National Native Title Tribunal

NATIVE TITLE Hot Spots

No. 21, October 2006

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Recent cases

Proposed determination of native title—Single Noongar application

***Bennell v State of Western Australia* [2006] FCA 1243**

Wilcox J, 19 September 2006

Issue

The Federal Court dealt with three preliminary issues in a separate proceeding relating to six claimant applications in the south-west of Western Australia made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA). The separate proceeding included part of the area covered by the claim referred to as the Single Noongar [No. 1] application (also referred to as the Single Noongar Claim (Area 1) in *Bennell v Western Australia* [2004] FCA 228, summarised in *Native Title Hot Spots* Issue 9).

The preliminary issues were, in paraphrase:

- putting extinguishment to one side, whether native title existed in the part of the Single Noongar [No. 1] application to which the separate proceedings related (referred to as Part A, which encompassed the city of Perth and surrounding non-urban areas);
- if so, whether native title was held by 'the Noongar people' as a single, communal title;
- without purporting to make a formal determination of native title, whether the native title rights and interests were rights to occupy, use and enjoy the area in certain specified ways.

All three questions were answered in the affirmative.

Background

The Single Noongar application, filed in September 2003 on 'behalf all Noongar people', has an external boundary that encompasses a large part of the south-west of Western Australia. However, any area where native title has been extinguished is excluded from the area covered by the Single Noongar application. Given the current tenure of the area, as noted in this case, the area that might eventually be subject to a determination recognising the existence of native title is far less than that encompassed by the external boundary. The description of the native title claim group identifies 99 apical ancestors and some 400 family names.

The separate proceedings also dealt with five claimant applications brought by Christopher (Corrie) Bodney seeking a determination of native title in favour of what he identified as two clan groups.

During the 21 days of the hearing, 30 Aboriginal witnesses gave evidence. Expert evidence was given by two historians, a linguist and four anthropologists. Although the separate proceeding dealt with only a small part of the area covered by the Single Noongar application, the evidence given by the claimants related to the whole of the area encompassed by the external boundary of that application.

Elements of native title

His Honour Justice Wilcox set out the definition of native title found in s. 223(1) and noted the findings of the majority of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 442; [2002] HCA 58 (*Yorta Yorta*), summarised in *Native Title Hot Spots* Issue 3, in relation to its interpretation. His Honour then adopted observations made by the Single Noongar claimants' counsel about the definition of native title found in s. 223(1), including that:

- as it referred to traditional laws acknowledged *and* traditional customs observed, there is no need to distinguish between the two and no need to draw fine distinctions between legal rules and moral obligations;
- while there must be 'rules' having a normative content derived from a normative system that existed before sovereignty, applying common law or Eurocentric concepts of 'property' or 'normative systems' is likely to mislead—at [58] to [60], referring to *Yorta Yorta* and *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 *(Alyawarr)*, summarised in *Native Title Hot Spots* Issue 16.

Among other things, the main respondents (the State of Western Australia and the Commonwealth) argued that the relevant 'society' at sovereignty was not the single Noongar community but smaller groups, possibly corresponding roughly with the 'tribes' identified on a map of south-western Western Australia produced in 1974 by Professor Norman Tindale. The court noted that native title has been established even in cases where smaller groups were found to have particular rights to particular areas, e.g. a clan estate or linguistic groups—at [61], referring to (among others) Alyawarr at [69] to [71].

Meaning of society in an NTA context

In relation to submissions made about the applicable legal principles, it was noted (among other things) that:

- it is difficult to separate questions about the relevant 'society' from questions about laws and customs;
- the state conceded that, if it was established that there was a single Noongar society at sovereignty, then there were persons alive today who are descendants of the members of that society;
- it is sufficient that those claiming native title acknowledge and observe what are essentially the same laws and customs because this is what unites them and makes them a 'society';
- the Single Noongar claimants must establish a connection with Part A but they were not required to demonstrate a connection specific to Part A, divorced from their asserted connection to the whole claim area;
- if they demonstrated the necessary connection between themselves and the whole claim area (or an identified part that included the Part A), then they demonstrated the required connection to Part A because: 'The whole includes its parts'—at [64] to [82].

Later in the reasons for decision, Wilcox J noted that:

- it is no easy matter to identify the relevant Aboriginal 'society', or community, with one 'problem' being that the word 'society' may appropriately be applied 'at various levels of aggregation';
- in the context of s. 223(1), the level of aggregation is 'the communal, group or individual rights and interests of Aboriginal peoples ... in relation to land or waters' at date of sovereignty;
- therefore, the court must determine the community or group (i.e. the 'society') under whose laws and customs those rights and interests were held and observed;
- it does not matter that there may exist a smaller, or larger, group of people which may properly be regarded, for other purposes, as a 'society' or 'community'—at [424] to [425].

Shared laws and customs sufficient to prove society

The state argued that something more than the sharing of law and custom was required to prove a 'society', including:

- a 'necessary ingredient' was that, at date of sovereignty, the individuals throughout the south-west said to constitute the 'Noongar society' were aware of the existence of all the other people in the south-west or acknowledged them as members of a single society;
- for the purposes of the NTA, 'other factors which demonstrate unity and organisation' were required—at [436] to [437].

His Honour referred to *Yorta Yorta* at [49], where it was said that the word 'society' was to be understood 'as a body of persons united in and by its acknowledgement and observance of a body of law and customs' before rejecting these submissions, noting that:

- no authority was cited to support these submissions and the 'other factors' were not identified;
- it appeared from *Yorta Yorta* that common acknowledgement and observance of a body of laws and customs was 'a sufficient unifying factor';
- it was not necessary that the 'society' constitute a community, in the sense of all its members knowing each other and living together and, if it was required, it would constitute an 'additional hurdle for native title applicants which would be almost impossible for most of them to surmount';

- the task of showing the existence of a common normative system some 200 years ago was difficult enough and it would be even harder to show the extent of the mutual knowledge and acknowledgment of those who then lived under that normative system, bearing in mind the non-existence of Aboriginal writings at that time—at [437].

Factual issues

The first major factual issue was the identification of the relevant community in 1829 when sovereignty was asserted. The second major factual issue was whether the 'degree of departure' from traditional laws and customs since sovereignty meant that the 'Noongars' no longer acknowledged and observed 'traditional' laws and customs in the sense that word is used in s. 223(1)—at [83].

The court found that:

- the claimants did not have to establish descent from people living in Part A at date of settlement;
- if members of the Single Noongar claimant group had native title rights and interests over Part A, then they were entitled to recognition of that claim regardless of the birthplace and/or residence of the ancestors of the particular people who made the communal native title claim—at [83].

Was there a single Noongar community in 1829?

His Honour noted that:

> The present case [was] unusual in regard to the number of surviving writings in which European visitors and settlers recorded observations, before and soon after the time of settlement, of Aboriginal society and practices within the relevant geographical area. There… [were] also writings based upon information provided by Aborigines who were alive at, or born shortly after, the time of settlement… [T]heir works provide a rich resource in addressing the 1829 situation—at [85].

The evidence also contained extracts from some twentieth century anthropological writings. The written material was supplemented by evidence given by Aboriginal witnesses as to oral traditions passed to them—at [86] to [87].

His Honour's conclusions about the nature of Aboriginal society in 1829 drew mostly on the work of the early writers and the comments about that work made by the expert witnesses, especially the historian Dr Host, anthropologists Dr Palmer and Dr Brunton, and linguist Dr Thieberger—at [89].

His Honour pointed out that:

> [I]t is necessary to be cautious about accepting the accounts of lay writers—that is, anthropologically untrained writers—of what they had been told by Aboriginal informants. Particularly in the first years of settlement, when Aboriginal people spoke little English, language problems must have imposed significant limitations upon accurate communication of complex information and ideas—at [107].

That said, in his Honour's view, regard should be had to lay-writers' material because:

> Accounts of events which the writers themselves witnessed would seem particularly useful. Also...[their]…obvious awareness of the dangers of innocently accepting anything they were told makes it more likely that the information they did record had a reasonable empirical basis...Where there is consensus, amongst two or more of the early writers… this is likely to be the most reliable available evidence—at [110].

Journals of pre-settlement explorers

From as early as the seventeenth century, European maritime explorers noted the presence of an Aboriginal population on the south-west coast and referred to aspects of their culture, including tools, fish traps, weapons, huts, burial grounds and use of fire. The court noted that:

- the cumulative effect of the maritime explorers' reports is to establish that Aborigines were present, in significant numbers, along the whole coast from present day Esperance to, and including, the Swan Valley;
- some contacts between them and Aboriginal people entered Aboriginal oral tradition and the detail of that tradition corresponded closely with the explorers' journal accounts;

- the early evidence established that those Aborigines were not a seagoing people, did not make canoes and were timid when they approached the water;
- in 1826, one of them described the local Aborigines as wearing kangaroo skin cloaks—at [121] to [124].

King George's Sound (Albany) writers

The evidence included writings of three people who served between 1826 and 1832, at King George's Sound, the first European settlement in Western Australia (modern Albany). They were: Dr Isaac Nind, Assistant Surgeon; Captain Collet Barker, who commanded the garrison, and Dr Alexander Collie, Government Resident at King George's Sound. All three became friendly with a local Aboriginal man called Mokare, whose family held special rights over the area. Dr Host's summary of the land-holding rules recorded at that time included:

- the family was the landholding group, the head of the family was recognized as the titular custodian and other family members had their plots within the ancestral estate but this was complicated by various connections and associations formed through kinship networks, as well as knowledge of, familiarity with, and access to, extra-territorial sites;
- there was a delicate balance between occupancy and usage rights because seasonal change demanded a degree of reciprocity;
- Aborigines at the time of settlement frequently travelled to other areas for purposes of ceremony, hunting, trade and wife-getting—at [136] to [138] and [145].

The early post-settlement years in the Swan River colony Perth region

In 1832, Lieutenant Governor Stirling estimated the Swan River Aboriginal population at about 11,000. In the following two years a corroboree and a battle took place on what is now St Georges Terrace in Perth which indicated to Dr Host that: 'the local Aborigines…were sufficiently robust, both culturally and numerically, to do so'. He also noted, among other things, that the Aboriginal people of the south-west had been identified as 'Noongar' (or 'Noongal', 'Nyungar', 'Nyungal', 'Yunger') since at least the 1840s and Aborigines in places as far-apart as York, Perth and Albany were 'Yung-ar'—at [148] and [151].

The evidence also included written material from three people who resided in Perth in the first years of that settlement: Robert Lyon; Francis Armstrong, who was fluent in at least five south-west Aboriginal dialects and conducted a census of Aborigines in 1837; and George Moore, who (among other things) compiled a vocabulary of the language of the people of the south-west—at [100].

Armstrong's writings dealt with a number of aspects of the culture of Swan River Aborigines, including:

- none of the 'tribes' exceeded 40 individuals, there was one tribe to about every ten square miles of country and about 700 individuals regularly visited Perth, Fremantle, Guildford and Kelmscott;
- land was inheritable, being received 'equally by all sons from their fathers' and there was no supreme authority, with the family being the largest association that appeared to be 'actuated by common motives and interests';
- they regularly communicated with at least ten surrounding tribes and got their 'very best' spears from friends south of the Murray River some distance away;
- a whole tribe did not, as a custom, migrate beyond its own district but sometimes paid a visit of a few weeks to a neighbouring tribe when invited;
- few had been further from the Swan River than 80 to 90 miles but they moved about in their own districts according to the seasons and, in winter, lived apart as families in huts, provided food was plentiful, for a month or six weeks;
- they had no knowledge of the use of canoes or any substitute and only one or two weirs were seen but they used nets in the shallower pools of rivers and the spear was their 'great instrument' for fishing;
- they were extremely sociable and, in summer, the tribe 'for sixty miles round' assembled and 'entertained each other with the well known dances and chants of the corrobaree';
- in the parts of the colony he had visited (from 100 miles north of Perth to what is now Albany),

'everything leads to the conclusion that the inhabitants are all one race'—at [157] to [168].

George Moore's observations did not contradict Armstrong's in any significant way and noted that the language was 'radically the same, though spoken with a variety of dialects'—see [170] to [173].

Later nineteenth-century writers

Of the writers who arrived in Western Australia soon after settlement, the works of Sir George Grey, Charles Symmons, Rosendo Salvado and Ethyl Hassel were in evidence.

Bishop Salvado ran the Benedictine mission at New Norcia from 1846 until 1900. His memoirs included the following observations:

- the 'natives' of Perth and King George Sound, although about 300 miles apart, speak practically the same language;
- the term 'tribe' was not an accurate term, given that the Aboriginal people 'seemed to govern in the patriarchal fashion', with each family forming a small society 'dependent on its own head alone';
- they possessed general laws, maintained by tradition and handed down from father to son, and any head of a family had the right to punish breaches of these laws severely—at [174].

Ethyl Hassel, who lived north-east of Albany, reported that even Aborigines who had developed long-term relationships with employers would absent themselves to undertake traditional activities—at [175].

Dr Host was of the view that many traditional Aboriginal practices persisted for many years after settlement. In particular, he drew on the writings of Hassell, Eliza Brown and Janet Millett which, in his view:

> [D]emonstrated that Noongar people at the end of the 1860s were alive and well, adapting to the European presence, adopting aspects of European culture but maintaining many aspects of their own…Most significantly, Noongar families remained together and on country. When they were employed by Europeans, they remained in the lands that held their significant and sacred sites—at [177].

The court noted these conclusions were not challenged— at [177].

Dr Host continued his survey through the remainder of the nineteenth century, citing accounts of hunting parties, corroborees and reprisal spearings before concluding that 'Noongar people remained robust…[E]ven deflated estimates showed a steady increase in the south-western Aboriginal population'—at [179].

Dr Host summarised the position at the end of the nineteenth century:

> Much…of the south-west remained untouched by formal colonial expansion...The kinship system and the principle of mutual obligation from which traditional law and custom arose, persisted, along with the Aboriginal sense of place and various aspects of ceremonial life and material culture—at [180].

It was noted that growth of the non-Indigenous population in Perth was relatively slow (about 6,500 in 1884, rising to 35,767 by 1911) and Noongars had access to the food and water resources of lakes and swamps in the area until after the Second World War—at [181] to [182].

