [P]robable that such a deed did exist, and that the legal estate in the reserved land ultimately vested in the Shire [as trustee]. The reason for that conclusion is that it is implicit in the functions of trustees under the…[Cemeteries Act] that the legal estate in the cemetery vests in them upon their appointment. Also, it is difficult to think of a reason why the Governor would appoint trustees but not vest the legal estate in them—at [139].

Therefore it was found that, when 'the totality of the statutory scheme' was considered, the 'inevitable' conclusion was that the vesting of cemetery reserve was inconsistent with native title and, therefore, it was extinguished over the whole of the reserve—at [140].

Right to live on certain leased areas and extinguishment via 'improvements'

It was accepted that the court was bound by the decision of the Full Court in *Northern*

Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group (2005) 145 FCR 442; [2005] FCAFC 135 *(Alyawarr)* at [130] to [132] (summarised in *Native Title Hot Spots* Issue 16) to find that the native title right to live on a non-exclusive pastoral lease was not inconsistent with the rights of the lessee under the lease—at [61].

However, the state argued that there should be a different outcome for areas covered by mining leases issued under the *Mining Act 1978* (WA), relying (among other things) on the extensive rights conferred on the lessee to use, occupy and enjoy the leased land. This included the right to do all things necessary to carry out 'mining operations', a phrase given a wide definition by the legislation. The Yawuru claimants disagreed but accepted that the exercise of some of the lessee's rights would extinguish any inconsistent native title rights.

Merkel J was of the view that the reasoning in *Alyawarr* at [131] and *De Rose v South Australia (No 2)* 145 FCR 290; [2005] FCFCA 110 *(De Rose 2)* at [157] (summarised in *Native Title Hot Spots* Issue 15) applied equally to mining leases, namely.

- a native title right to live on the land leased was not necessarily inconsistent with any of the rights conferred under a mining lease and did not necessarily involve permanent settlement at a particular place;
- even if a permanent structure was erected in exercise of the native title right to live on the land, that did not preclude a mining lessee's right to require its removal in the event that it conflicted with a proposed exercise of a right under the mining lease;
- in the event there was a 'necessary' inconsistency, the lessee's rights would prevail;
- if the right under the lease was, for example, to erect improvements necessary for mining operations, the exercise of that right would extinguish any inconsistent native title rights in respect of the area on which the improvements were constructed and any adjacent area necessary for their enjoyment;
- the native title right to live on the leased land was 'qualitatively different' from a native title right to live on land where there was a native title right of exclusive possession because, in the latter case, the right of the native title holder is not subject to the risk of subsequent extinguishment—at [65] to [66].

In relation to the last point, with respect, even where 'exclusive' native title is recognised, it is 'subject to the risk of subsequent extinguishment' e.g. by operation of certain of the future act provisions of the NTA.

Native title and pearling

In order to preserve the point for any appeal, WAFIC submitted, 'as a matter of formality', that native title rights to take and use a particular species of pearl oyster were extinguished by the enactment of the various pearling Acts. It was accepted that His Honour Justice French had rejected the same submission in *Sampi v Western Australia* [2005] FCA 777 at [1146] to [1147] and that French J's decision would be followed unless shown to be 'clearly wrong', something WAFIC did not contend. Accordingly, Merkel J rejected WAFIC's submission for the reasons given by French J in *Sampi*, with which his Honour agreed—at [15].

Relevant area for purposes of ss. 47A and 47B

In relation to s. 47A, his Honour found that:

- 'textual, contextual and purposive considerations' pointed to 'the area' referred to in s. 47A(1)(c) as being the particular area the subject of the freehold estate, the lease, the vesting or the land expressly held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders as defined in that paragraph;
- the occupation that must be established was occupation in respect of the whole, rather than merely a part, of the particular

area the subject of the freehold estate, lease, vesting etc.—at [69] to [70], referring to *Neowarra* at [686] and [721] and the Explanatory Memorandum for the *Native Title Amendment Bill 1997* (the EM) at [5.45] to [5.49].

In relation to s. 47B, it was found that:

- the relevant area is the particular area in relation to which it has been concluded that, but for the section, native title rights would be extinguished;
- 'occupation' must be shown in respect of the whole, rather than merely a part, of the particular area where, but for s. 47B, native title would be extinguished—at [71] to [72], referring to Neowarra at [721] and [758] to [760] and the EM at [5.56].

Proving 'occupation' under ss. 47A or 47B

His Honour noted that the Yawuru claimants:

- relied on 'extensive' evidence of connection with visits to, and use of, numerous urban and bush areas within the Yawuru claim area;
- contended that the traditional connection with, and use of, the areas in question over a period of time by certain members of the claimant group constituted occupation of those areas at the relevant date;
- 'even' argued that they did not have to establish use because the native title right of exclusive possession recognised in these proceedings (subject to findings on extinguishment) was sufficient to constitute occupation, which was found to be 'erroneous' because it failed to distinguish between the criteria under s 223(1) for recognition of a native title right to exclusive occupation and 'the discrete requirement' in ss. 47A or 47B for occupation 'as a matter of fact'—at [74].

After noting that whether or not there was 'occupation' for the purposes of ss. 47A or 47B involved matters of 'fact and degree', Merkel J went on to extract some 'general principles' from earlier cases which included, in summary:

- while a broad and beneficial construction of the word 'occupy' was preferred, generally it required something more than a traditional connection with, or mere use of or visits to, the area;
- occupancy may be established, notwithstanding that members of the claimant group are rarely present on the area, so long as at least one claimant makes use of the area as and when they wish to do so;
- although it was not necessary to establish frequent use, it could be a relevant factor;
- the requirement for occupation should be understood in the sense that the Indigenous people traditionally occupied the land, rather than according to common law principles;
- use of the area by members of the claimant group that is not random or co-incidental but accords with the way of life, habits, customs and usages of that group is sufficient;
- while evidence in relation to traditional connection can be relevant, it was erroneous to equate connection with occupation;
- while 'random or co-incidental use' was unlikely to constitute occupation, and traditional use may be more likely to constitute occupation, there was no proper basis for reading a requirement of traditional use into these sections;
- where the use was not traditional, the question was whether the evidence about connection, use, habitation or visitation is sufficient to warrant a conclusion, as a matter of fact, that the requisite occupation was established;
- it was not necessary for occupation to be confined to members of the claimant group —it could be shared with others; and
- occupation by non-claimants did not preclude the claimants from 'occupying' the area in the sense required—at [76] to [85].

Over areas where there was a dispute as to whether or not ss. 47A or 47B applied, his Honour considered each in turn in the light of principles set out above. Not all of Merkel J's findings are noted below, only those that raise an additional issue.

On the application of ss. 47A or 47B, see also *Risk v Northern Territory* [2006] FCA 404 (summarised in this issue of *Native Title Hot Spots*) at [879] to [903].