Early twentieth-century writers

His Honour noted this was the latest point of time at which it was possible for any writer to have contact with a person who was alive in 1829, or born shortly thereafter.

Daisy Bates, who was appointed by the Western Australian Government in 1904 to research the Aboriginal tribes, was not a trained anthropologist and her writings had been criticised, e.g. she disregarded 'mixed-blood' Aborigines. His Honour therefore took her comment that 'the once numerous inhabitants had dwindled down to one or two old men' as being 'probably a reference to the number of surviving full-blood members of the tribe'—at [104] and [185].

In a manuscript from about 1910, Bates identified informants who had been alive in the early years of settlement. She used the term 'Bibbulmun' to describe the people called 'Noongar' by others. The court noted, among other things, that the area of the 'Bibbulmun Nation' described by Bates broadly corresponded to the territory claimed in

the Single Noongar native title application—at [104] to [105] and [183] to [184].

Bates' conclusions included that:

- people claimed certain portions of territory through their ancestors, they could not be dispossessed of it and on these (or as near as white settlement allowed), they 'lived and died';
- every group had a relationship of some kind with every other group and the 'Bibbulmun Nation' were one people, speaking one language and following the same fundamental laws and customs;
- along its landward boundary (which corresponded roughly with the northern and north-eastern boundary of the Single Noongar claim, according to the court), there were circumcised tribes i.e. there was a 'line' dividing the 'Bibbulmun Nation', who did not practice circumcision, from its neighbours who did—at [185] to[186].

Late twentieth-century writers

The court noted that the writers on early WA Aboriginal history published during the latter half of the twentieth century did not talk to people with personal knowledge of conditions in the early years of the colony and so they were not of much assistance in determining the situation in 1829—at [114].

Language a significant factor

The court noted that a conclusion as to whether or not there was a common language throughout the area at date of settlement would be a significant factor to be taken into account in identifying the relevant 1829 community—at [274].

Expert linguistic evidence

Dr Thieberger was the only witness who had specialist linguistic qualifications and 'extensive experience' in Aboriginal languages, including a long association with south-west Western Australia. His Honour noted that Dr Theiberger:

- expressed the firm opinion that, in 1829, there existed a common language, although with dialectical differences, throughout the Single Noongar claim area;
- was not challenged by the respondents either as to his methodology or sources or his opinion and was not explicitly contradicted by other evidence;
- was 'an impressive witness: knowledgeable, careful and fair'—at [192] and [277].

Aboriginal evidence on language

In his Honour's view, the Aboriginal witnesses' evidence supported Dr Thieberger's conclusions about a single Noongar language with only dialectical variations. It was noted that:

- the Aboriginal witnesses came from widely scattered parts of the Single Noongar claim area and their dates of birth spanned a period of about 40 years;
- all claimed to speak and understand, to varying degrees, a language they identified as 'Noongar', which most said they learned from their parents, grandparents or other older people and had passed, or were passing, on to their descendants;
- many mentioned regional differences in vocabulary or pronunciation but all insisted that Noongar speakers could understand each other—at [217], [251] and [252].

Conclusions on language

His Honour accepted the respondent's submission that people who all speak a particular language are not necessarily members of the same society or community. However, it was noted that: 'The converse is also true; a single society may transcend language differences'—at [273], referring to *Neowarra v Western Australia* [2003] FCA 1402 *(Neowarra)* at [586], summarised in *Native Title Hot Spots Issue 9* at [393].

In his Honour's opinion (among other things):

- the overwhelming view of the early writers who touched upon the issue was that, in 1829, the people of south-west WA shared a common language with regional variations and the oral tradition of south-west Aborigines was that there is, and always has been, only one Indigenous language in the south-west;
- Dr Thieberger, whose opinions were to be preferred because of his training (i.e. the only expert with specialist linguistic qualifications) and practical experience, gave 'detailed and persuasive reasons' for concluding that the

language spoken inside the Single Noongar claim area was a language different to that spoken immediately outside its boundaries, despite some degree of commonality;
- the evidence of some early writers supported Dr Thieberger's view that regional variations were dialects, rather than different languages, and those variations did not preclude communication between the different 'dialect' groups—at [276] to [279].

Therefore, it was found that the evidence about language in the claim area provided 'significant, although not decisive, support' for the claim that, in 1829, 'there existed a single [Noongar] community throughout the claim area'—at [280].

Laws and customs about land at sovereignty

From the early writings, which provided a lot of information about the 'ownership' and use of land in the south-west at around 1829, his Honour concluded that:

- there was no rule that all members of a large community (whatever it was) had equal rights over all land;
- particular relatively large areas of land were 'owned' by particular small groups of people whose members inherited their right of 'ownership';
- each of those groups was made up of several nuclear family units, with some members of different units being ordinarily related by blood or marriage;
- some of the early writers used the word 'tribes' to refer to these small groups and all agreed that, although the groups were led by a 'titular custodian', that person was not a 'chief', in the sense of having a right of command;
- the land-owning groups enjoyed some exclusive rights over their land but, generally, their rights were not exclusive of all others;
- by virtue of laws or customs acknowledged by them and operating beyond their own ranks, they had to submit to periodic intrusions by particular people or on particular occasions and they also recognised obligations, which were probably reciprocated, to share any abundant produce of their land;
- it is unhelpful to use the word 'ownership' to refer to the land rights held by particular individuals or 'tribes' at date of settlement since this was not 'ownership' in the European sense i.e. the rights were held in common with other members of the 'tribe', were subject to obligations towards others outside the 'tribe' and were not transferable by sale or lease;
- a particularly striking feature was 'the consistency of the accounts of land laws and customs written by people who lived as far apart as King George's Sound, Perth and New Norcia'—at [282] to [284].

The contemporary evidence of the Aboriginal witnesses was relevant to the issue of law and custom at sovereignty only in that it was 'consistent throughout the claim area' and tended to suggest there were similar land 'ownership' rules throughout the claim at that time. The relevant evidence was summarised this way:

- although there was some inconsistency as to the details of the descent rules, the pattern was broadly the same, i.e. there was no regional or geographic variation in the evidence;
- all the Aborignal witnesses claimed special rights over particular areas of country, variously described as their *'boodja'* or 'run' or 'country', including the right to 'speak for' that country;
- they all expected to have access to other land within the claim area, dependent on some special relationship with that land (e.g. mother's country) or via permission;
- even if access was available, the person would not think it proper to 'speak for' that land—at [285] to [286].

After reviewing the anthropological evidence, his Honour went on to note the parties' submissions on this issue—see [287] to [341].

Conclusions on laws and customs about land at sovereignty

Wilcox J noted that:

- the evidence concerning laws and customs in 1829 relevant to land was of 'cardinal importance' to the question of whether, in 1829, there was in a single normative community or

a number of normative communities occupying discrete, smaller territories, perhaps similar to the dialect areas identified by Tindale;
- it was 'significant' that Dr Brunton, who was called by the state, conceded the existence of a 'considerable degree of cultural similarity' throughout the whole claim area in 1829, including in relation to laws, customs and beliefs;
- the only difference he identified was that concerning descent rules claimed by Bates (i.e. that in one area, the people took descent from their mothers and, in the rest, from their fathers) but even Bates wrote that, throughout the whole area, there was only 'one people, speaking one language and following the same fundamental laws and customs'—at [348] to [349].

It was noted there was 'considerable' common ground on the laws and customs relating to land at 1829, including that:

- in dealing with widely-scattered geographical areas, the early writers reported normative rules that differed from each other only to the extent that Bates detected a more rigid system of descent than the other writers and thought it differed between one part of the claim area and the remainder;
- in 1829, the normative system governing rights to land was that of a larger community than either the 'tribes' mentioned by some of the early writers or the 'estate groups' or 'country groups' and that system supplied members of smaller groups rights to occupy and use particular areas and imposed obligations to allow certain others to use that area for certain purposes, e.g. food-gathering and ceremonies;
- the normative system derived its force from the fact that it was part of a mosaic of laws and customs that were generally observed by a community of people larger than the various 'tribes', 'estate' or 'country' groups;
- the notion of a geographical difference in descent rules was rejected and a general rule of patrilineal descent, subject to exceptions, was accepted but there were differences between the expert witnesses, and other anthropologists, as to the nature and extent of those exceptions—at [350].

It was found that the apparent lack of points of distinction between the laws and customs governing land use and occupation in different parts of the claim area at 1829 tended to support the view that the people within that area were a single community at that time—at [351].

Evidence of other laws and customs at 1829

His Honour then went on to note the evidence about laws and customs in relation to:

- the 'circumcision line', identified by Bates and Tindale, which all parties accepted existed in 1829, that divided people who practised circumcision from the people of the south-west, who did not. The line roughly followed the north and north-east boundary of the Single Noongar claim and 'must have been', for pre-settlement societies a 'marker of the existence of different communities;
- the practice of skinning kangaroos and wearing a coat made from the skin which, it seemed from the evidence, was not the practice in any area outside of the Single Noongar claim area;
- spiritual beliefs, many of which did not add weight to a claim to a separate, distinctive community because similar beliefs were widely held outside the claim area. However, the court noted that evidence of present-day adherence to those beliefs was relevant to the question of continuity in adherence to traditional laws and customs of such a community, and saw no reason to read down the reference to laws and customs in s. 223(1) to exclude laws and customs observed in common with other Aboriginal communities;
- marriage, sexual transgressions and 'payback', which did not assist the claim to a single community at 1829 because either those practices were 'once wide-spread in Aboriginal Australia' or the area they applied to could not be geographically defined or there was nothing to suggest the practice was different in the south-west;
- funeral rites and tools, weapons and food-getting, which were of no assistance to the question of the existence of a single community at 1829 as there was no indication that

these practices were different elsewhere in Aboriginal Australia;
- social interaction between local groups, which demonstrated interaction between 'tribal' groups (e.g. for trade, feasting, ceremonies, wife-getting and fighting), rules under which particular land 'owners' had to submit to the intrusions of others and a custom of land 'owners' accepting certain intrusions by friendly neighbours—at [352] to [389].

His Honour went on to consider both the expert evidence and the submissions of the parties on point—see [391] to [423].

Conclusion on 1829—one society

For the following reasons, it was found that there was a single Noongar community in 1829—at [453].

His Honour first commented that all the expert witnesses (consistently with the early writings) agreed that the normative system binding the members of the 'tribes' or 'estate' groups or 'country' groups was that of a larger community. The issue was how much larger—at [426].

It was then noted that, while Dr Brunton thought there were 12 or 13 normative communities in the south-west at 1829, roughly corresponding to the dialect groups, he was not able to cite anything in the early writings that supported that conclusion and, when pressed, ultimately advanced two matters:

- the likely limits of travel in pre-settlement times, which would have broken people into a number of discrete communities; and
- Bates' observation about the existence of a patrilineal descent system in one part of the south-west and a matrilineal system in another.

As to the first, Wilcox J found (among other things) that:

- while that there were travel limits in pre-settlement times (probably around 100km in all directions), in the absence of any over-arching government structure that necessitated clearly-defined boundaries, there was no reason to assume such limitations resulted in the creation of a series of discrete communities occupying identifiable territories;
- it was important to note the absence of any correlation between the extent of the Swan Valley tribe's regular contact, as reported by Armstrong, and the area in which a particular dialect was used, i.e. Swan Valley tribes were reported as using an area that would have brought them into frequent contact with people using at least three, and possibly five, other dialects—at [429] to [431].

In relation to the second, while initially this appeared 'potentially persuasive', his Honour found that Dr Brunton:

- was unable to say what significance should be attributed to Bates' observation and conceded it was not factually well-founded;
- eventually conceded that there were significant exceptions to what he assumed to be a universal rule of patrilineal descent;
- started with the assumption of a normative society smaller than the single Noongar community and chose the dialect group for lack of any arguable alternative;
- accorded a great deal of respect to Bates, who was unequivocally of the opinion that, there was 'one people, speaking one language, and following the same fundamental laws and customs, i.e. a single fundamental normative system—[432] to [434].

In relation to the significance of dialectical differences, his Honour found that:

- the evidence clearly established the existence, in 1829, of a number of different dialects in the claim area;
- it would have been 'natural' for those who spoke the same dialect to feel special affinity with others who spoke that dialect and to express that affinity by using a name having regional significance but there was no evidence that any such affinity had 'normative significance';
- in the absence of any over-arching government, such evidence could only be found by identifying substantive differences in the norms (i.e. the laws and customs) operating in different dialect areas;
- there was no such evidence despite 'the number of early writers who took an interest in the normative system governing the lives of the Aborigines with whom they came into contact'—at [435] to [436].

While the court accepted there was no evidence that, in 1829, individuals throughout the south-west were aware of the existence of all the other people in the south-west or acknowledged them as members of a single society, it was found it was not necessary for this to be proven. All that was required was proof of 'a body of persons united in and by its acknowledgement and observance of a body of law and customs'. It was noted that, in *Yorta Yorta*, common acknowledgement and observance of a body of laws and customs was regarded as 'a sufficient unifying factor'—at [437]

Any 'additional' requirements having been rejected, his Honour went on to examine the evidence, especially the early writings, to determine whether a single normative system operated in the south-west at 1829 and whether it was acknowledged and observed by all the people in the claim area in 1829.

Barker, Nind, Collie, Lyon and Armstrong were of little assistance, in his Honour's view, either because they had no knowledge of Aborigines living elsewhere or expressed no opinion about the extent of the Aboriginal community (or society) and said nothing about normative differences.

The following early writer's were noted as providing useful information:

- Moore, who noted that 'every thing leads to the conclusion that the inhabitants are all of one race' with 'sharp dialectical boundaries' and have a language that was 'radically the same', which his Honour took as being 'consistent with the notion of over-lapping communities';
- Salvado, who interested himself in the content of the 'general laws', which he said were 'maintained by tradition and handed down from father to son', i.e. it may be significant that he did not mention any regional differences in those laws;
- Bates who, thought they were all 'one people, speaking one language, and following the same fundamental laws and customs'—at [442] to [444].

Aboriginal witnesses on dialects

His Honour noted that the contemporary evidence from Aboriginal witnesses:

- saw them claiming association with a group identified by a name that closely corresponded with one of the dialect names mentioned by Dr Thieberger;
- was 'striking', in that none of them treated their local name as a sufficient, or even primary, statement of their identity;
- each of them strongly asserted they were 'Noongar', although a Noongar associated with a particular local group;
- most contrasted Noongars, as a whole, with people, such as Wongais (or 'Wangkayi', who lived out towards Kalgoorlie) and Yamatji (towards Geraldton);
- while not much weight could be put on this evidence in relation to the position in 1829, it was not inconsistent with their case concerning it—at [445] to [451].

The evidence relied upon was:

- the explicit assessments of Moore and Bates and an inference to be drawn from the silence of the other early writers in relation to the question whether or not there was a single community;
- expert evidence as to the use of 'one fundamental language' throughout the claim area, albeit with regional dialectic differences;
- the existence of a circumcision line, sharply separating the area in which circumcision was practised from that in which it was not;
- the difference in practice, in relation to kangaroo skinning, between the people of the south-west and those outside it;
- the evidence of extensive 'tribal' interaction within the claim area, over areas of land greater than particular dialect areas;
- the absence of any suggestion of normative differences, other than the dubious possibility of a distinction between patrilineal and matrilineal descent—at [452].

Continuity of laws and customs from 1829 to now

On the question of continuity of law and custom since sovereignty, the court considered the evidence in the light of two logically distinct questions:

- whether the single Noongar community that existed in 1829 continued to exist over subsequent years, with its members continuing

to acknowledge and observe at least some of the traditional laws and customs that were acknowledged and observed in 1829;

- whether that community continues to exist today, with its members, including at least some of the claimants, continuing to acknowledge and observe at least some of those laws and customs—at [457].

Having noted that the evidence of the Aboriginal witnesses 'tended to lock together what the person had learned, or experienced, as a child and the position today', his Honour said that:

> I am conscious of the possibility that a native title claim may fail because of a discontinuity in acknowledgement and observance of traditional laws and customs, even though there has been a recent revival of interest in them and there is current acknowledgement and observance…Before upholding a native title claim, the Court must be satisfied, on the balance of probabilities, of continuity of acknowledgment and observance, by the relevant community, from the date of sovereignty until the present time—at [457], referring to *Yorta Yorta* and *Risk v Northern Territory* [2006] FCA 404 *(Larrakia)*, summarised in *Native Title Hot Spots Issue 19*.

His Honour went on to note that:

- there can never be direct evidence covering such a long time but inferences may be drawn, from the evidence, concerning the situation in earlier times;
- the 'usual' course taken is to call middle aged or older people who state that, in their time (usually at least 50 years), the relevant practice had 'always prevailed' and, in the absence of contrary evidence, to show that practice has 'prevailed from all time';
- where there is a 'clear claim' of the continuous existence of a custom or tradition that has existed at least since settlement that is supported by 'creditable evidence' and evidence of a 'general reputation' that it had 'always' been observed, it could be inferred (absent evidence to the contrary) that the tradition or custom had existed at least since the date of settlement—at [457], referring to *Yorta Yorta* at [80] and quoting from *Gumana v Northern Territory* [2005] FCA 50 at [195] to [201]

His Honour went on to set out the evidence given by the Aboriginal witnesses in order to determine whether the single Noongar community that existed in 1829 continued to exist, as such, from that time up to the present. Most of the evidence of the Aboriginal witnesses had been provided in statements in which each witness was then cross-examined. Due to its length, it is not set out in any detail here—see [460] to [595] and [602] to [604].

Evidence as to Noongar identity

Wilcox J commented that the evidence given by the Aboriginal witnesses as to their identity as a Noongar person was 'critically important' to the issue of continuity of a single Noongar society and then noted (among other things) that:

- while there were some differences in the Aboriginal witnesses' perceptions, there was unanimity about the existence of such a society;
- there was substantial agreement about the location of Noongar land and little variation in the boundary descriptions, which were generally consistent with both the early writings and the anthropological evidence;
- most witnesses gave clear evidence of differences between Noongars, on the one hand, and Yamatjis and Wongais on the other and were of the view that those differences were not like the differences between Noongar 'tribes';
- while it would have been 'relatively easy' for them to 'fabricate' identification evidence, and there were moments of confusion, the manner in which they dealt with the Noongar 'identity' issue was impressive and the witnesses all were genuine and confident in their identification;
- many of them told about first learning they were 'Noongar' when they were children which, given their age, was around the 1940s or earlier, i.e. well before the 'recent resurgence of interest in Aboriginal traditions and culture';
- it was 'important…that no respondent suggested to any of the witnesses that they were being dishonest, or were mistaken, either in their general evidence about identification or in stating the date when they first learned about their membership of the Noongar community'—at [596] to [599].

Distinguished from Yorta Yorta

After noting that, while European settlement had a 'profound effect' on Aboriginal people in the south-west of WA, Wilcox J found that 'the culture of those people persisted', going on to distinguish the facts of this case from those relevant to *Yorta Yorta:*

> Unlike the Yorta Yorta people…the south-west community did not suffer a cataclysmic event that totally removed them from their traditional country. Families were pushed around, and broken up…However, people continued to identify with their Aboriginal heritage—at [599].

His Honour was impressed, for example, by:

- the extent to which witnesses were able to trace their line of descent back for many generations and identify their contemporary relatives, despite the paucity of written records;
- the extent to which they were able to speak about Aboriginal customs, beliefs and codes of conduct—at [599].

A 'Noongar network'

From the evidence given, his Honour concluded that:

- there was 'clearly' a present-day 'Noongar network', linking families throughout the claim area;
- whether this was a 'community' for the purposes of s.223(1) depended on the extent to which the network's members continued to observe and acknowledge their traditional laws and customs—at [600] to [601].

Spiritual beliefs

Wilcox J noted that each of the Aboriginal witnesses gave 'extensive' evidence about spiritual beliefs which 'overwhelmingly' conveyed that they shared particular beliefs, however unlikely those beliefs might seem to a non-Aboriginal person. These included beliefs about:

- feeling good (or being safe) on *boodja* (country) because of the presence of familiar or friendly spirits and the description of spirits that do good things;
- the adverse effects of unfriendly spirits or those ensuring correct behaviour;
- smoking an area to clear away bad spirits;
- ways of propitiating unfriendly spirits, especially before fishing or hunting;
- places to avoid, regardless of cleansing, because of bad spirits;
- the chitty chitty bird (willy wag-tail) and 'messenger' birds';
- *Wudatji* or *mamari* (little people who cause mischief and take possessions);
- *Marbarn* men, who have special powers;
- Creation stories for particular country;
- spiritual totems—at [602] to [603].

This evidence was found to:

- indicate that some beliefs were held by virtually all the witnesses, despite their variation in ages and the fact that they came from widely-scattered parts of the single Noongar claim area;
- illustrate a 'rich and active' spiritual universe;
- have a high degree of consistency in relation to the most widespread beliefs, which 'says something about both the unity of the people across the claim area and their adherence to traditional ways'—at [604] to [606].

Marriage rules

On the evidence, his Honour concluded that there were, and continued to be, strict rules designed to prevent marriage between close relatives operating throughout the Single Noongar claim area:

> Marriage between first cousins or second cousins was, and is, universally condemned; third cousins may be alright. The kinship rules were traditionally enforced by parental involvement; parents either chose the marriage partner or needed to give their permission [and]…people in leadership positions throughout the south-west continue, against great difficulties, to enforce at least the substance of the rules, by discouraging marriages between close cousins—at [643] to [644].

Death and funerals

Almost all the Aboriginal witnesses gave evidence about death and funerals, which included:

- when a person dies, his or her spirit goes back to the land so it is best to die in one's own country and a person who dies away from his

or her traditional country should be taken back to it for burial;
- Noongars are never cremated because fire would burn the spirit;
- people should not be buried quickly because the spirit needs time to escape and wander;
- burial places should be approached only if the spirit has been put to rest—at [645].

'Importantly', as there was no challenge to, or inconsistency in, the evidence about any of those matters, the court could 'properly' say they represented attitudes widely accepted throughout the Single Noongar claim area—at [647].

It was also noted (among other things) that the evidence about the method of burial contained 'significant discrepancies'—at [649].

Hunting, fishing and other food-gathering

On this issue, his Honour pointed out that:

- all the Aboriginal witnesses gave evidence of learning about food-gathering as a child;
- while the food sources varied from one part of the claim area to another, a common feature was that there were rules attached to taking, preparing and cooking particular food and most witnesses expounded these rules;
- many of the rules apparently stemmed from pragmatic considerations but some had a spiritual rationale;
- the witnesses considered the rules still apply when people seek the particular food;
- the most notable feature was the surprising proportion of the witnesses who claimed they still continued to hunt and/or fish, either for themselves or in order to teach their children or grandchildren, i.e. 22 of the 29 witnesses were more than 50 years old and 18 of them were more than 60—at [653].

His Honour went on to summarise the extensive evidence given on this topic before concluding that:

> [H]unting, fishing and food-gathering remain important ingredients in the lives of most of the witnesses, and this despite the constraints imposed upon them by *wajala* [whitefella] laws and practices and the fact that these activities are presumably no longer essential to Aboriginal survival…[I]n carrying out these activities, the witnesses strive to follow traditional laws and customs and…many of them…are actively teaching their skills, and those laws and practices, to younger members of their families—at [684].

Evidence of laws and customs concerning rights to land

Wilcox J was of the view that:

> The continuing importance attached to land will…be apparent from the identification evidence….Each one of the 30 Aboriginal witnesses identified his or her *boodja*, or 'country'. This was an area, special to the witness, in which he or she felt at home and could move about freely without need of anybody's permission. There is a striking resemblance between the situation described by those witnesses and the picture conveyed by early writers…I have the impression that the typical contemporary *boodja* is more extensive than in 1829…[which was]…the logical result of the interaction of a rule (or…a practice) that a man should seek a wife from a tribe far away from his own, with the greater mobility …forced upon…the Noongar people by white settlement—at [686].

The evidence as to the rules dictating how a person acquired rights over particular land and waters was, in summary:

- there must be a connection, by birth or family, with the particular area;
- the person must seek to associate himself or herself with that area, by living within, or frequently visiting, that area and learning about it;
- the person must be recognised by other Noongars as being connected with it;
- while a marriage connection will enable a person to live and hunt in particular country, it did not entitle the person to 'speak for' that country;
- it appeared possible for a person to gain rights to particular country through either parent;
- although each Aboriginal witness expressed the matter in their own way, 'overwhelmingly' they claimed the existence of a rule about

seeking 'permission' to visit another's *boodja* (country), the importance of that rule and the tradition that, if permission is asked, it is not usually refused;
- the 'permission' rule has had to accommodate the realities of modern life (e.g. a person would not need to seek permission if merely driving through another's country on the way to somewhere else) but the rule is regarded as extant and its breach strongly disapproved—at [685] to [700].

Continuity of acknowledgement and observance of laws and customs

His Honour rehearsed the parties' submissions at [701] to [749] and, before settling out his conclusions, dealt with some 'peripheral' matters.

Peripheral matters

It was noted that, while the finding that there is a present-day Noongar network was based on the evidence of only 30 Aboriginal witnesses, it provided an 'insight into the way of life of a much greater number of Aboriginal residents of the south-west…and the family and social relationships between those people'. Further, it was not the number of witnesses that was important but the nature and quality of their evidence—at [750].

His Honour went on to, among other things, express his disagreement with several submissions made by counsel for the Commonwealth, including that evidence of different practices and rituals used to manage spirits was an indication of disunity, rather than unity, of society:

> I accept there were differences in their manner of expressing those beliefs...However, some Christians pray standing, some seated and some kneeling. Some use rosary beads, or other aids; some do not. Those differences in behaviour do not destroy the peoples' essential unity as Christians—at [753].

It was also noted that, while there were some differences in the evidence about creation snake stories, that did not establish societal fragmentation e.g. some Christians accept the virgin birth, some do not—at [750] to [755].

Wilcox J then said these were sufficient examples to demonstrate that the Commonwealth's submission (among other things):

- sought to impose on the Noongar community a degree of conformity in belief that did not apply to the non-Aboriginal community;
- trivialised the Aboriginal evidence on marriage because there was 'obviously' a Noongar rule forbidding marriage between second cousins, and a strongly held Noongar belief that infractions should be sanctioned by social ostracism. The fact that it persists was a 'powerful indication of both the unity of the south-western community and its continuity from 1829 to the present day';
- understated the evidence about death and funerals because, while non-Aboriginal notions had impacted heavily, the evidence showed the persistence of some traditional beliefs about death and funerals that were different to non-Aboriginal beliefs, e.g. the relationship between liberation of the deceased's spirit and the timing of the funeral, that cremation is unacceptable because it may burn the spirit and the importance of being buried in one's own country *(boodja)*—at [758].

The Commonwealth's submission in relation to hunting, fishing and food-gathering, included a statement that:

> [I]n an urban environment, which is patently inconsistent with a "hunting and gathering" lifestyle…the evidence must show that…hunting, fishing and gathering are not random or coincidental in the sense that other members of the broader urban community also undertake those activities.

Wilcox J found this submission 'puzzling' since the Aboriginal witnesses' evidence was that:

- they were not free to hunt, fish and gather food wherever they wished, as a non-Aboriginal person would do, but rather only within their own boodja or elsewhere by permission of the local senior elders;
- the animals they hunted and the foods they gathered extended far beyond those that would ordinarily be taken by a non-Aboriginal person;
- they employed traditional Aboriginal techniques, skills and weapons in carrying out

these activities and abided by restrictions that they perceived to be imposed upon them by Noongar laws and customs; and

- they saw their activities as having both a spiritual dimension, requiring them to observe some rules that would not be known to, or observed by, a non-Aboriginal person, and a cultural dimension, requiring them to pass on their knowledge to younger people—at [760] and see [650] to [684].

It was found that:

> In the light of this evidence…the activities described by the witnesses must be regarded as being different in kind to whatever fishing, hunting and food-gathering activities are carried out by non-Aboriginal people in the claim area—at [761].