Occupation under s. 47A or 47B and in areas used by the public

His Honour was of the view that:

- general public use of the area is a relevant, if not a determinative, factor;
- traditional connection cannot be assumed in respect of use of public areas where the use of those areas by claim group members is 'not a use for a traditional activity and is not distinguishable from use of the areas by other members of the public';
- the court should take account of the fact that, generally, visits to and use of areas in Broome, by the public, were largely indistinguishable from visits to, and use of those areas, by members of the claim group;
- that said, the case put in respect of each area must be considered in its own context and on its own facts having regard to all of the circumstances—at [85] to [87].

Section 47A and areas held by Aboriginal corporations

The issue was whether s. 47A applied to parcels of land held by several corporations (the corporations), all of which were incorporated under the *Aboriginal Councils and Associations Act 1976* (Cwlth). The objects of each of the corporations were, generally, to promote the economic and social development of their members. The rules for each provided for the property and funds of the corporation to be available at the discretion of the governing committee for the purpose of carrying out the objects of the corporation. His Honour found that:

- the property of each association was held expressly for the benefit of Aboriginal people;
- a combination of activities could amount to occupation by claim group members, notwithstanding that the area was also occupied by the corporation—at [95] to [87], referring to *Neowarra* at [697] to [698], [706] and [708].

However, it was found that s. 47A did not apply to areas held by:

- Mamabulanjin Aboriginal Corporation, because the 'activity' relied on was residence in one of the two houses on the area by a claim group member and this was occupation of 'merely' part of the area;
- Bidyadanga Aboriginal Community La Grange Inc, where a sobering up centre was in operation, because 'the involvement of some Yawuru persons, as well as others, in co-ordinating and using the centre is not sufficient to constitute occupation of the centre';
- Nirrumbuk Aboriginal Corporation, because the evidence did not establish the requisite occupation;
- Broome Aboriginal Media Association, because 'the involvement of Yawuru persons, together with others, in the association (whether as members or employees) and participation in some of its activities' was not sufficient to constitute occupation—at [98] to [101].

Pastoral lease held by ILC and s. 47A

It was found that:

- Roebuck Plains pastoral lease, held by the Indigenous Land Corporation, was held 'expressly' for the benefit of Aboriginal people; and
- at the relevant time and thereafter, the area was used by members of the Yawuru claim group to pursue traditional activities as and when they chose to do so;
- therefore, the requisite occupation was established and s. 47A applied—at [102].

Section 47B and areas outside town boundary

Although the evidence in relation to these areas of unallocated Crown land (UCL) was sometimes 'sparse', his Honour accepted that the requisite degree of 'occupation' was established in relation to all areas outside of the town boundary where the application of s. 47B was in dispute on this ground, largely on the basis of continuing traditional use of the general area by Yawuru claim group members, or connection with the area and traditional activities undertaken in the area by Yawuru claim group members, as and when they choose to do so—at [104] to [114].

Section 47B and areas within the town boundary

Section 47B was found to apply only to areas of UCL within the town boundary where there was evidence that members of the claim group:

- visited and used the areas to obtain bush tucker, bush medicines and, in some instances, different kinds of wood for traditional and ceremonial purposes;
- hunted possums, kangaroo and goanna;
- and, in the coastal areas, fished, crabbed and cockled as well obtained bush medicine and bush tucker.

The state mostly accepted the evidence was sufficient for proof of 'occupation' under s. 47B but argued it was evidence of contemporary usage, rather than usage at the relevant dates i.e. in 1994 or 1995 when the application was made.

While Merkel J was prepared to find that s. 47B did apply, based on an inference that the same, or a substantially similar, usage by claim group members occurred at the relevant dates as did the 'contemporary usage', it was noted that it was 'preferable' for direct evidence to be given of occupation at the relevant date—at [121].

In relation to all other areas of UCL within the town boundary, which ranged from bushland to walkways and drains, it was held that:

- the 'sparse evidence' of usage was not sufficient; and
- in some cases, it was not evidence of a traditional usage; and
- 'more importantly', the usage was not distinguishable from 'a likely similar usage by the public'—at [115] to [117] and [120].

Inter-tidal areas and ss. 47A or 47B

It was held that:

- exclusive native title was not 'recognised' in the inter-tidal zone under s. 223(1)(c);
- therefore, ss. 47A and 47B could not be relied on to claim exclusive possession because those sections are concerned with disregarding past extinguishment rather than 'non-recognition'—at [123], referring to *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50 at [263], summarised in *Native Title Hot Spots* Issue 14.

Extinguishment via improvements disregarded where ss. 47A or 47B applied

His Honour rejected the state's argument that past extinguishment brought about by exercise of the right to 'improve' leasehold land is not disregarded even where either ss. 47A or 47B applies:

> [P]ast extinguishment only occurred by the grant of the lease or prior interest which conferred the right to construct the improvement….[T]he extinguishment arises from the grant of the lease and operates when the improvement is constructed. It follows that, if the grant of the lease or other prior interest is to be disregarded under s 47A or s 47B, there can be no extinguishing effect by the exercise of the right to construct the improvement—at [124], referring to De Rose 2 at [157].

Public works

Among others, the following (which otherwise fell within the definition found in s. 253) were found to be 'public works':

- an open, unsealed shallow storm water drain because it was a 'major earthwork' as defined in s. 253;

- an uncompleted sports oval on a reserve because the whole of the area had been 'traversed and disturbed' by heavy earthmoving equipment and so it was a 'major earthwork' notwithstanding that not all the works planned for the oval were completed—at [129] to [133].

It was found that graves and tombstones in cemetery reserves were not 'public works' because they were not 'constructed or established' by or, on behalf of, the Crown or a local government body or other statutory authority of the Crown in any of its capacities—at [136].

Future 'hypothetical' use not relevant to s. 251D

Unallocated Crown land outside the perimeter of the Broome jail was found to be outside the extended definition of 'public work' in s. 251D. It was not 'necessary for, or incidental to, the construction, establishment, or operation of the work' because it was not, as the state contended, required for 'privacy and recreational purposes' and on the evidence, the question of 'future expansion' was:

> [N]o more than a mere possibility and can be put to one side as it is hypothetical. If the expansion occurs, any extinguishing effect of the expansion will need to be considered by reference to the NTA as at that date—at [144].

Conclusion

His Honour noted that the determination of native title made in this case brought to an end 'an epic struggle by the Yawuru people to achieve recognition under Australian law of their traditional connection to, and ownership of, their country'—at [159].

The Yawuru claimants were largely successful because:

- the claim succeeded, in whole or in part, over approximately 4900km2 of their traditional country in and around Broome;
- they established a communal native title entitlement to exclusive possession of their traditional country.

However, the court pointed out that as a result of 'the criteria laid down under Australian law' for recognition of native title, the native title rights and interests in respect of most of those areas were found to be 'non-exclusive'—at [162].

Determination of native title effective only in part at present

A determination of native title was made in accordance with the reasons for decision given in this and *Rubibi* 5 and *Rubibi* 6. The part of the determination recognising the existence of native title will not take effect until the native title holders have a prescribed body corporate registered on the National Native Title Register: see ss. 55 to 57 of the NTA. The determination that native title is wholly extinguished over some areas took effect immediately upon the making of the orders.