Conclusion on existence of normative system

Wilcox J then turned to the 'critical' question which was:

> [W]hether the state and the Commonwealth were correct in arguing there was no longer a normative system for allocating rights and interests in land, within the Noongar community, or, if there is, that system is not a continuation of the normative system that existed at date of sovereignty—at [762].

His Honour summarised the respondents' submissions put to support that proposition:

- Dr Palmer, who was called by the Single Noongar claimants, postulated a normative system whereby a person obtained rights as a 'matter of negotiation and assertion' based upon one or more of three factors: descent (either matrilineal or patrilineal), place of birth or affinal relationships;
- a 'rule' that makes rights and interests dependent upon choice, and/or negotiation and assertion, is no rule at all;
- the evidence of the Aboriginal witnesses did not demonstrate the existence of a consistent rule as to how a person obtains rights in country through descent;
- the evidence was inconsistent in relation to the importance of birthplace;
- whatever the balance of evidence, the Aboriginal witnesses did not evince or articulate a common understanding of the rules;
- the evidence did not disclose any mechanism for resolving disputes over access to land—many Aboriginal people have come to live in Perth without opposition or criticism;
- the system of local organisation at settlement involved 'bounded estate (or country) group areas and bands (or residence groups)' and that system no longer exists in Area A;
- there is no longer a distinction between 'home area' and 'run' (i.e. core and contingent rights) and the witnesses simply made claims to large areas of country;
- by virtue of six propositions set out below, there was no normative system of law and custom in relation to permission or, if there is, it is not traditional—at [763].

His Honour dealt with each in turn.

Rights were a matter of negotiation and assertion

It was held that, while Dr Palmer did refer to the exercise of rights to country being 'a matter of negotiation and assertion', in the light of the evidence:

- it was erroneous to see a 'normative problem' in the reference to negotiation;
- Dr Palmer was 'really' talking about recognition of an asserted right, being a right allegedly conferred on the asserter by other rules, such as the rules about descent, and was not saying that a person with no asserted right could obtain rights through a bargaining process;
- the range of choice was limited by other normative elements, such as the requirement to live in, and learn about, particular country and the Aboriginal evidence that being a Noongar involved three things, namely being born to a Noongar father or mother, living in Noongar country, and having learned Noongar ways, was consistent with Dr Palmer's views about entitlement to country;
- the starting point was birth (patrilineal or matrilineal) and then there must be a choice, to live in particular country and to a learning and commitment process—at [764] to [772].

Rules regarding birthplace and descent

In relation to this submission, his Honour noted that;

- in 1829, land entitlements were acquired by a general rule of patrilineal descent, subject to exceptions, which implied that people would ordinarily succeed to their father's country with succession to mother's country being exceptional;
- while it was undeniable that claims to matrilineal descent were now commonly recognised, the 'critical point' was the recognition in *Yorta Yorta* that European settlement has had the most profound effects on Aboriginal societies and that it was inevitable that the structures and practices of those societies, and their members, would have undergone great change since settlement;
- the Aboriginal people in south-west WA had been personally affected, in a profound way, by European actions;
- every one of the 30 Aboriginal witnesses had at least one white male ancestor;
- if a rule of patrilineal descent had been strictly applied, all these witnesses would have lost their entitlements to country;
- in such a situation, it is only to be expected that members of the community would have widened the application of the exception, so as to allow a claim to country to be made through the mother, equally with the father, and even, skipping a generation, through a grandparent;
- for the normative system to have survived, it was obviously necessary to allow a degree of choice of country exceeding what would have been necessary in more ordered, pre-settlement times—at [773] to [775].

How much change in birthplace and descent rules was tolerable?

In assessing how much change to the 'descent rules' was tolerable before it must be said the pre-settlement normative system no longer existed, his Honour was of the view that:

> [O]ne should look for evidence of the continuity of the society, rather than require unchanged laws and customs. No doubt changes in laws and customs can be an indication of lack of continuity in the society; they may show that the current normative system is 'rooted in some other, different, society'. Whether or not that conclusion should be drawn must depend upon all the circumstances of the case, including the importance of the relevant laws and customs and whether the changes seem to be the outcome of factors forced upon the community from outside its ranks—at [776], referring to *Yorta Yorta* at [89].

In this case:

- the descent rules are undoubtedly of great importance but changes to them must have been inevitable if the Noongar community was to survive European colonisation;
- the move away from a relatively strict patrilineal system to a mixed patrilineal/matrilineal or cognative system should not be regarded as inconsistent with the maintenance of the pre-settlement community and the continued acknowledgement and observance of its laws and customs;
- it would have been natural for the community to respond by regarding birth upon country as not essential to recognition of the person's entitlement to rights over that country, provided the person was prepared to commit to an association with that country by living upon it, at least for substantial periods of time, and learning about it;
- a principle in those terms emerges clearly from the evidence of the Aboriginal witnesses—at [777] to [778].

Lack of articulation of the rules

As to the submission that the lack of articulation of the rules about country led to an inference that there was no normative system, his Honour was of the view that, while some witnesses were unwilling to speak generally, some did and:

> All the witnesses…identified their own country and explained the basis of their claim to it. I see no error in Dr Palmer using these items of individual evidence to discern and describe the set of rules that appears to be in operation...[and his]…opinions about land rights and interests…seem to be soundly based on the early writings and the evidence in these cases—at [780].

No mechanism for resolving disputes

As to the submission that there was no mechanism for resolving disputes over access to land (e.g. no action has been taken to resist, or protest against, entry to Perth by Aborigines from other areas), Wilcox J noted (among other things) that:

- it was not necessary to identify a claimed right or interest as one which carries with it, or is supported by, some enforceable means of excluding from its enjoyment those who are not its holders;
- some regard must be paid to the realities of post-settlement life, i.e. in pre-settlement times, intruders may have been sanctioned by being speared but that practice became illegal and so the most effective method of enforcement disappeared;
- the only remaining method was disapproval, perhaps involving social ostracism, and the evidence suggested this still occurred;
- 'home areas' had effectively disappeared and so today's boodjas are similar in concept to—although probably larger in area than—the 'runs' of pre-settlement times which, while a significant change, was readily understandable in that it was forced on Aboriginal people by white settlement;
- surprisingly, the social links between families seemed to have survived but the related families ceased to be residence groups and the ability to maintain the 'home area' element of the pre-settlement normative system was lost—at [784] to [786].

Permission rule

Among other things, in relation to the rule requiring permission, the state submitted that the evidence 'clearly' supported six propositions:

- there was no law or custom requiring 'permission' to simply go to an area but, rather, the concept only arose in respect of conducting certain activities on the land, which his Honour accepted was 'substantially' correct since it could hardly be otherwise in the age of the motor car and urbanisation;
- the rationale for the concept was that there might be dangerous places and spirits in other country, which was found to be 'partly' true but Wilcox J noted there was also a recognition of the duty to acknowledge the local group's right to control access to their land;
- in most cases, no form of permission was sought at all, which his Honour found was correct in relation to non-Aboriginal visitors and some Aboriginal people but there was not much that the local group can do about it now;
- to the extent any form of 'permission' was sought, it was a matter of courtesy, was never refused and there is no consistent understanding as to how it should be sought or from whom. As to this, among other things, his Honour noted that the evidence clearly indicated permission should be sought from a senior member of the local group in the territory which is to be visited;
- the witnesses' concept of 'permission' was not specific to Noongar country but was a general principle that applied everywhere, which his Honour agreed was correct—see [724] to [730].

However, his Honour found the permission rule survived:

> Certainly, today, there are more convenient ways of seeking permission than there were in 1829. But it is still the rule that permission must be obtained. Not everybody obeys the rule. However, a law is not abrogated by the disregard of some. Of course, remedies for breach of the rule are today extremely limited. But that does not mean the community has discarded the rule—at [787].

Dr Palmer's view preferred

Where there were points of disagreement between Dr Palmer and Dr Brunton, Wilcox J preferred Dr Palmer's views. Therefore, his Honour accepted Dr Palmer's opinion that there was a Noongar normative system relating to land—at [788] to [790].

Conclusion—1829 normative system survives

His Honour then concluded that, while the changes noted above raised important issues and many traditional laws and customs had not been maintained, when he came back:

> [T]o the test stated in *Yorta Yorta*, and ask myself whether the normative system revealed by the evidence is 'the normative system of the society

which came under a new sovereign order' in 1829, or 'a normative system rooted in some other, different society', there can only be one answer. The current normative system is that of the Noongar society that existed in 1829, and which continues to be a body united…by its acknowledgement and observance of some of its traditional laws and customs...It is a normative system much affected by European settlement; but it is not a normative system of a new, different society—at [792].

Connection to Part A

It was found (among other things) that:

- the Single Noongar claimants succeeded in demonstrating the necessary connection between themselves and the whole claim area (excluding the off-shore islands and any other area below low-water mark from the mainland);
- therefore, they had established a connection with Part A, which is part of the Single Noongar claim area;
- it was sufficient that they were members of a community of Aboriginal people who continued to acknowledge and observe the traditional laws and customs possessed by them at sovereignty, under which particular rights and interests in that area are enjoyed by some or all members of the community;
- there is no doubt that Aborigines inhabited Part A at date of settlement;
- they were members of the single Noongar community which acknowledged and observed the traditional laws and customs discussed above;
- accordingly, it was open to present day members of that community to obtain recognition of the community's rights in relation to Part A, whether or not there are, today, members of the community who can trace their ancestry to people living in Part A at sovereignty;
- actual use of particular land by particular members of the Noongar community is an intracommunal matter to be regulated by that community;
- the single Noongar community established 'on the probabilities' that some members of the present day Noongar community are descended from one or more Noongars who lived in Part A at sovereignty;
- while the evidence did not permit a positive finding in relation to any particular witness, it was highly unlikely that all their claims to be descended from an ancestor living in the Part A were wrong since thousands of Aborigines lived in that area at date of sovereignty;
- even allowing for a high rate of infant mortality and the effect of European settlement, it seemed most unlikely that today's wider Noongar community contains no descendant of any of them—at [792] to [799].

Mr Bodney's applications

Mr Bodney's applications were all dismissed because:

- the court was not convinced that the 'Ballarruk and Didjarrak people', through who he claimed, were land-holding groups and seemed instead to be names of moiety (skin) groups;
- there was no evidence that the members of Mr Bodney's claim group were descended from anybody who was a Ballarruk or Didjarruk person alive at or about the date of settlement or that they have continued to acknowledge and observe whatever were the Ballarruk and/or Didjarruk rules about landholding at that time;
- his claims were inconsistent with the finding that the relevant community in 1829 was the Single Noongar community—see [842] to [876].

No native title below low-water mark

Low-water mark was found to constitute the seaward limit of any area subject to native title, in this case, because:

- as there was no evidence or oral tradition that, in 1829, the Aboriginal inhabitants of the south-west had means of accessing islands or used any island, the normative system relating to land and waters in 1829 did not extend to the off-shore islands;
- in relation to land and water below low-water mark, the only evidence was that, at date of settlement, the south-west Aborigines did not use any kind of boat and must have been restricted to places they could reach from dry land or by wading—at [802] to [805].

Surviving native title rights and interests

His Honour noted that:

- many laws and customs of the 1829 Noongar community have not survived;
- the 'bundle of rights' metaphor used to describe the nature of native title implies one or more rights may survive, even though others have disappeared;
- the rights and interests that make up that bundle are possessed under the laws and customs as presently acknowledged and observed;
- the term 'extinguishment' is usually used to refer to a loss of rights though acts attributable to the legislative or executive branches of government and it is confusing, and potentially misleading, to use the same term to refer to a loss from a quite dissimilar cause;
- there is no difficulty in saying that a particular right has been lost through a failure of the relevant community to continue to acknowledge and observe it—at [806] to [807]

It was emphasised that the findings on surviving rights and interests did not purport to specify the precise wording of any determination that may ultimately be made and the parties should have a further opportunity of discussing the form it should take—at [809].

The evidence was found to indicate that:

- Noongar people have, since sovereignty, continued to occupy, use and enjoy those parts of the lands and waters of the claim area to which they have had legal access;
- it was appropriate to make a determination of a non-exclusive right (at least) to occupy, use and enjoy the area concerned;
- the specific rights attached to that general right ought to be exhaustively stated— at [829].

His Honour held that, subject to formulation of the precise wording of the determination and the application of the principle of extinguishment, what survives as native title is the right of the Noongar people to occupy, use and enjoy lands and waters for the following purposes:

- to live on and access the area;
- to use and conserve the natural resources of the area for the benefit of the native title holders;
- to maintain and protect sites within the area that are significant to the native title holders and other Aboriginal people;
- to carry out economic activities on the area, such as hunting, fishing and food-gathering;
- to conserve, use and enjoy the natural resources of the area for social, cultural, religious, spiritual, customary and traditional purposes;
- to control access to, and use of, the area by those Aboriginal people who seek access or use in accordance with traditional law and custom;
- to use the area for the purpose of teaching, and passing on knowledge, about the area and the traditional laws and customs pertaining to it;
- to use the area for the purpose of learning about it and the traditional laws and customs pertaining to it—at [841].

Wilcox J rejected:

- rights to inherit, dispose of or give native title rights and interests, to determine and regulate membership of, and recruitment to, the native title holding group and to regulate and resolve disputes between the native title holders because they were not 'rights and interests ... in relation to lands and waters', as required by s. 223(1);
- the right to conduct social, religious, cultural and economic activities on the area because initiation and corroborrees are not part of the contemporary system of law and custom and it was not clear what other activities this right might contemplate but the applicants have the opportunity to revisit this before the form of the determination is finally settled;
- the right to control access to and use of the area by all Aboriginal people, not only Noongars, but such a right concerning Aboriginal people who seek access to, or use of, the claim area in accordance with traditional law and custom was accepted—at [832] to [837].

'Exclusive' native title

It was noted that:

- there were 'obvious practical difficulties' in the way of the Noongar people exercising a right of exclusive possession, occupation, use and enjoyment in an urban and or a semi-urban environment;

- this did not preclude the court from recognising the existence of that right because the definition in s. 223(1) is directed to the possession of the rights or interests, not their exercise;
- the difficulty in practical enforcement of a native title right is not a proper ground for denying its existence—at [816].

The case law was considered, including *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28, summarised in *Native Title Hot Spots Issue 1*, where it was said at [88] to [89] that:

> It is the rights under traditional law and custom to be asked permission and to "speak for country" that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.

Wilcox J rejected the state's submission that the Aboriginal witnesses' claimed rights to speak for land ought not be construed as a claim of ownership—at [825].

That said, the court left the question in relation to 'exclusive possession' open because:

- 'no attention was paid' to, and no evidence led in relation to, this claim;
- while absence of previous extinguishment is an obvious prerequisite to recognition of native title, it is not 'self-evidently sufficient' to justify a determination of a right of exclusive possession;
- the question was a complex one that could only be addressed in a case-by-case basis over each tenure parcel and, in this case, only in relation to the six specified types of area where it was claimed—at [838] and [840].

Comment

With respect, the issue of whether or not a native title right to exclusive possession, occupation, use and enjoyment can be recognised (putting extinguishment to one side) turns on whether or not the Noongar people have proven that, under the normative system in operation today, they have:

- the right to speak for country, which his Honour apparently found they did; and
- the right to be asked permission to access or use the area concerned, and on this point, the finding appears to be that they do but only in relation to those bound by their law and custom—see [285], [700], [727] to [730], [781] to [782] and [787] for example.

Further, in the statement made to summarise the decision, Wilcox J said:

> In particular, contemporary Noongars continue to observe a system under which individuals obtain special rights over particular country—their *boodjas*—through their father or mother, or occasionally a grandparent. Those rights are generally recognised by other Noongars, who must obtain permission to access another person's boodja for any traditional purpose. Present day Noongars also maintain the traditional rules as to who may 'speak for' particular country.

The correct approach seems to be taken by his Honour Justice Sundberg in *Neowarra v State of Western Australia* [2003] FCA 1402, summarised in *Native Title Hot Spots* Issue 8, at [368] to [383], i.e. if there is both a right to speak and a right to be asked permission, then, *prima facie*, the right to exclusive possession is established as a matter of fact but subject to consideration of extinguishment. It is unfortunate that such an important issue was apparently left unresolved by the trial judge, particularly since Wilcox J retired soon after delivering this decision.

Postscript: the state's notice of motion

On 25 August 2006, the state filed a notice of motion seeking:

- rescission of the orders made for the hearing of a separate question in a separate proceeding;
- an order for a new trial of the separate proceeding before a different judge;
- an order pursuant to s. 84C that Part A of the Single Noongar application be struck out; and
- orders concerning discovery and interrogatories relevant to the identity of the native title claim group and authorisation.

Reaction to the motion

Wilcox J;

- thought the state's legal advisers had been discourteous to the court by filing the notice of motion in circumstances where there had been a lengthy hearing into the separate question,

the parties were advised that work had commenced on the judgment, that judgment was expected to be delivered soon and no notice was given of the state's intended action;
- was surprised by the complete U-turn by the state i.e. it was the state that had urged the court to pursue the separate question yet it was now seeking, nearly three years later and after expenditure of taxpayers' dollars, to rescind the orders—at [892] to [893].

Validity of the order for the separate question
Wilcox J agreed that while a decision to order determination of a separate question under Order 29 rule 2 of the Federal Court Rules is one to be made carefully after consideration of the views of the parties, there was no limit on the court's discretion to take that course. Wilcox J was of the view that the order was valid.

Is it open to the state to complain about the order for a separate question?
Wilcox J agreed with the principle stated by the House of Lords in *Marsh v Marsh* (1945) AC 271 at 285: 'If a litigant has himself induced, acquiesced in or waived the irregularity, he cannot afterwards complain of it'—at [931].

His Honour noted that:
- the state had clearly made a considered decision to proceed to trial on the separate question without filing a prior strike-out motion in relation to authorisation within time;
- both the state and the Commonwealth appreciated that authorisation was not before the court but that the court was agreeable to widening the hearing if all the parties agreed but they took no action to obtain the agreement of the other parties to do so;
- the court then embarked upon a long and expensive hearing and now, in the absence of any new factors, the state was seeking to throw away all the work that had been done
- the word 'unconscionable' sprang to mind and 'whatever happened to the longstanding principle that the Crown sets an example to others by behaving as a model litigant?'—at [932].

Conduct of the strike-out motion
Wilcox J viewed the state's apparent belief that the effect of the filing of the strike-out motion was to prevent anybody taking any further action in relation to the proceedings as 'breathtaking', amounting in effect to taking out an injunction against a judicial officer—at [940].

It was held that the state's strike-out application failed to satisfy the condition precedent specified by s. 84C which, in this case, related to evidence about lack of authorisation. According to Wilcox J:

> [I]t is inimical to the purpose of s 84C(2) to allow a party to ignore a direction about filing a strike out motion by a particular date, engage in a lengthy hearing and then raise an issue of authorisation without supporting evidence—at [943].

This did not mean that a judge could not give leave to file a strike-out motion after a specified date, as s. 84C(1) refers to the words 'at any time'.

Disposal of the 'postscript' motion
His Honour dismissed the motion because:
- the state required leave to file a strike-out motion out of time and had not sought or obtained it;
- the motion was not supported by evidence of an arguable case of non-compliance in the terms of s. 84C—at [945].

Costs of the late motion
Wilcox J was of the view that the state had acted unreasonably and put another party to avoidable expense. Therefore, the usual rule in s. 85A(1) was departed from and the applicant's costs of the motion were awarded against the state. The costs position of the other parties was reserved and further carriage of the matter remitted to Justice French—at [950].

Final comment
Among other things, Wilcox J urged the parties to 'consider their desirable future action':

> [T]his litigation is not a private squabble about money. It is litigation that deals with matters of great importance to…all Western Australians…[and] has significant implications for…'reconciliation'…It ought not be conducted

like a game...[I]t would seem…desirable for the parties to engage in some serious thought and discussion before any of them spends more money on legal action—at [952].

Appeal
The state and the Commonwealth have annnounced they intend to appeal against certain aspects of this decision. As Wilcox J noted, as the orders in this case are not final, leave to appeal will be required—at [880].

Determination of native title—Yankunytjatjara/Antakirinja

Yankunytjatjara/Antakirinja Native Title Claim Group v South Australia
[2006] FCA 1142

Mansfield J, 28 August 2006

Issue
The issue was whether the Federal Court should make a determination of native title over part of central northern South Australia in the terms of the consent orders proposed by the parties.

Background
The claimant application dealt with in this matter was made under the *Native Title Act 1993* (Cwlth) (NTA) in 1997. The claim group, made up of members of the Western Desert social and cultural bloc, was comprised of approximately 1300 people from 19 families. Most identified as Yankunytjatjara but the group included people from other groups who were married to Yankunytjatjara people. None of the claimants lived on the claim area itself, residing primarily in neighbouring towns. The main respondents were the State of South Australia and the owners of several pastoral leases in the area.

Anthropological report
The applicant's evidence was given in an anthropological report containing detailed genealogical information regarding the families comprising the claim group from the mid-nineteenth century. It also described traditional patterns of migration and noted that the:

> [A] relationship of reciprocal benefit developed between pastoralists and claimants and their ancestors. That relationship continues today, with claimants readily acknowledging their friendships with pastoralists and recognising their mutual rights in country.

The members of the claim group were described as a society which continued to observe the fundamentals of traditional life as adapted to meet changing circumstances and challenges.
The report noted that:

> People express rights with different degrees of authority in differing social and geographic contexts. The strength of that authority is measured in socio-political terms—through age and gender, family connection, ritual and communal status.

Decision
His Honour Justice Mansfield:

- agreed with the principal parties that the report supported the recognition of native title rights and interests possessed by the claimants;
- accepted that the parties likely to be affected by the proposed determination had had sufficient access to independent legal representation and that the state, in consenting to the determination, had given appropriate consideration to the evidence and the interests of the community generally;
- considered the terms of the proposed determination satisfied the requirements of s. 225 of the NTA—at [18] to [20].

His Honour was therefore satisfied that it was within the power of the court to make the determination: see s. 87.

Effect of future pastoral improvements
The parties were unable to agree as to whether future pastoral improvements done after the date of the consent determination would extinguish native title: see *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCAFC 110 at [149] to [158], summarised in *Native Title Hot Spots* Issue 15. They sought to resolve the issue by providing for 'the possibility of future extinguishment, according to law, of native title' by the construction of further pastoral improvements. His Honour noted that:

- this left open the possibility of further

extinguishing acts in limited circumstances and it was 'realistic of the parties to have recognised the possibility of such future conduct, whatever its legal effect';
- it was far better that the parties addressed the legal effect or consequences of such conduct, if it eventuated, than leave the issue unresolved;
- the proposed order reflected the common understanding of past conduct as applied to possible future conduct and provided sufficient certainty to the parties—at [24].

Determination over only part of application area
Despite the fact that the question of native title in relation to part of the area claimed was unresolved, the court was not precluded from making the proposed consent determination because:
- ss. 87(1)(a)(ii) and (3) expressly contemplated resolution by agreement of any part of a proceeding; and
- the remaining part of the proceeding may be dealt with later—at [25].

Determination area
The determination recognised non-exclusive rights to 18,665sq km of land and waters over Alberga Creek and Neales Creek and the catchment areas of Arkaringa Creek, across the interface of the Simpson Desert and Great Victoria Desert and included Lambina Station, Welbourne Hill Station and Todmorden Station and parts of four other pastoral leases.

Native title holders
Under the relevant traditional laws and customs of the Western Desert Bloc, the native title holders comprise those Aboriginal people who have a spiritual connection to the determination area and the *Tjukurpa* associated with it because:
- that area is their country of birth (also reckoned by the area where their mother lived during the pregnancy); or
- they have had a long-term association with the area such that they have traditional geographical and religious knowledge of that country; or
- they have an affiliation to the area through a parent or grandparent with a connection specified in the two paragraphs above; and
- they are recognised under the relevant Western Desert traditional laws and customs by other members of the native title claim group as having rights and interests in the determination area.

Native title rights and interests
The nature and extent of the native title rights and interests are non-exclusive rights to use and enjoy the determination area in accordance with the native title holders' traditional laws and customs, being rights to:
- access and move about, hunt and fish and gather and use the natural resources such as food, medicinal plants, wild tobacco, timber, stone and resin;
- use the natural water resources;
- live, camp and erect shelters and cook and light fires for all purposes other than the clearance of vegetation;
- engage and participate in cultural activities, including those relating to births and deaths and conduct ceremonies, hold meetings, teach the physical and spiritual attributes of locations and sites within the area;
- maintain and protect sites and places of significance to native title holders under their traditional laws and customs;
- be accompanied on to the area by those people who, though not native title holders, are spouses of native title holders, people required by traditional law and custom for the performance of ceremonies or cultural activities on the area, people who have rights in relation to the area according to the additional laws and customs acknowledged by the native title holders or people required by native title holders to assist in, observe, or record traditional activities on the area; and
- make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders.

Qualifications
The native title rights and interests are for personal, domestic and non-commercial communal use and do not confer possession,

occupation, use and enjoyment to the exclusion of others. There is no native title in minerals or petroleum as defined in state legislation. Native title does not exist on certain areas, including:

- public works; and
- areas where an improvement (e.g. a house or any other building, an airstrip or a dam) has been constructed pursuant to one of the pastoral leases noted in the determination, including any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements referred to.

Native title rights and interests are subject to and exercisable in accordance with:

- the traditional laws and customs of the native title holders;
- valid laws of the state and Commonwealth, including the common law.

Other interests

The nature and extent of other non-native title interests, including those created by pastoral leases or held by telecommunications operators and those of the Crown in right of the state, are recognised in the determination area. The relationship between the native title rights and interests and the non-native title rights and interests is set out in the determination.

Prescribed body corporate

The native title rights and interests are not to be held in trust and an Aboriginal corporation must be nominated within six months to be the prescribed body corporate for the purposes of ss. 57(2) and 57(3).

Proposed determination of native title—Timber Creek

Griffiths v Northern Territory [2006] FCA 903

Weinberg J, 17 July 2006

Issue

The question before the Federal Court in this case was whether native title exists over the land and waters in the vicinity of Timber Creek in the Northern Territory. The main area of contention was the evidence of the various anthropologists.

Background

The proceedings, before his Honour Justice Weinberg, involved three separate, but related, claimant applications brought on behalf of the Ngaliwurru and Nungali Peoples under the *Native Title Act 1993* (Cwlth) (the NTA). The area covered by the applications was the town of Timber Creek in the Northern Territory. The Commonwealth was initially a party but withdrew from proceedings, leaving the Northern Territory (the territory) and the Amateur Fishermen's Association of the Northern Territory (AFANT) as the only respondents. The area covered by the application had previously been subject to a number of pastoral leases. The town lies along the south bank of the Victoria River and a waterway known as Timber Creek (the creek) flows through the claim area.

Historical evidence

The court had been provided with 'a large folder of what the claimants termed History Documents'. Given the issues in this case, the earliest extant records of European explorers, dating back to 1855, were of 'particular importance' because 'they shed considerable light upon conditions in the area at the time'. While his Honour had regard to all of the historical documents, it was not necessary to refer to them in any detail because: 'The historical record is not, of itself, a focal point of dispute between the parties. Broadly speaking, the history of the area is uncontentious'—at [31] and [39].

His Honour noted that the historian who compiled the folder concluded, among other things, that:

- the historical record clearly showed that Aborigines had been associated with the Timber Creek area from the time of the first European explorers and during the entire period of European settlement and there was no reason to believe that the Aboriginal people encountered by the explorers and early settlers were not the ancestors of the Aboriginal people living in the area today;
- those Aboriginal people strongly identified with particular tracts of country and Professor W. E. H. Stanner recorded a long-standing connection between the Nungali and Ngaliwurru peoples with Timber Creek as far back as 1934;

- since the successful land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the Land Rights Act) over Timber Creek in 1985, strong Aboriginal communities had developed in the area;
- despite over 100 years of European settlement, traditional languages were still spoken, ceremonies performed and traditional foods and medicines harvested;
- people knew where the travelling and localised Dreamings were active and had taken steps to map and register sacred sites;
- traditional trade links still operated, people remembered and recounted their history and young men's initiation ceremonies were performed regularly—at [69].