Comments on the claim process

Merkel J set out the history of the proceedings, noting (among other things) that resolving the claim took more than 12 years, involved 71 hearing days, several attempts at a mediated outcome and the hearing of 'voluminous' evidence, for two reasons.

The first was to explain why native title claims 'are not only complex' but impose 'unprecedented' demands on the parties and the court. His Honour noted that:

- unlike most adversarial proceedings, which must be commenced within 3 to 6 years of a cause of action accruing, proceedings involving a claimant application 'require evidence to be given concerning… connection…and…observance and acknowledgment of traditional laws and customs since sovereignty, which in Western Australia was 1829'; and
- while it is 'obviously' unsatisfactory for resolution of 'any litigious dispute to take over ten years', there were 'special circumstances' surrounding resolution of 'native title disputes that make the delay in achieving resolution understandable, even if not acceptable'—at [163].

The second 'and far more important reason' was that his Honour thought it would be 'remiss' of the court to:

> [D]epart from the present matter without observing that there may be a better, more efficient, more effective and fairer way of resolving native title disputes…[T]here are presently 608 applications in relation to native title awaiting resolution…Most…have been before the Court a considerable time…603 of the 608 applications …have no final hearing date fixed in the reasonably foreseeable future. In these circumstances, it is fair to describe native title in Australia as being in a state of gridlock—at [164].

Merkel J did not put the lack of progress to final hearing down to the court's inability to provide hearing dates or a lack of resources available to the court to conduct final hearings but, rather, identified (among others) ongoing mediation, lack of financial resources for claimants, unresolved intra-communal disputes and logistical difficulties confronting parties to a final hearing—at [165].

His Honour also identified the requirement under s. 87 that any agreement to resolve a native title claim must involve all the parties to the proceeding, irrespective of whether their interest may be affected by the terms of the agreement, as a 'significant brake' on the resolution of native title disputes because it usually required the agreement of numerous parties and some, including those who were publicly funded, 'may have little incentive to resolve the claim'—at [165].

It was noted that obtaining a determination recognising the existence of native title could lead to 'the enhancement of self respect, identity and pride for indigenous communities' and be a 'stepping stone' to more effectively securing their involvement 'the economic, social and educational benefits that are available in contemporary Australia'—at [166].

However, it was also important that those indigenous communities:

> [A]ppreciate the risk, which recent experience reveals is far from hypothetical, of failure in a native title claim. Where that occurs, it can have devastating consequences for the claimant community—at [167].

Merkel J made some suggestions for resolving the 'present native title gridlock' by mediation, including:

- amending s. 87 of the NTA so that it only relates to the parties whose interests are affected by the relevant agreement;
- providing for formal, confidential offers of settlement to be made, in the course of mediation, that may be presented at trial for consideration in relation to awarding costs against parties for whom the final outcome was not greater than the settlement offered;
- greater emphasis being placed in mediation on narrowing contested issues to reduce costs and enhance the efficiency of the trial process;
- adopting a practice in mediation, and in the court, of determining issues not resolved by mediation at an early hearing and requiring the parties to then finally decide to either settle or contest the claim—at [169].

His Honour hoped that adopting these suggested changes might:

> [D]iminish the risk of, and the harm that can flow from, a final finding at an adversarial hearing that the 'tide of history' has washed away recognition of a community's native title under Australian law. It might also greatly advance the reconciliation between Australia's past and present—at [170].

Determination of native title—two more in the Torres Strait

Nona and Manas v Queensland [2006] FCA 412; *Manas v Queensland* [2006] FCA 413

Dowsett J, 13 April 2006

Issue

These cases deal with two determinations made under the *Native Title Act 1993* (Cwlth) (NTA) recognising the existence of native title. The parties in both matters reached agreement and asked the Federal Court to make orders in, or consistent with, the terms of their agreement under s. 87 of the NTA.

Background

In *Nona and Manas v Queensland* [2006] FCA 412 *(Nona)*, Victor Nona and John Manas applied on behalf of the Badualgal and Mualgal Peoples for a determination of native title over numerous uninhabited small islands, islets and rocks located south of Badu Island and south-west of Mua Island in the Torres Strait in the State of Queensland—at [1].

In *Manas v Queensland* [2006] FCA 413 *(Manas)*, Father John Manas, on behalf of the Mualgal People, applied for a determination recognising the existence of native title in relation to numerous small uninhabited islands, islets and rocks in the vicinity of Mua Island in the Torres Strait—at [1].

Power of the court under s. 87

In both cases, his Honour Justice Dowsett noted the relevant provisions of the NTA including:

- section 87, which empowers the court to make an order in, or consistent with, the terms of the parties' written agreement without holding a full hearing if it is satisfied that such an order is within its power;
- section 94A, which requires that an order containing a determination of native title must include details of the matters set out in s. 225—Nona at [7] to [8] and Manas [6] to [7].

Material before the court

In both cases, the material before the court included an affidavit of a member of the native title claim group and an anthropological report prepared by Dr Garrick Hitchcock, an anthropologist employed by the Torres Strait Regional Authority. Dr Hitchcock's reports were based on his own studies and discussions with elders of the native title claim groups. In addition, Dr Hitchcock relied on reports prepared by other anthropologists.

In *Manas*, one of the reports Dr Hitchcock relied on was prepared for an earlier claimant application made on behalf of the Mualgal people. The court noted that, in 1999, his Honour Justice Drummond made a determination recognising native title to the area claimed in that application, the Mualgal people's 'home' island of Mua.

In both *Nona* and *Manas*, Dowsett J quoted at length from Dr Hitchcock's reports. In *Manas*, the court noted that the report:

- described organised Torres Strait Islander occupation and possession of the determination area since some time prior to the establishment of British sovereignty over the area in 1872;
- confirmed the continuity of an identifiable society of Torres Strait Islander people (the Mualgal) having a connection with the proposed determination area in accordance with traditional laws acknowledged and traditional customs observed by them, which appeared to be recognised by other Torres Strait Islander groups—at [7] to [8].

Maintenance of traditional law and traditional custom

In both cases, Dowsett J drew an inference that the State of Queensland had taken such advice as it considered 'appropriate' and had chosen to agree to a determination recognising native title.

In *Manas*, his Honour was satisfied 'in any event' that:

> [T]he objective facts of the case demonstrate the probability of continued connection between the people resident on Mua and the various islands, islets and rocks in the determination area. The Mua people were, and are, seafarers, able to travel to these features and further afield. There was, and is, good reason for them to visit them on a regular basis. Food is available there. It would be inconsistent with one's experience of human nature if, over the centuries, successive generations had not come to view these islands, islets and rocks as their own. No doubt, over those same centuries, there have been challenges to their claims, but any such challenges must have been resolved in favour of those of whom the claim group are successors. I accept the anthropological evidence to the extent necessary to find that native title exists in relation to the…[proposed determination area]—at [14].

In *Nona*, Dowsett J was satisfied that native title exists in the area concerned:

> The evidence demonstrates that the claim group members are descendents of people who have lived on their respective islands for a very long time. They were, and are, seafarers who would almost certainly have visited neighbouring islands, islets and rocks, searching for food. It is probable that over the centuries, they have come to regard the determination area as being theirs. The anthropological evidence supports this view, but it is really based on observations of human nature. This connection pre-dates the first assertion of British sovereignty—at [19].

Determination areas

The native title rights and interests recognised are confined to the area landward of the 'high water mark' as defined in the *Land Act 1994* (Qld).

Rights and interests recognised

In relation to the areas of land covered by each determination, native title is recognised as a right to possession, occupation, use and enjoyment to the exclusion of all others.

In relation to water, the native title right recognised is limited to the right to:

- hunt and fish in or on, and gather from, the water for the purpose of satisfying personal, domestic or non-commercial communal needs; and
- take, use and enjoy the water for the purpose of satisfying personal, domestic or non-commercial communal needs.

The right to water is subject to a proviso that it does not confer any right to possession, use or enjoyment of the water to the exclusion of others.

The native title rights and interests are subject to, and exercisable in accordance with:

- the laws of the Commonwealth and the state, including the common law;
- traditional laws acknowledged, and traditional customs observed, by the native title holders; and
- other interests in relation to the determination area, with the relationship between native title and the other interests being that the other interests:
  - continue to have effect and related rights may be exercised, notwithstanding the existence of the native title; and
  - prevail over the native title and any exercise of the native title (including any activity done in exercise of related rights).

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* (the 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.

His Honour 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 her Honour 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 this issue of *Native Title Hot Spots*, where his Honour 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 [sic] 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 Tjurta—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 Repor*t 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, 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* (NT). 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 (NT). 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.

Determination of native title—Larrakia

Risk v Northern Territory [2006] FCA 404

13 April 2006, Mansfield J

Issues

The case deals with a number of claimant applications made over Darwin and its surrounds. His Honour Justice Mansfield noted that the three broad issues for consideration were:

- whether the Larrakia people established that they had native title rights and interests in the claim area as defined in s. 223(1) of the *Native Title Act 1993* (Cwlth) (NTA);
- if such rights existed, the detailed nature of those rights; and
- whether such rights have been extinguished, either at common law or by operation of the NTA.

Each issue was 'vigorously' contested by the main respondents, the Northern Territory and Darwin City Council (DCC).

Background

The area dealt with in these proceedings covered parts of metropolitan Darwin and its surrounds on the Darwin Peninsula. It comprised an area of about 30 km^2 of land and waters, including mangrove swamps and mostly covered areas of Crown land and some land held by DCC and Palmerston City Council.

The proceedings were a consolidation of 19 applications filed by three different groups of applicants. The applications were filed between 1994 and 2001 by the Larrakia applicants (the first applicants), the Quall applicants (the second applicants) and the Roman applicants (the third applicants).

The orders consolidating the proceedings divided application DG6017/1998 into Parts A and B. The orders also consolidated Part A of DG6017/1998, generally concerned the more urbanised areas in that claim, with 18 other applications into one action – DG6033/2001. The consolidating orders confined the consolidation to those parts of the other 18 claim areas which overlapped with Part A of DG6017/1998.

The hearing proceeded in respect of 216 areas of land and waters in and around Darwin which did not precisely correspond with those areas of land the subject of the consolidated proceeding. On 31 January 2005, Mansfield J varied the original orders so as to clarify the area covered by the proceedings.

Applicants

The Larrakia applicants asserted that their claim group encompassed the Quall applicants and the Roman applicants. Tibby Quall, the applicant in the Danggalaba Clan's

claimant application, asserted that the Larrakia people are a language group and that it is the Danggalaba Clan that should be recognised as holding native title. The Roman applicants discontinued their claim.

Authorisation

Most of the applications dealt with in these proceedings were made under the 'old Act' i.e. before the commencement of the *Native Title Amendment Act 1998* (Cwlth) (amending Act). Under the old Act, authorisation of the application was not required. However, all but one of the applications were either amended or filed after the 'new Act' commenced. Under the new Act, the person or persons making a claimant application must be authorised to do so by the native title claim group: see ss. 61(1) and 251B.

After summarising the authorities on point, his Honour followed the approach in *Quall v Risk* [2001] FCA 378 at [65], where it was held that an old Act application that is amended subsequent to the commencement of the amending Act must comply with the new requirements of s. 61—at [68] and [75].

Compare *Jango v Northern Territory* [2006] FCA 318 at [28], summarised in this issue of *Native Title Hot Spots*, where his Honour Justice Sackville took the opposite view i.e. 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'.

After summarising the evidence and the law on authorisation under s. 251B, Mansfield J deferred making a ruling until findings were made about s. 223(1)(a) and (b) as that was likely to 'expose the answer to the competing submissions' on authorisation. As a result of those findings, his Honour decided it had become unnecessary to further address authorisation—at [94].

The law in relation to native title

Mansfield J considered the following matters:

- the definition of native title in s. 223(1);
- what is to be determined when making a determination of native title as defined in s. 225; and
- the case law on ss. 223(1) and 225, particularly *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28, summarised in *Native Title Hot Spots* Issue 1 *(Ward)* and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58, summarised in *Native Title Hots Spots* Issue 3 *(Yorta Yorta)*— at [48] and [58].

The court relied on the majority judgment in *Yorta Yorta,* which stated that the relevant rights and interests for the purposes of s. 223(1) are those which derive from traditional laws and traditional customs forming a body of norms that existed before sovereignty. His Honour noted that this principle affects the construction of the definition of native title in s. 223(1), particularly the meaning of 'traditional'—at [52] and [54].

It was noted that:

- the joint judgment in *Yorta Yorta* imposed a requirement of continuity on both the Aboriginal society and the acknowledgement and observance of the traditional laws and traditional customs which are claimed to give rise to the rights and interests under the NTA;
- the requirement for continuity is not absolute but acknowledgement and observance of traditional laws and customs must have continued 'substantially uninterrupted' since sovereignty—at [55] and [58].

His Honour looked at the evidence for each of three periods of history:

- 1825 to c 1910;
- 1910 to World War II;
- World War II to 1970.

The period 1825 to c 1910

It was agreed between the parties that the Crown acquired sovereignty over the Northern Territory in 1825 and that the first European settlement in the Darwin region was in 1869—at [99].

Mansfield J noted that each of the following questions must be answered in the affirmative if the applications dealt with in this case, or any of them, were to succeed:

- whether at sovereignty in 1825 a society of Aboriginal persons existed with traditional laws and traditional customs that formed a normative system which gave rise to rights and interests in the claim area that were possessed by members of that society under those laws and customs;
- whether at settlement in 1869, such a society of Aboriginal persons existed;
- whether the society at the time of settlement (in, say, the mid 1870s) was the Larrakia people;
- whether that was the same society as that found to exist at the time of sovereignty—at [230], referring to *Yorta Yorta* at [46] to [47], [79] and [86].