Findings in Land Rights Act matters

The claimants based their case largely upon findings made by various Aboriginal Land Commissioners (the commissioners) under the Land Rights Act between 1985 and 1992 which related to the area surrounding the town of Timber Creek. These were said to be of particular importance because of the proximity of the areas concerned and because they related basically to the same Aboriginal people as those who constituted the native title claim group in this case—at [70].

Weinberg J noted one 'key distinction' between the Land Rights Act and the NTA:

> Under the Land Rights Act, claimants are not required to establish either continuity or historical links with the land…(T)he Land Rights Act deals not so much with "traditions", in the sense of immutable customs handed down from ancestors, but rather with the observances, customs and beliefs actually practised by a particular community at the time of the relevant inquiry.
>
> The position under the NT Act stands in sharp contrast. The claimants must show that they are a society united in and by their acknowledgment and observance of a body of laws and customs; that the present day body of accepted laws and customs is, in essence, the same body of laws and customs acknowledged and observed by their ancestors (adapted to modern circumstances); and that the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty in 1825—at [73] to [74] and see also [404] to [405].

Notwithstanding these differences, his Honour admitted four land claim reports pursuant to s. 86 of the NTA. In all four, those claiming under the Land Rights Act were successful.

The key requirements for establishing native title

Weinberg J noted the critical provisions of the NTA were s. 223, which defines both 'native title' and 'native title rights and interests', and s. 225, which states the requirements for a determination of native title—at [125] and [126].

His Honour examined the relevant authorities, noting that:

- the High Court in *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*) stressed the relevant starting point for considering native title is to focus on the 'rights and interests' claimed;
- in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 442; [2002] HCA 58 (*Yorta Yorta*), the High Court made it plain that all elements of the definition of native title found in s. 223(1) must be given effect—at [133], [136] and [502] to [519].

His Honour also examined the background to the NTA and the developing case law in relation to interpreting it—at [519] to [547].

The claimants' evidence

A total of 14 witnesses, mostly elders of the Ngaliwurru and Nungali Peoples, gave evidence on site at Timber Creek. Most of this evidence is set out in some detail by Weinberg J. However, evidence given in a confidential session on a restricted basis is referred to only in very general terms. As 'no real challenge to the credibility' of these witnesses was mounted and the issue was not the evidence itself but how it was to be interpreted, it is not summarised here—see [150] to [256] and [475].

Weinberg J was of the view that the restricted evidence 'painted a somewhat different picture of the claimants' adherence to ceremonial and ritual practice than had previously been adduced', noting

that the witnesses spoke mainly about initiation ceremonies, various Dreamings (knowledge of which was confined to men) and traditional customs such as *Winan*. No objection was taken to any of this evidence—at [462] to [463].

In Dr Kingsley Palmer's opinion (one of the claimants' anthropological witnesses), the practices described had not changed significantly since well before the first white men came to the region. By that, Weinberg J understood him to mean that these practices dated back to before sovereignty. No serious challenge was mounted to Dr Palmer's opinions—at [464] to [467].

On the basis of evidence of the Aboriginal witnesses (including the restricted evidence) and supporting documents, Weinberg J was satisfied:

- that the claimants constitute a society bound together by adherence to traditional laws and customs; and
- the members of this claim group are relevantly linked to the claim area through ancestral ties that go back to a named ancestor and well before his time—at [470], [490] to [501] and [560].

It was found as a matter of fact that (among other things) the members of the claim group:

- continue to acknowledge traditional laws and to observe traditional customs in much the same way as their ancestors did over many generations;
- continue to practise important ceremonial rites, including initiation and burial customs, in ways similar to those that were followed long ago;
- follow traditional practices regarding hunting and gathering of food;
- maintain cultural and spiritual beliefs relating to the Dreamings associated with the claim area;
- share a common language (Ngaliwurru) and that Nungali is, and always was, either part of that language or a dialect spoken with a different accent—at [471].

The restricted evidence was found to provide 'powerful support for the claimants' case in almost all its aspects'—at [500].

His Honour observed that:

> [T]he real factual dispute in this case turns not upon the primary facts adduced through the indigenous witnesses, but rather upon what interpretation should be placed upon those facts—at [475].

The claimants' anthropological evidence

A central feature of the claimants' case was the evidence given on their behalf by two anthropologists, Dr Palmer and Ms Wendy Asche, who prepared a 'joint' report. Dr Palmer was acknowledged as both the senior anthropologist and the major contributor to the report and took particular responsibility for collecting data on spiritual life, sites, ritual and belief. He also took the lead role regarding questions of land ownership and the way in which rights to country 'were articulated through social processes'. Ms Asche took primary responsibility for genealogical data and evidence showing maintenance of connection by traditional law and traditional custom. That said, they took 'joint' responsibility for all aspects of the report and agreed on all of its conclusions —at [262] to [264] and [270].

Dr Palmer and Ms Asche were of the view that, among other things:

- rights to country in the Victoria River region were, and had for many years been, inherited cognatically;
- the claimants observed the same, or substantially similar, customs, laws and practices, as did the Indigenous inhabitants of the region at the time of the acquisition of sovereignty—at [288] and [293].

The claimant community

According to the report, there was an 'ideology' that responsibility for, and use of, a grouping of countries was a matter for the members of a social unit consisting of an amalgamation of a number of country groups, described as 'the applicant community'. However, members of that community used a number of different names when referring to themselves, depending upon the circumstances and the context of the discussion. The conclusion that the claimants shared a culture and identified with each other as a community was supported by the claimants' common understandings founded upon a shared spiritual belief.

The report noted that the claimants had characteristics that were similar to those of other Aboriginal communities in the Victoria River district and that certain aspects of their beliefs could be found in varying forms throughout Indigenous societies in many parts of Australia—at [300] and [301].

There were various features said to link the claimants both to each other and to various places and things, including:

- identification typically by reference to one of several named areas of country or 'estates', commonly called *Yakpali*;
- that a person is linked to a particular country by descent and those who trace common descent and common affiliation to the same country together comprise 'descent groups';
- a descent group member at Timber Creek generally cites both matrifiliation and patrifiliation as a source of spiritual attachment to country (therefore, a 'cognatic descent system');
- an association with country could be reinforced by reference to spiritual beings of the Dreaming thought to be connected with the country in question who perform actions that result in both physical and spiritual modification to the countryside;
- a member of a country group will have a special spiritual tie with that country's Dreaming and, since some Dreamings range widely over the landscape, their spirituality can encompass more than one country;
- exchange relationships have developed through the practice of a ritualised trade known as *Winan*, which creates a particular relationship between trading partners, often of neighbouring countries, characterised by reciprocal obligations;
- at Timber Creek, the concept of the Dreaming is expressed by the term *puwaraj*, which is manifest not only at sites in the landscape but also through the reproduction of certain designs used in ritual;
- the system of rights relating to *puwaraj* indicates that, within the cognatic descent system, there is (at least in ritual dealings) a priority accorded to country claimed through patrifiliation (whether father's father or mother's father);
- the claimants all regard themselves as having inherited from their fathers, and from their father's fathers, a *kuning* (a personal Dreaming or affiliation, such as goanna or sugarbag);
- while all the claimants spoke a form of English, indigenous languages that were typically associated with a particular area or region were an important means of establishing an identity. Earlier research identified the local Indigenous community as speaking one or more of the Jaminjung, Ngaliwurru and Nungali languages and, according to the claimants, all three languages were brought to the area by Dreaming beings—at [296] to [309].

Taking country—ancestral and genealogical ties

His Honour observed that: '[T]he most important aspect of the evidence of Dr Palmer and Ms Asche…is their discussion of ancestral and genealogical ties—at [316].

The anthropologists identified a recognised system of kinship or shared ancestry, involving eight subsections (the skin system), under which people were expected to act towards particular kin in specific ways. This system, they said, consolidated the homogeneity of the community—at [316] to [318].

The *Winan*

Another unifying characteristic relied on by the claimant group was that Timber Creek was also the centre of the ritual trade system known as *Winan* and movement of goods along the '*Winan* road' was said not to be a matter of traversing distance but of cementing relationships. His Honour noted that, while much more could be said about the *Winan*, most of it was the subject of restricted evidence to which the court could not refer—at [319] to [321].

Countries and members of the claimant group

According to the joint report, the claimants listed five 'countries', and their constituent country groups, when they identified their rights to the Timber Creek town site and adjacent areas. As a consequence, they identified the members of these five country groups as, together, making up the native title claim group—at [326].

Among other things, Dr Palmer and Ms Asche:

- rejected any notion of a collapse of an earlier traditional system where country groups operated independently into some different, more cohesive, social group, operating under a new normative system;
- reiterated their belief that the society was, and still is, essentially cognatic in terms of affiliation with country;
- were of the view that such a system, though likely to be more flexible than a patrilineal system, would not be entirely open ended—at [354] to [356].

Rights and duties of members of country groups

From an anthropological perspective, Dr Palmer and Ms Asche said that the members of the various country groups had various gradations of rights of ownership, including access rights, rights to exclude others, rights relating to intellectual property, and 'use and benefit' rights. The authors identified various duties as well, including to protect and care for country and to care for visitors—at [361].

Continuity of connection to country

The anthropologists concluded (among other things) that:

- the claimants have had a continuous and ongoing relationship with *Makalamayi* (a 'focal site' in the north-east corner of the town area) that long predated sovereignty;
- a very important part of the claimant community's culture continued to be a belief in the manifestation of Dreaming spirituality related to sites, many of which were recorded by earlier researchers;
- the claimants shared a belief in the spirituality of the Dreaming and had traditional beliefs, practices, concepts and ways of doing things that rendered them both a distinctive culture and a homogenous community and, given the complexity and rich nature of their social relationships, it was unlikely that these emerged in recent times;
- descent is the primary principle for reckoning membership of country groups, this had been so since before European contact and descent at Timber Creek was cognatic but with some preference for claiming country through patrifiliation;
- although the earliest literature available for the area did not demonstrate conclusively that the system of laws and cultural rules that applied today would have been found at the time of first contact, still less in 1825, the claimants' culture and the rules that mould it are, in all probability, based upon a traditional system that predates sovereignty—at [371] to [372] and [378].

The territory's anthropological evidence

The territory relied upon Professor Basil Sansom, 'a distinguished anthropologist', to rebut the joint report and the oral evidence given by Dr Palmer and Ms Asche—at [380].

Essentially, Professor Sansom felt the opinion expressed by Dr Palmer and Ms Asche that the claimants' culture, and the rules that mould it, are in all probability, based upon a system that predates sovereignty was 'little more than a restatement of an "ideological" position'—at [386].

According to his Honour, Professor Samson took Dr Palmer and Ms Asche to task for:

> [G]lossing over the shift from a patrilineal system to a cognatic system, which they acknowledge has occurred, but regard as nothing more than an adaptation of an existing normative system. Professor Sansom strongly disagrees. He sees that shift as reflecting a quite fundamental change to an entirely different normative system. In other words, he sees the shift as revolutionary, rather than evolutionary, and as involving a change from one operating principle to another—at [387].

Professor Sansom identified two 'far-reaching' and 'radical' shifts that he argued had significant legal implications in a native title context, namely:

- a shift from patrilineal inheritance to cognation as the basis for 'taking country'; and
- a shift from the position whereby each separate language group (or 'tribe') was associated with a distinct territory of its own to a position where two language groups merged which provided 'a new and inclusive social and

political identity'—at [392] to [393] and [406] to [409].

Professor Sansom cautioned against use of the 'ethnographic present', i.e. a tendency to assume that what is observed at any given time can readily be translated back, and projected forward, even if there is no empirical basis for doing so, arguing that:

- this approach would lead to 'major' normative shifts being 'suppressed and denied' by the community through the operation of 'the myth of eternal recurrence';
- Aboriginal genealogies based on recall were 'shallow' and Aboriginal cultural conceptions yield an historical present of about 100 years, with anything before that being allocated to the time of the Dreamings;
- things that were probably new developments would be characterised by Indigenous witnesses as realities that have existed 'from time immemorial'— at [398], [403], [429] to [437].

His Honour noted that:

> [Professor Sansom's] thesis is that anything that does not fit within the template of traditional lore regarding continuity and uniformity of custom and practice…will be expunged from the record of oral history…[P]resent day indigenous persons will assert that what is in fact a reformed kinship system is no new creation, but simply an eternal endowment of law ordained in the Dreaming—at [435].

Dr Palmer, who was given the opportunity to rebut Professor Sansom's report, took strong exception to, among other things, Professor Sansom's view that oral traditions are inherently suspect—at [451] to [456].

Findings on anthropological evidence

His Honour accepted the evidence of Dr Palmer and Ms Asche in preference to that of Professor Sansom for the following reasons:

- the formers' extensive involvement with the members of the claimant group over many years;
- Dr Palmer speaks Ngaliwurru, which Professor Sansom does not;
- Dr Palmer and Ms Asche gave evidence that was 'intelligent, and cogent', they 'withstood cross-examination well', and were 'well aware of their duties to the court'—at [475] to [478].

Professor Sansom's evidence troubled his Honour with respect to (among other things) his 'undue deference' to earlier anthropological works and repeated reference to work previously carried out in parts of Australia 'far removed from Timber Creek'—at [480] to [485].

Weinberg J was particularly concerned at Professor Sansom's contention that oral history is 'essentially worthless':

> If that contention were to be accepted, there would be little point in bringing native title determination applications in the Northern Territory. Paradoxically, it is in the Northern Territory…that the prospects of claimants being able to establish a continuous connection with the land, of the kind required by the NT Act, ought to be greatest—at [483].

Weinberg J concluded that:

> [T]he crucial point is that rights to 'country' in Timber Creek are and always have been based upon principles of descent. The shift to cognation is one of emphasis and degree. It is not a revolutionary change, giving rise to a new normative system—at [501].

AFANT's evidence

AFANT, whose only real interest was to ensure that its members maintained their access to the waters of the Victoria River and the creek, led evidence from a number of people concerning fishing in these waterways and the tidal areas of the creek—at [457].

Were the elements of s. 223(1) met?

His Honour was satisfied that the claimants established they possess native title rights and interests in the claim area as defined in s. 223(1) of the NTA—at [564].