His Honour was satisfied about each of those matters and made the following findings:

- within the claim area at sovereignty there existed an Aboriginal society which, by its traditional laws and customs, had a normative system which gave rise to rights and obligations on the part of its members in relation to the land and waters within that area;
- the archaeological evidence pointed to there having been some form of society at that time, albeit directly demonstrating only an 'economic' society;
- the first observations of the area by Europeans were generally consistent with there being then, and there having been, such a society, although such observations were only an indication of such a society—at [232].

The material from the time of European settlement of the Darwin area, covering a period of three decades or so, was found to reveal the existence of a society of Larrakia people who had a close attachment to the land and waters in the area, including in the claim area—at [233].

It was found that, at the time, the Larrakia people had a normative system by reason of their traditional laws and customs which created rights and obligations possessed by them in relation to the land and waters of the claim area. In particular, the Larrakia people:

- identified themselves as a society in that way;
- spoke the Larrakia language; and
- had a complex and sophisticated set of laws and customs which included rules governing their internal societal relationships, the way they dealt with the claim area and the collection and use of its resources, and the ceremonial and spiritual aspects of their relationships with the land and waters of the claim area—at [233].

The court accepted the linguistic evidence given by Dr Paul Black, an 'impartial and dispassionate witness', which was said to be 'of great assistance'—at [139] and [145].

That evidence led Mansfield J to conclude that:

- the Larrakia language had a common ancestry with the Wulna language extending back over many generations;
- that finding, together with the absence of any evidence to suggest that any other language group existed within the claim area and the wider Darwin area at the time of sovereignty, led to the conclusion that, at sovereignty, the Aboriginal society which then existed was in general terms the same as the society which existed at the time of European settlement of the general area—at [236] to [237].

Therefore, Mansfield J concluded that the society which occupied the claim area at sovereignty was the same society, with the same traditional laws and customs (whether adapted by economic or environmental factors or not) as he had found to have been the occupants of the Darwin region including the claim area in the latter decades of the nineteenth century—at [238].

In relation to ethnographic evidence, the court accepted the observations and views of the expert witness but found that they did not take the applicants' case further than the oral evidence—at [117].

In relation to the historical evidence, Mansfield J accepted that:

- an historical source document is only as objective as its author and it is, therefore, reasonable that an expert historian would adopt a methodology requiring a critical reading of source documents;
- it must always be borne in mind that any historical record about Aboriginal people is incomplete and that there are 'silences' in the historical record;
- the nature of these 'silences' and the manner in which they should be addressed are not just of academic interest but bear directly on the approach the court must take in interpreting the evidence and deriving inferences that, of necessity, must be made to decide the issues in contention in native title proceedings;
- this was particularly so where the historical records, such as those of police and pastoralists, were ethnocentric and where, in the absence of anthropological observation, those record did not identify Aboriginal people by tribe or language—at [135] and [137], referring to Nicholson J in *Daniel v Western Australia* [2003] FCA 666 *(Daniel)* at [149], summarised in *Native Title Hot Spots* Issue 6.

However, based on the cross-examination of Dr Samantha Wells (who prepared a historical report and gave expert evidence in this matter), his Honour formed the view that:

> Dr Wells to a degree adopted a view of historical records which was favourable to the Larrakia claimants. That is not because she was in fact partisan, or was not trying to assist the Court. It was appropriate for her to assess the significance of elements of the historical record….[C]ross-examination exposed a number of instances where the historical record was not silent, and where Dr Wells had taken a view as to its significance which appeared not to be justified by its terms or on occasions which appeared to be inconsistent with its terms…[T]he primary sources which Dr Wells sought to interpret…were many in number and in a number of instances the reasons for doing so were not persuasive to me…[T]hat material on its face was also consistent with (and in some cases indicative of) the alternative thesis that during the middle part of the 1900s the Larrakia people were not consistently as coherent a society as Dr Wells said the record intended to show. I think that alternative thesis in respect of that period was not as fully considered by Dr Wells as it might have been—at [137].

For those reasons, Mansfield J approached Dr Wells' evidence about the state and status of Larrakia people as a communal group during the mid 1900s with some circumspection—at [138].

The period 1910 to WWII

Mansfield J found that accounts of cultural practices of Larrakia people during this period existed but were of a more general nature than earlier ethnographic accounts—at [300].

His Honour relied on the evidence of Baldwin Spencer in his 'Preliminary Report on Aboriginals of the Northern Territory' early in the twentieth century that the practice of Larrakia traditional laws and customs in the Darwin area was waning. Spencer attributed this to the 'racially mixed' community—at [813].

It was held that:

- the contemporary material in the period from about 1910 to the start of World War II did not point clearly to the Larrakia people being a continuing strong community practising their traditional laws and customs in the Darwin area, including the claim area;
- the material did point to some 'elder structure' within the Larrakia community, to the on-going holding of corroborees (apparently in conjunction with other Aboriginal groups) and to the conduct of some ceremonies;
- that said, it 'more strongly' suggested that the conduct of ceremonies had barely persisted and there was no evidence to suggest that all, or most, of the cultural practices of the Larrakia people which were observed during the latter part of the nineteenth century continued to be practised;
- documentary evidence of the two decades before WWII also pointed to the erosion of the practice of those laws and customs, prompted by the removal of most Aboriginal persons from Darwin during World War II and by the policy of assimilation which was introduced when many of them returned to Darwin—at [339] and [816].

His Honour took the view that a corroboree for tourists did not necessarily constitute a 'ceremony'—at [319].

The period WWII to 1970

Mansfield J considered evidence in relation to the Kulaluk, Gundal, Old Man Rock and Kenbi land claims made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the Land Rights Act).

The documentary material relating to the Larrakia land rights claims, starting with the Kulaluk Land Claim, indicated that, by the 1970s, there was a small group of 'full-descent' people identified as Larrakia pursuing such a claim. According to Mansfield J:

- this did not otherwise indicate the ongoing practice of traditional laws and customs;
- its leader, Bobby Secretary, was reported as saying he did not know of the traditional significance of the site claimed and had to be educated about it by Tommy Lyons from Delissaville on the Cox Peninsula;
- Mr Lyons was reported as saying the area was taboo to women but women clearly now have (and at the time had) ready access to the site in question—at [817].

Mansfield J also considered the Gundal Land Claim material and noted that:

- there were a number of people who identified themselves as Larrakia;
- those people did have knowledge of the ceremonial significance of that area but it ceased to be used as a ceremonial site between 1927 and 1933;
- the exclusion of women from that site in accordance with traditional laws and customs was not insisted on by the 1970s, which was not a mere adaptation of those laws and customs (although it was noted that the contemporary community of Larrakia people are re-asserting the site as taboo for women)—at [818].

In relation to the land claim over Old Man Rock, Dr Wells' evidence was that she could not recall any references in the historical record to Old Man Rock between 1931 and the 1970s—at [426].

In relation to the Kenbi Claim, which related to an extensive area of land on the Cox Peninsula, Mansfield J declined to adopt any of the findings of the Land Rights Commissioner for the following reasons:

- it covered a different claim area to that covered by these proceedings;
- not all of the witnesses who gave evidence were called in these proceedings;
- the expert evidence was in part from different witnesses;
- the expert evidence related to the different issues arising under the Land Rights Act

and was given in respect of different land; and

- the matters to which those findings related have also been the subject of additional and, in some instances, different evidence to that brought in these proceedings—at [442].

Expert anthropological evidence

In relation to the expert anthropological evidence it was noted that:

- it is important that the intellectual processes of the expert can be readily exposed;
- that involves identifying, in a transparent way, what are the primary facts assumed or understood;
- it also involves making the process of reasoning transparent and, where there are premises upon which the reasoning depends, identifying them;
- the premises, whether based on primary facts or on other material, then need to be established;
- at least in the context of expert anthropological reports, the line between an opinion and the fact upon which that opinion is based is not always clear;
- while the clear separation of fact and premise from opinion is clearly desirable, it is necessary to accept that there is sometimes difficulty in discerning between the facts upon which an opinion is based and the opinion itself in an expert anthropology report;
- such a difficulty should not be regarded as a fatal flaw that may render the report or the opinion inadmissible—at [469], [470], [472] and [473].

Clan estates

According to the expert anthropological evidence, there was little material on the status of groups within the Larrakia community prior to the lodgement of the Kenbi Claim. Despite the lack of ethnographical and historical source information, Dr Michael Walsh (who prepared a genealogical report for the Larrakia applicants), Mr Robert Graham (who prepared an anthropological report for the Larrakia applicants) and Professor Kenneth Maddock (who prepared an anthropological report for the territory) all agreed that, at the time of sovereignty, Larrakia country was divided into small territories with each territory being affiliated with a local descent group (i.e. a clan). Each clan would also have its own particular set of Dreamings—at [488].

However, the court was of the view that the evidence pointed to the spread of disease, interaction with other Aboriginal groups, the removal in 1912 of Aboriginal people to the Kahlin Compound north-west of Darwin, and the separation of mixed descent children from their parents which led to the 'ultimate decline' of the clan organisation. It was, according to Mr Graham, replaced by a system of 'families of polity', described as groups composed of the descendants of deceased ancestors known to have been members of the Larrakia language group or 'tribe'. Mr Graham considered that the Danggalaba clan was the sole remaining Larrakia clan—at [489] to [490].

Current Larrakia society

The oral evidence, in Mansfield J's judgment:

- disclosed that the current Larrakia society had not carried forward the traditional laws and customs of the Larrakia people so as to support the conclusion that those traditional laws and customs have had a continued existence and vitality since sovereignty;
- revealed inconsistencies between members of the present applicants in some respects about what their laws and customs are;
- revealed inconsistencies in the extent to which those laws and customs are practised, at least as apparent from a number of instances where only one or a few witnesses spoke of a law or custom which would have been expected to have

been recognised and addressed in the evidence of many of the witnesses;

- revealed in many instances the adoption of knowledge of traditional laws and customs from those learned during the Kenbi Claim hearings, and later from other research, and from direct inquiry of elderly Larrakia people and elderly non-Larrakia people both near to Darwin and remote from it;
- disclosed that certain beliefs now regarded as fundamental were derived only from the Kenbi Claim hearings;
- disclosed a level of generality of knowledge—including the absence of knowledge of particular Dreamings or stories for sites, of site specific ceremonies, and of body adornment—which was not consistent with the acquisition of knowledge in accordance with the traditional laws and customs of the Larrakia people;
- did not reveal the passing on of knowledge of the traditional laws and customs from generation to generation in accordance with those laws and customs during much of the twentieth century—at [820] to [822].

Funeral rites

Mansfield J noted that:

- the current Larrakia people no longer practise traditional bush burials and most Larrakia people are now buried in cemeteries;
- customs such as self-harm as an 'expression of grief' are no longer practised, although it was noted that persons gave evidence as to traditional elements of funeral rites that are practised by members of the Larrakia people—at [543].

Economy and resource use

Evidence was considered in relation to economy and resource use which included:

- hunting, fishing and gathering resources;
- sharing, conserving and not wasting resources;
- restriction on consumption of certain food;
- knowledge about location and use of bush food, craft and medicine; and
- methods for hunting and preparation of food—at [571] to [598].

Spiritual aspects

Evidence was considered in relation to the following spiritual aspects of Larrakia society:

- Dreamings, including place Dreamings, personal Dreamings and family/clan Dreamings/totems;
- mythical malevolent being;
- ancestors;
- site specific ceremonies and rites including 'calling out'/'singing out' to spirits and washing in salt water or 'giving sweat' to country;
- giving offerings to country;
- involvement in ceremony;
- knowledge about sacred sites;
- dances; and
- songs—at [599] to [678].

Dreamings

There was significant evidence in relation to both place and personal Dreamings, and of family Dreamings and totems. It was accepted by the first applicants that the evidence was not uniform or consistent about those matters. One 'inconsistency' was whether the totemic system of the earlier Larrakia people existed at all—at [826].

The inconsistencies, and to some degree the lack of detailed knowledge of certain witnesses about the source of their Dreamings or their significance, influenced the weight his Honour attached to this evidence in the context of s. 223(1) of the NTA:

> I think this evidence is significant to showing that today there is a body of cultural or spiritual laws and customs governing the Larrakia people. It does not point in any real way to that body of cultural or spiritual laws and customs being passed from generation to generation in

accordance with traditional laws and customs, so as to support any conclusion that the contemporary laws and customs are themselves 'traditional'—at [826].

Ceremony

There was 'considerable' evidence about certain ceremonies and rituals performed at certain locations or in certain circumstances—at [826].

In respect of the issue of involvement in ceremony, Mansfield J concluded that it was clear from the primary evidence that there were no longer any ceremonies (in the sense of large group gatherings and initiation rites) which take place on the Darwin side of the harbour, including in the claim area. The first applicants accepted that:

- the intensity and consistency of Larrakia involvement in ceremonies had diminished since sovereignty;
- the Larrakia people no longer practise distinctly Larrakia ceremonies; and
- there has been an 'attenuation' of knowledge in relation to, and in the observance of, ceremony—at [664].

This led Mansfield J to conclude that:

- there had been a loss of the function of ceremony which would otherwise provide a process for the transfer and reinforcement of knowledge about Dreamings, sites and laws;
- that means of transmission of knowledge did not now occur and had not occurred for many decades—at [827].

Mansfield J also noted that there was no evidence of any Larrakia body painting designs, specifically in relation to particular ceremonies or rituals, now said to be possessed by the Larrakia people which might suggest there was no normative system within which any past cultural practices in that regard were conveyed to the current generation or are to be conveyed to future generations—at [678].

Sites

It was found that:

- the evidence in relation to looking after sites did not demonstrate a general understanding and expression of the knowledge about stories, songs and ceremonies for sites and looking after those sites;
- nor did it demonstrate a particular process of acquisition of knowledge about those matters—at [740].

Language

The fact that the Larrakia language is no longer spoken, except generally by the use of some Larrakia words as a substitute for English words, was not taken to be of any real moment—at [833].