The final questions to be determined were whether:

- the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty in 1825; and
- the society has continued to exist throughout that period as a body united in and by its

acknowledgment and observance of those laws and customs—at [565].

Observing that 'native title cases are almost always fact specific', Weinberg J was satisfied that the evidence established these things—at [566] to [573].

In discussing the lack of direct evidence linking the date of sovereignty (in this instance, 1825), first European contact (1839) and settlement (the 1880s), his Honour pointed out that:

> [I] is easily forgotten that the elderly, when they recall the events of their childhood, and what they may have been told by their grandparents, are in effect, recounting events that go back perhaps as far as a century and a half—at [572] and [573].

Weinberg J felt that the evidence was sufficient to allow the finding that:

> [T]he senior claimants in these proceedings have established that they are the direct descendants of a group of indigenous inhabitants of the area around Timber Creek, and that they observe essentially the same rituals and ceremonies as were practised by their ancestors more than a century ago. I infer that those same rituals and ceremonies have been followed by indigenous people who are the direct ancestors of the claimants since before sovereignty. The rights and interests that have passed on through this system of descent are…recognised by the common law of Australia, and are therefore properly to be characterised as native title—at [584].

The native title rights and interests—exclusive?

In relation to this, Weinberg J said:

> The question to be determined…is whether the native title rights and interests…that have been established rise significantly above the level of usufructuary rights…[T]hat question should be answered both 'yes' and 'no'. The evidence…establishes both usufructuary and proprietary rights. However, it falls short of establishing native title rights and interests…'to the exclusion of all others'. It also falls short of establishing an unfettered right…to control others' access to that area, or to control others' use and enjoyment of the resources of that area—at [614].

His Honour acknowledged that:

- there was some evidence that the claimants expected outsiders to ask permission before going on land or regarded themselves as 'entitled' to fish, camp, hunt, take ochre and induct strangers;
- one witness regarded seeking permission as irrelevant because, in practice, no Indigenous person would wander about on the land without the guidance of a member of that community because to do so would be to 'court disaster'.
- there were 'scattered references in some of the anthropological material which hint at the need to obtain permission before going onto the land'—at [615] to [619], [714] to [716].

That said, his Honour was of the view that:

> [T]hese few…suggest that there is an ingrained belief on the part of the claimants that those who come to Timber Creek will, without anything having to be said, respect the claimants' 'rights to country'. It is almost as if 'permission' will be sought as a matter of courtesy, or form, because this is expected when a stranger passes through someone else's land. If for some reason permission is not sought, then guidance at least will be requested—at [619].

Weinberg J considered the evidence supporting the claimants' right to exclude others from using the waters of Timber Creek 'even weaker than that in relation to land' in that there was:

- very little evidence directed to that issue;
- nothing to suggest that any attempt had ever been made to restrict access to the creek by fishermen;
- little, if any, evidence to suggest that traditional law and custom, as acknowledged and observed, would operate to restrict such access—at [620].

It followed that any native title rights that exist in relation to those waters were non-exclusive. This conclusion precluded the need to consider what effect, if any, the so-called 'public right to fish' might have upon native title rights—at [620].

It was noted that there had been evidence of some 'modification of laws' but this did not necessarily mean the loss of native title:

> As long as the claimants continue to observe their traditions and customs, and maintain their links with and use of the land, and waters, native title will continue to exist. It is only if the society as a whole ceases to adhere to that traditional law, particularly in relation to the use or occupation of the land, that native title will be lost—at [636] to [639].

In conclusion, his Honour was satisfied the claimants had established a connection with the claim area, and some, but not all, of the native title rights and interests they claimed could be 'recognised' by Australian common law. Any that were not so recognised would be excluded from any native title determination as a matter of course—at [652] to [655].

Extinguishment by pastoral lease

It was common ground between the parties that the claim area was, at one time entirely the subject of pastoral leases. His Honour observed that:

> [I]f pastoral leases do not extinguish native title completely, they may nonetheless impair any native title rights that would otherwise amount to incidents of full ownership. They may thereby abrogate any 'exclusive' native title rights and interests—at [631], referring to Ward.

Did s. 47B apply?

If s. 47B applies to an area, then all extinguishment brought about by the 'creation of any prior interest…must be disregarded' for all purposes under the NTA. Three conditions must be fulfilled to attract this provision, with the relevant ones in this case being that:

- the area concerned must not be 'covered' by (among other things) a 'proclamation' that was 'made by the Crown in any capacity under which the whole or a part of the… area is to be used for public purposes or for a particular purpose'; and
- one or more of the members of the native title claim group must 'occupy' the area when the claimant application is made—at [660] and [661].

A proclamation constituting the town boundaries of Timber Creek was made in 1975 under s. 111 of the *Crown Lands Ordinance 1931—1952* (NT). A similar proclamation was considered by the Full Court of the Federal Court in *Northern Territory v Alyawarr* (2005) 145 FCR 135; [2005] FCAFC 135 (*Alyawarr*), summarised in *Native Title Hot Spots* Issue 16.

After rehearsing the arguments put to the court, his Honour noted that the decision in *Alyawarr* was binding on him. Therefore, the proclamation of the town of Timber Creek was not a 'proclamation…under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose' and so it was arguable that s. 47B applied—at [673] to [675], [677] and [700].

In relation to the second issue, Weinberg J found that the claimants had clearly established that, when the applications were made, one or more members of the native title claim group 'occupied' the claim area. Accordingly, s. 47B(1)(c) was satisfied—at [702].

It followed that, with the exception of certain lots, s. 47B applied and so any extinguishment brought about by pastoral leases in relation to the claim area must be disregarded for all purposes under the NTA—at [705] and [706] and [784].

Nature and extent of native title rights and interests

In accordance with the requirements of s. 225, Weinberg J noted that the claimants had clearly established:

> [T]hat they are entitled to a determination of native title that specifies rights of a usufructuary nature. These include the right to hunt and forage in or on the land, and the right to fish in the waters of the Creek…[,]the right to engage in rituals and ceremonies upon the land, and to be appropriately consulted about, and protect particular sites located within the claim area. These rights do not operate 'to the exclusion of all others'—at [717].

The special position of the waters of Timber Creek

There was considerable dispute as to the claimant's precise position on claiming native title rights

over the waters of Timber Creek. After careful study of both the oral and written submissions, his Honour concluded that the evidence supported a finding that:

- the claimants had native title which allowed them the right to fish, and to gather and take resources from, the waters of the creek;
- insofar as those waters are tidal, those rights go no further than would be encompassed by the public right to fish in such waters;
- insofar as those waters are non-tidal, the rights are non-exclusive, just as they are in relation to the land component of the claim area;
- the claimants had no right to prevent others from exercising similar rights in those waters—at [775] and [776].

Decision

Weinberg J found that (subject to hearing further argument in relation to five lots) there should be a determination of native title in favour of the claimants since: 'All of the elements necessary to ground such a determination have been established'—at [785].

The parties were directed to file contentions regarding the orders that should be made to give effect to the reasons for judgment. The determination subsequently made is summarised in this edition of *Native Title Hot Spots*: see *Griffiths v Northern Territory (No 2)* [2006] FCA 1155.

Appeal

On 18 September 2006, those found to hold native title filed an appeal against the decision that their native title rights and interests did not confer a right to exclusive possession.

Determination of native title—Timber Creek

Griffiths v Northern Territory (No. 2) [2006] FCA 1155

Weinberg J, 28 August 2006

Background

Judgment in this matter was delivered by the Federal Court on 17 July 2006 in *Griffiths v Northern Territory of Australia* [2006] FCA 903 (summarised in this issue of *Native Title Hot Spots*). The parties were ordered to file material regarding the form of any determination of native title to give effect to it. A joint draft determination was subsequently filed and his Honour Justice Weinberg made the orders, declaration, and determination accordingly: see s. 87 of the *Native Title Act 1993* (Cwlth).

Determination area

The court determined that native title exists in the area described as Schedule A, which consists of identified lots within the town of Timber Creek and the creek named Timber Creek (including its beds and banks) as it flows within the boundaries of the town.

Native title holders

The determination area comprises the whole or part of five estates held by the members of five estate groups. These persons are collectively referred to as 'the estate group members'. Each of these estate groups include Ngaliwurru and Nungali persons who are members of the relevant estate group by reason of:

- descent through his or her father's father, mother's father, father's mother, mother's mother; or
- having been adopted or incorporated into the above descent relationships.

Native title rights and interests

The native title rights and interests of the estate group members were non-exclusive rights to use and enjoy the determination area in accordance with their traditional laws and customs, being the right to:

- travel over, move about and access the area;
- hunt, fish and forage on the area and to gather and use natural resources of the area such as food, medicinal plants, wild tobacco, timber, stone and resin;
- have access to and use the natural water of the area;
- live on the land, to camp, to erect shelters and other structures;
- engage in cultural activities, conduct ceremonies, hold meetings and teach the physical and spiritual attributes of places and areas of importance;

- participate in cultural practices relating to birth and death, including burial rights;
- have access to, maintain and protect sites of significance in the area; and
- share or exchange subsistence and other traditional resources obtained on or from the area but not for any commercial purposes.

Rights held by other Aboriginal people
The determination also said that, in accordance with traditional laws and customs, 'other' Aboriginal people have rights in respect of the land and waters of an estate which is not their own, such people being:

- members of estate groups from neighbouring estates;
- spouses of the estate group members; and
- members of other estate groups with ritual authority.

Although Weinberg J refers to these other Aboriginal people as holding 'native title rights and interests', they are not defined as 'native title holders' and arguably hold contingent rights only which are narrowly defined non-exclusive rights, namely:

- rights of access to, and rights to hunt, fish and gather the natural resources on the land and waters of their neighbouring estate group members, in relation to members of estate groups from neighbouring estates;
- rights of access to, and to hunt, fish and gather the natural resources on, the land and waters of their spouse's estate, in relation to spouses of estate group members;
- rights to act, in accordance with traditional laws and customs, in relation to the maintenance and protection of sites associated with travels of an ancestral being associated with a Dreaming which passes through the estates in the determination area, in relation to members of other estate groups who hold ritual authority.

Other interests
To the extent that the exercise of rights of access by an employee, servant, agent or instrumentality of the Northern Territory, Commonwealth or other statutory authority as required in the performance of his or her statutory duties, conflicts with the exercise of the rights and interests of the native title holders, the rights and interests of the former prevail over, but do not extinguish, the native title rights. Any interest of members of the public to the access and enjoyment (subject to the laws of the Northern Territory and the Commonwealth) of the waters, beds and banks of Timber Creek within the claim area, coexist with the rights and interests of the native title holders.

Prescribed body corporate
Native title is not to be held in trust. An Aboriginal Corporation must be nominated within 12 months or such further time as the court allows, and is to be the prescribed body corporate for purposes of s. 57(2). The application is not 'finalised' until a prescribed body corporate has been determined.

Note on boundaries
During the proceedings, the claimants were granted leave to exclude the Victoria River from the ambit of their claim. The map of the determination area shown in Schedule A of the determination has not been adjusted to show that alteration and still indicates the boundary of the claim area as running through the middle of the Victoria River.

Determination of native title in non-claimant application

Hillig v NSW Native Title Services Ltd [2006] FCA 1184

Bennett J, 1 September 2006

Issues
The question in this case was whether the Federal Court should make an 'approved determination' that native title did not exist in relation to land covered by a non-claimant application to facilitate the sale of that land.

Background
A non-claimant application was made under s. 61(1) of the *Native Title Act 1993* (Cwlth)(NTA) by Peter Hillig, the administrator of the Worimi Local Aboriginal Land Council (the council). It covered parcels of land transferred to the council under the *Aboriginal Land Rights Act* 1983 (NSW)(Land

Rights Act). The members of the council had resolved to sell the land and a contract for sale had been signed. However, the transfer to the council was subject to ss. 40 and 40AA of the Land Rights Act, which provided that the land could not be dealt with unless it was subject to an 'approved determination' of native title, as defined by s. 13 and s. 253 of the NTA. Mr Hillig sought a determination that native title did not exist in relation to the land to facilitate the completion of the contract for sale.

Unopposed applications—s. 86G

Section 86G of the NTA empowers the court to make orders in an application under s. 61(1) (in this case, a non-claimant application) at any stage of proceedings after the notice period in s. 66 has expired if the application is unopposed and the court is satisfied it is within its power to make those orders. Her Honour Justice Bennett noted that:

- notice as required by s. 66 had been given by the Registrar and the notification period had expired;
- the application was unopposed within the meaning of s. 86G(1)(a) because the only respondent, NSW Native Title Services Ltd (the representative body for the area), had notified the court it did not oppose the orders being made and signed the proposed minutes of order;
- Mr Hillig was the holder of a non-native title interest in the land and was entitled to bring the non-claimant application under s. 61(1) and there was no approved determination of native title in relation to the land under s. 13(1)(a);
- there was no evidence of any native title rights and interests in the land nor any evidence of persons who have asserted or might seek to assert such rights—at [9] to [11].

Decision

Having found that s. 86G(1)was satisfied, Bennett J exercised the discretion available under that subsection to make an approved determination that no native title exists over the area concerned.

Determination of native title in non-claimant application

***Cruse v NSW Native Title Services Ltd* [2006] FCA 1124**

Jacobson A, 23 August 2006

Issue

The question in this case was whether the Federal Court should make a determination that native title did not exist in relation to the area covered by a non-claimant application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

The two parcels of land covered by the non-claimant application were subject to restrictions on dealings under ss. 40 and 40AA of the *Aboriginal Land Rights Act* 1983 (NSW), which prevent Aboriginal land councils from dealing with land unless it is the subject of an 'approved determination' of native title, as defined by ss. 13 and 253 of the NTA. The applicant, who made the application on behalf of the Eden Local Aboriginal Land Council (the council), was the registered proprieter of one of the parcels and held an equitable interest in the other because the relevant Minister had agreed to transfer legal title to the applicant upon completion of a survey—at [3] to [4].