Songs

Mansfield J's view was that:

- there is only a general knowledge of the existence of one or two particular songs and dances previously part of the traditional laws and customs of the Larrakia people;
- the current level of knowledge did not support the conclusion that it has been received by an appreciation of, or transfer of, knowledge within the Larrakia community according to its traditional laws and customs;
- it was consistent with some childhood memories from observation and some individual provision of information from one generation to the next but not in the context of a normative structure—at [677].

Transmission of knowledge

Evidence was considered in relation to the social structure of Larrakia society and particularly in relation to the transmission of knowledge. Mansfield J concluded that the central issue in relation to the transmission of knowledge between generations (putting aside any interruption to the transmission of knowledge) is whether there is a requirement

for the current system of transmission of knowledge to be the same as that which existed at the time of sovereignty—at [723].

It was noted that:

- the NTA does not require a specific method for the transmission of knowledge between generations of an Aboriginal society;
- subsection 223(1) requires that the 'rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed' and that the Aboriginal group have a connection with the land or waters 'by those laws and customs';
- 'traditional' as used in s. 223(1) does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the NTA deals as rights and interests rooted in pre-sovereignty traditional laws and customs;
- demonstration of some adaptation or change will not 'necessarily be fatal' to a native title claim, and that the 'key question is whether the law and custom can still be seen to be traditional law and traditional custom'—at [724].

His Honour was of the view that this case presented a situation where:

- there was no documentary or expert evidence of an historical or anthropological nature indicating the existence of any traditional system of transmission of knowledge at the time of sovereignty;
- it was obvious, given the notorious oral nature of historical tradition of all Australian Indigenous societies, that such a system must have existed; and
- the primary evidence indicated that current members of the Larrakia community have obtained knowledge through a variety of methods, including from other Larrakia people, from non-Larrakia people, from books, from courses of study, and from the Kenbi Claim hearings which spanned many years—at [725].

His Honour was of the view that:

- the recent processes for the acquisition and transmission of cultural knowledge were piecemeal because of the history of the Larrakia people during several decades of the twentieth century;
- it could be inferred that the process of knowledge acquisition and transmission which existed at sovereignty (and which was found to have continued to the time of settlement in the 1870s and beyond) was not of the same piecemeal character;
- it was likely to have been a process effected within formal rules of the Larrakia people as to who should hold, and pass on, knowledge, when they should do so and to whom they should do;
- it was unlikely to involve any passing on of knowledge from non-Larrakia people—at [726].

Mansfield J noted that it was also important to consider the content of that knowledge. The question for the court was whether the community has the same set of laws and customs as it did at the time of sovereignty, allowing for any adaptation which may have occurred over the past 180 years. If it is found that the traditional laws and customs which give rise to rights and interests have remained unchanged (again allowing for adaptation), then the fact that the method of transmitting them has been adapted to cope with the exigencies of the past will be less significant—at [727].

Apart from the process of information transference through ceremony, the first applicants accepted that knowledge of traditional laws and customs was passed essentially through family. The senior family members held the knowledge and passed it to the appropriate persons of the next generation at an appropriate time. The acceptance and recognition of elders, their status as decision-

makers and their role in passing on knowledge was, on the data relating to earlier periods, an important element of the Larrakia traditional laws and customs—at [830].

However, it was found that the evidence did not show that:

- those cultural principles are, and have continuously been, intact;
- for the generations during the middle decades of the twentieth century, the then elders adopted the process for the transfer of knowledge which was traditional—at [831].

It was noted that much of the contemporary knowledge was accepted as having come from other sources and that many of those now recognised and respected as Larrakia elders do not hold the detailed knowledge which the current generation is seeking, simply because it was not given to them—at [831].

Mansfield J considered that this breakdown was also revealed in the current decision-making structures for the Larrakia people because:

- it was clear that the decision-making process among the Larrakia people had been largely transferred to the Larrakia Nation Aboriginal Corporation, whose composition and decision-making process was not traditional;
- there was no 'superior elder' reflecting the sort of status reported by the 'King' figures referred to in earlier literature;
- there was no evidence of the means of identification of the elders or of them having met as a group to make decisions for the Larrakia people;
- there was no evidence as to how the elders of the Larrakia people as a group (as distinct from individual family practices) would come together and would make decisions for the Larrakia people—at [832].

Quall applicants – Danggalaba clan

Mansfield J was impressed by Tibby Quall's evidence and his knowledge of particular laws and customs. However, it was held that:

- there was uncertainty, or inconsistency, about the composition of the Danggalaba clan and the rules governing its structure;
- there was no satisfactory foundation for finding that the second applicants practised and enjoyed certain rights and interests which arose under laws and customs which they only have inherited from or had passed on to them by their predecessors back to sovereignty;
- there was no satisfactory foundation for concluding that the laws and customs reflected or were derived from the normative system of the Aboriginal society which existed at sovereignty—at [798].

Interruption of traditional law and custom

Mansfield J noted that:

- interruption of the enjoyment or exercise of native title rights and interests in a particular geographical area will not necessarily be fatal to a native title claim;
- nor will change of itself necessarily have that effect;
- the significance of change to, or adaptation of, traditional law or custom in particular circumstances may present difficult questions as to whether the current law and custom is still 'traditional' as that word is used in s. 223(1)(a);
- interruption of use or enjoyment of native title rights or interests may be significant in determining whether those rights and interests now possessed are possessed under 'traditional' laws and customs;
- this is why the observance and acknowledgment of the pre-sovereignty laws and customs should be shown to have continued substantially uninterrupted since sovereignty—at [811], referring to *Yorta Yorta* at [84].

In his Honour's opinion, a combination of circumstances had, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the twentieth century in a way that has affected their continued acknowledgement and observance of the traditional laws and customs of the Larrakia people that existed at sovereignty. One 'significant' circumstance was the development of Darwin into a substantial community following European settlement because that process involved many other Aboriginal people who were not Larrakia moving into the Darwin area. Other circumstances related to natural or external events and some were the consequence of government policy—at [812].

Mansfield J accepted that:

- there is, and has been, a continuous recognition in the Darwin area of certain persons as Larrakia, both by self-identification and by community recognition. However, the process for doing so had not remained constant;
- it was originally a patrilineal descent system, and it is now a cognate descent system;
- there are some intra-Larrakia disputes as to who are now within the compass of the Larrakia people;
- there has been, so far as circumstances allowed, a practice among the Larrakia people of hunting, fishing and foraging for food in the Darwin area which has continued through the nineteenth century to the present time;
- there had been a practice of using bush foods as medicines and for craft works and similar evidence was given about food preparation and cooking—at [825].

However, according to Mansfield J:

- the evidence did not suggest specifically Larrakia techniques for those practices;
- Nor did it indicate that the knowledge relating to them has come from other Larrakia people in any traditional way;
- while some of the knowledge had come from particular older Larrakia people, the evidence did not show a picture of the inter-generational transmission of such knowledge according to traditional laws and customs—at [825].

Conclusion

The court concluded that the present society comprising Larrakia people does not now have rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by the Larrakia people at sovereignty. That is because their current laws and customs are not 'traditional' in the sense explained in Yorta Yorta—at [834].

In Mansfield J's view:

- there was considerable ambiguity, and some inconsistency, about the current laws and customs of the Larrakia people and significant changes in those laws and customs from those which existed at sovereignty;
- those differences and changes stem from, and were caused by, a combination of the historical events which occurred during the twentieth century that gave rise to a substantial interruption in the practice of the traditional laws and customs of the Larrakia people as they existed at sovereignty and at settlement, so that their practise and enjoyment has not continued since sovereignty;
- the present laws and customs of the Larrakia people are not simply an adaptation or evolution of the traditional laws and customs of the Larrakia people in response to economic, environmental and historical and other changes—at [835].

Accordingly, the application was dismissed.

Extinguishment

Given the conclusions set out above, there was no need to address the question of extinguishment of native title. However, Mansfield J was of the view that it may be 'helpful to the parties to address certain matters of principle which were the subject of detailed submissions'—at [845].

Section 44H

Mansfield J came to the view that s. 44H provides that any extinguishment of native title rights and interests occurs by reason of the relevant 'tenure' grant of rights, rather than by the exercise of the rights under it. Accordingly, any inconsistency arises at the time of the grant and results in extinguishment of native title rights and interests by reason of the inconsistency at that time—at [872].

Although it is not mentioned in the judgment, this seems to accord with what was said by the Full Court about the operation of s. 44H in *De Rose v South Australia* (No 2) 145 FCR 290; [2005] FCFCA 110 at [159] to [165], summarised in *Native Title Hot Spots* Issue 15.

Section 47A and 47B

In Mansfield J's view, the requirement in s. 47A that the area be held 'expressly' for the benefit of Aboriginal peoples does not require that the instrument granting the freehold or lease of the particular area contain that explicit condition. The requirement for the grant is contained in s. 47A(1)(b)(i) and it is that legislation under which the grant of the freehold or leasehold interest have a particular character. The separate condition imposed by s. 47A(1)(b)(ii) that the area be held expressly for the benefit of Aboriginal people may be shown either by the terms of the grant or by the terms of the legislation under which the grant is made—at [879].

His Honour considered a situation where neither the enabling legislation nor the lease indicated that the area was to be held expressly for the benefit of Aboriginal people. The lease in question was held by Gwala Dariniki Association Inc. Mansfield J doubted that the composition of the grantee of a freehold or leasehold entity can itself be sufficient because it may change and its purpose may change—at [880].

Mansfield J noted the requirement in s. 47A(1)(c) and s. 47B(1)(c) that, at the time the claimant application is made, one or more of the members of the native title claim group must occupy the area. The submissions about the measure by which occupation is to be determined related to two issues:

- the identification of the 'area' which is so occupied; and
- what is required in fact to constitute occupation—at [883] and [884].

His Honour was of the view that:

- the area required to be occupied must be the area held expressly for the benefit of the particular Aboriginal group under the relevant grant;
- at least in respect of s. 47A, this accords with the observations of Sundberg J in *Neowarra v Western Australia* [2003] FCA 1402 at [686], summarised in *Native Title Hot Spots* Issue 8;
- it is the nature of the extinguishing act or acts which informs the identification of the area or areas within the claim area upon which s. 47B (if otherwise applicable) may operate;
- it is not the claim area itself, although in certain circumstances the claim area and the 'area' to which s. 47B refers may entirely overlap;
- the finding about whether that 'area' was occupied at the time of the relevant application then becomes a matter of fact to be determined upon the whole of the evidence—at [885], [887] and [892].

On the application of ss. 47A or 47B, see also *Risk v Northern Territory* [2006] FCA 404 (summarised in this issue of *Native Title Hot Spots*) at [879] to [903].

Old Act applications and ss. 47A and 47B

The DCC submitted that neither ss. 47A nor 47B applied to claimant applications made under the old Act. The argument was that when the old Act applications were made, ss. 47A and 47B did not exist and so could not be relied on by the applicants. The first applicants disputed this, contending that the sections generally applied whenever the applications were made. The territory also disputed this, contending they applied to applications whenever made but with effect only from 30 September 1998. It submitted that 'there appears to be little doubt' that s 47A and s 47B can operate in respect of the native title determination applications made prior to the commencement of the new Act but only from that date.

Mansfield J took the view that it was a matter of deliberate drafting that the transitional provisions found in Schedule 5 of the *Native Title Amendment Act 1998* (Cwlth) did not deem the applications made under the old Act to be taken as having been made to the court as having been so made at 30 September 1998, when most of the amendments commenced. The intention of s. 47B, if it applies, is to require that the extinguishing effect brought about by the creation of 'prior' interests to be disregarded for all purposes under the NTA.

His Honour found that:

- a prior interest must be one created before the application was made;
- if s. 47B deemed the application (at least for its purposes) to have been made at 30 September 1998, then intermediate grants would have given rise to prior interests;
- the alternative, which has been adopted, is to deem the application to have been made to the court but not to affect the date it was made;
- accordingly, there is no special category of intermediate grants which fall between the arms of operation of s. 47B—at [903].

Whether s. 47A applies to land within the Municipality of Darwin

The DCC contended that s. 47B did not apply within its municipal area because (among other things) it was subject to a proclamation, namely the proclamation of the Town of Darwin.

His Honour accepted the submission of the first applicants that the 'purpose' required by s. 47B(1)(b)(ii) applied to any form of instrument by which the area was set aside—at [914].

Mansfield J found that s. 47B(1)(b)(ii) did not require the proposed use to be dictated by the terms of the relevant instrument. Nevertheless, according to his Honour, it was 'plain' that s. 47B was intended to apply except where the proposed use, which fell within its terms, involved a permanent or long-term element. It was not intended to apply in circumstances where, at the option of the beneficiary of the instrument, the use of the relevant area may be readily altered.

Consequently, his Honour found that the qualifying purpose must clearly emerge from either the relevant instrument or from the legislative or regulatory structure under which the relevant instrument was made—at [915] to [916].

The issue, in this case, concerned whether the proclamation of parts of the claim area, by which they were 'set apart for towns', brought those areas within s.47B(1)(b)(ii) so that s. 47B would not apply.

Mansfield J referred to the Full Court decision in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 at [187] (summarised in *Native Title Hot Spots* Issue 16) to the effect that the mere proclamation of a townsite, which might comprise largely private property holdings by lease or otherwise, does not define a 'public' purpose or a 'particular' purpose within the meaning of s. 47B(1)(b)(ii)—at [919].

DCC is not a statutory authority for the purposes of s. 23B(9C)

In his Honour's opinion, the DCC was not a statutory authority as defined in s. 253 of the NTA as it was not constituted as a body corporate established by the *Local Government Ordinance 1954* (NT) but rather, as the territory submitted, under it. The use of the word 'established' points to the need for the enactment itself to create the statutory authority—at [925].