His Honour Justice Jacobson was satisfied that the court had power under s. 86G of the NTA to make the proposed consent orders and that it was appropriate to do so on the following grounds:

- notice in accordance with s. 66 had been given and the notice period had expired;
- the only respondent was the representative body for the area and it had consented to the orders being made
- therefore, the application was 'unopposed' in the terms that is used in s. 86G;
- if the non-claimant application was sucessful, the land would be used for purposes consistent with the interests of the council and the local Indigenous community;
- native title had not been extinguished over the application area—at [6] to [11].

Decision
An approved determination of native title was made that no native title existed in relation to the area covered by the non-claimant application.

ILUA—review of decision to register an area agreement

***Kemp v Native Title Registrar* [2006] FCA 939**

Branson J, 25 July 2006

Issue
The issue before the Federal Court in this case was whether, the decision of a delegate of the Native Title Registrar to register an area agreement (a type of indigenous land use agreement) was correct. It arose in the context of an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (ADJR Act) for judicial review of the Native Title Registrar's decision to register the agreement.

Background
In 1998, two claimant applications were made by Patricia Davis-Hurst on behalf of the Kattang People over an area known as Saltwater. After a contested hearing, Her Honour Justice Branson joined Keith Kemp (the applicant in this case) as a respondent to those applications, on the basis that he was a descendant of the Pirripaayi people who were traditionally associated with the area concerned. No appeal was instituted in relation to that decision: see *Davis-Hurst v Minister for Land and Water Conservation (NSW)* (2003) 198 ALR 315; [2003] FCA 541, summarised in *Native Title Hot Spots* Issue 6.

On 11 August 2005, the Minister for Lands for NSW applied to the Native Title Registrar pursuant to s. 24CG of the *Native Title Act 1993* (Cwlth)(NTA) for the registration of an area agreement (the ILUA). Mr Kemp was not a party to the ILUA. The parties to these proceedings conceded, among other things, that:

- Mr Kemp was not a member of the native title claim group represented by Dr Davis-Hurst and so he would not enjoy any benefits or assume any obligations under the ILUA;
- registration of the ILUA would 'give substance' to a decision by the state of NSW that those Dr Davis-Hurst represented should be recognised as the holders of native title rights and interests;
- whether or not those whom Dr Davis-Hurst represented were the holders of native title rights and interests in the relevant area was in dispute before the court—at [8].

In December 2005, a delegate of the Registrar (the delegate) determined that:

- notwithstanding Mr Kemp's objection, the ILUA should be registered pursuant to s. 24CL(1) of the NTA;
- while Mr Kemp was a person who, *prima facie*, may hold native title in the area, his objection to the registration of the ILUA did not, in itself, result in the ILUA not being properly authorised—at [9].

Mr Kemp applied for judicial review of the delegate's decision, alleging an error of law and relying upon s. 5(1)(f) of the ADJR Act—at [10].

Statutory framework and relevant facts
The ILUA was an area agreement as defined in s. 24CA of the NTA. Therefore, all persons in the 'native title group', as defined in s. 24CD, must be parties to the agreement: s. 24CD(1) NTA. On the facts of this case, the 'native title group' consisted of all registered native title claimants in relation to the agreement area: s. 24CD(2). Dr Davis-Hurst was, therefore, part of the 'native title group', because she was a registered native title claimant. Mr Kemp was not. The critical issue was whether, nonetheless, the ILUA could be registered if Mr Kemp had not authorised its making—at [15].

Authorisation of ILUA by claimant group
The application for registration was accompanied by a statement as to the efforts made in relation to the authorisation of the ILUA. In the court's view:

- it was 'probably uncontentious' that the statements demonstrated that reasonable efforts were made to ensure that all members of the native title claim group represented by Dr Davis-Hurst were identified;
- however, it was 'not entirely clear' that those statements provided grounds on which the Registrar could have been satisfied that all reasonable efforts were made to ensure that 'all

persons who hold or may hold native title' to the agreement area (as opposed to those who made up the native title claim group) were identified, e.g. the statement made no reference to the Pirripaayi people—at [18] and see s. 24CG(3)(b).

The application for registration was also accompanied by a statement recording that Mr Kemp had attended part of the meeting held for the purposes of authorising the ILUA and expressed his objection to the making of that agreement. The Registrar's delegate considered the application for registration and decided that notification of the application should be given. Within the three month notice period prescribed in s. 24CH, Mr Kemp wrote to the Registrar raising issues that went to the authorisation of the ILUA. The delegate decided (among other things) that, despite Mr Kemp's concerns, the 'second condition' for registration found in s. 24CL(3) (i.e. that the requirements of s. 24CG(3)(b), which relate to the identification of the native title holders and ensuring that they authorised the making of the agreement) had been met and the ILUA must be registered.

Grounds for review

Mr Kemp applied for judicial review of the delegate's decision to register the ILUA on the ground that it involved errors of law, namely that the delegate:

- misconstrued s. 251A; and
- found that the requirements of s. 24CG(3)(b) had been met, notwithstanding recognition of Mr Kemp as a person who may hold native title in relation to the area but who did not authorise the making of the agreement—at [34].

Authorisation and s. 251A

In a letter to the delegate seeking information on the authorisation process, the solicitor acting for Dr Davis-Hurst 'confirmed' that:

> [T]here was no traditional decision-making process and…the Applicants had agreed and adopted a decision-making process of authorising through the decision of the majority. This majority decision-making process was used to authorise the ILUA, unanimous consent was not required to authorise the ILUA—at [35] to [36].

Acting on this information, the delegate was satisfied that all those persons identified as potential native title holders for the area, including Mr Kemp, had authorised the making of the ILUA by a majority decision. However, in the court's view:

It seems likely that the…[delegate] overlooked the fact that the…response [from Dr Davis-Hurst's solicitor] identified the decision-making process adopted by *'the Applicants'*. In the context of the response, the reference to *'the Applicants'* is to be understood as a reference to the claimant group represented by Dr Davis-Hurst. It is accepted on all sides that Mr Kemp is not a member of that group—at [38].

The court noted it was 'plain' that s. 251A is concerned with 'how a single community or other group…may authorise the making of an indigenous land use agreement'—at [40].

Her Honour went on to find that:

> Section 251A is not intended to provide, and does not provide, a means whereby a single authorising decision can be obtained which is binding on two or more groups where their respective claims to hold native title in an area are in conflict. This can be seen from the reference in paragraph (a) to a process of decision-making that, under the traditional laws and customs of the persons who hold or may hold…native title, must be complied with in relation to authorising things of that kind. It is hard to imagine any such process of decision-making where the respective claims of two groups to hold the native title are in conflict; it would require traditional laws and customs in relation to jointly authorising things binding on the members of both groups—at [41].

The delegate erred, it was held, in concluding that Mr Kemp was bound by that majority decision of the native title claim group represented by Dr Davis Hurst; and that therefore, the requirements of s. 24CG(3)(b) were met—at [43].

Was authorisation by Mr Kemp required?

It was argued that Mr Kemp's authorisation was not required because s. 24CL required that all reasonable efforts had been made to ensure that all of the persons described in s. 24CG(3)(b)(i) had

been identified and did not require that all persons so described had in fact been identified. The court accepted this interpretation and noted that the delegate also understood the provision in this way. However, as the delegate regarded Mr Kemp as a person identified by the efforts of Dr Davis-Hurst, it was held that the ILUA could not be registered unless Mr Kemp had authorised its making—at [46].

The court noted that the intended meaning of the words 'all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement' found in s. 24CG(3)(b)(i) presented 'a much more difficult issue of statutory construction'—at [47].

The majority decision of the High Court decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 was noted. Her Honour then set out the two competing views as to the meaning of the words in s. 24CG(3)(b)(i), i.e. it should be:

- construed literally so that, for example, where two competing groups each claimed to hold the common or group rights which constitute the native title in the area, the words were capable of including the persons in both groups (the first view); or
- understood to refer to all persons who, according to the traditional laws and customs of the registered native title claimants, hold the common or group rights in the area (the second view)—at [49].

Her Honour confessed 'to having found this issue difficult to resolve' and accepted that the second view would result in a logically coherent scheme for the registration of area agreements. However, the court preferred the first view—i.e. a literal construction of s. 24CG(3)(b)(i)—because it did not:

> [R]esult in an absurd or otherwise plainly unlikely outcome. In the absence of a compelling case to do so, I am reluctant to depart from the literal meaning of the words which the legislative [sic] has chosen because a departure from that meaning could, in this and other cases, result in the loss of rights which an individual might otherwise enjoy—at [58] and see [61].

If Mr Kemp's claim to be a person who holds, or may hold, native title 'was merely colourable', her Honour was of the view that it would have been open to the Registrar's delegate to conclude that it was without substance and, therefore, that his authority was unnecessary. However, as Mr Kemp had successfully applied to be joined as a party to proceedings to oppose the claim, her Honour was of the view that the appropriate forum for the resolution of that dispute was the court—at [59].

Decision

As the delegate erred in concluding that the requirements of s. 24CG(3)(b) had been met, her Honour set aside the delegate's decision and remitted the application to the Registrar to be determined according to law—at [62] to [63].

Registration test decision—s. 190D review

Wakaman People #2 v Native Title Registrar [2006] FCA 1198

Kiefel J, 5 September 2006

Issue

The issue before the Federal Court in this review, conducted pursuant to s. 190D of the *Native Title Act 1993* (NTA), was whether the Native Title Registrar erred in refusing to accept the Wakaman People #2 claimant application for registration. The main question was whether the delegate could 'look behind' the certificate provided under s. 203BE by the Northern Queensland Land Council (the representative body) in relation to the authorisation of the application.

Background

The Wakaman People #2 application was refused registration on 18 April 2005. This was because the delegate was not satisfied that the application met the requirements of ss. 190C(4)(b) and 190C(5) relating to authorisation or s. 190B(3) relating to the description of the claim group. The application was subsequently amended to change the description of the native title claim group. The amended application was certified by the North Queensland Land Council for the purposes of s. 190C(4)(a). The Registrar's delegate

subsequently informed the applicant that the description of the native title claim group in the amended application would not satisfy s. 190B(3). The applicant responded by further amending the description of the claim group. The further amended application was accompanied by a copy of the same certificate from the NQLC as was provided with the previous amended application.

The Registrar's delegate refused to accept the further amended application for registration, concluding that, due to the further amendment, the native title claim group had changed significantly after the issuing of the certificate and, therefore, the certificate could not be relied upon for the purposes of s. 190C(4)(a) and s. 190C(4)(b) and (5) were not satisfied either. The applicant then sought judicial review of that decision under s. 190D of the NTA.

Grounds for review

The applicant submitted that:

- the delegate had neither the duty nor the power to go behind the certification provided; and
- the delegate was in error in finding that the native title claim group described in the application was a wider, and significantly different, group from that referred to in the previous application, which had been the subject of the certification.

Review not restricted to questions of law

Her Honour Justice Kiefel considered the nature of a review under s. 190D and concluded that:

- it placed the controversy constituted by the issues of fact and law before the court; and
- if a ground of review was established, appropriate orders might be made to do justice as between parties (i.e. it is essentially a hearing *de novo*)—at [29], referring to *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652.

Certification

Her Honour held that:

- a consideration of aspects of the authorisation process was not to be undertaken by the Registrar where the application in question had been certified in accordance with s. 203BE;
- certification meant that the function of considering the question of authorisation had been carried out by the representative body and there was no basic function for the Registrar to carry out;
- it was, therefore, not open for the delegate to conclude that the certification provided earlier could not relate to the subsequent application;
- as the conditions set out in ss. 190B and 190C were met, the registration test was satisfied and the Registrar was obliged to accept the claim for registration;
- it was not necessary to consider whether the delegate was correct in finding that the native title claim group described in the amended application differed from that found in the further amended application—at [30] to [35], following *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384, summarised in *Native Title Hot Spots* Issue 8.

Claim group description and self-identification

On the last point noted above, it was argued that the claim group could be seen to be different and larger following the removal from the description in the further amended application of a requirement that a person identify as one of the Wakaman People before they could be said to be a member of the claim group. Her Honour noted that:

- the registration test is concerned with the clarity of the description of persons making up a claim group so that it may be determined whether a person is a member of it;
- a requirement of self-identification would not appear to meet such an objective and might be thought to provide grounds for refusal of registration;
- at a practical level it cannot be known whether descendants will or will not identify with the group;
- a conclusion that a group described as descendants, regardless of their opinion as to membership, will be larger is merely conjecture—at [37] to [38].

Decision

The delegate's decision was set aside. The court proposed making orders requiring the Registrar to accept the application for registration and include

the details of the claim in the Register of Native Title Claims but sought further submissions as to when the latter order should take effect: see *Wakaman People 2 v Native Title Registrar* [2006] FCA 1251, summarised in this issue of *Native Title Hot Spots.*

Registration test review successful—date for registration

Wakaman People #2 v Native Title Registrar [2006] FCA 1251

Kiefel J, 21 September 2006

Issue

The issue before the Federal Court was whether, in making an order that the Native Title Registrar include particulars of a claim in the Register of Native Title Claims (the register) following a successful review application under s. 190D of the *Native Title Act 1993* (Cwlth)(NTA), the Registrar could be ordered to enter those particulars on the register as at the date of the incorrect decision to refuse to accept the claim for registration.

Background

This decision followed on from the decision in *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198, summarised in this issue of *Native Title Hot Spots.* The court adjourned the question of whether or not an order made following a s. 190D review could be retrospective to allow submissions to be made.

Construction of the NTA

Kiefel J referred to provisions of the NTA concerning the maintenance of the Register of Native Title Claims, found in Part 7, and the Explanatory Memorandum to the Native Title Amendment Bill 1997, noting that none of them suggested that a date, other than the day upon which the Registrar actually entered the details in the register, was appropriate—at [8].

Kiefel J noted (among other things) that:

- registration of a claimant application confers a right to negotiate in relation to the doing of some future acts and, among others, notice must be given to a registered native title claimant of certain future acts, e.g. see s. 29;
- the effect of s. 28(1)(a) is that, if there is no registered native title claimant at the end of a period of four months following notification given under s. 29, then the future act to which the notice related can be validly done;
- if a native title claim group is unable to get its claim registered within that period, it generally loses the right to negotiate with the parties in relation to that future act;
- the importance of timely registration is recognised by provisions such as ss. 190A(2), which requires the Registrar to use best endeavours to consider a claimant application in the four month period if it is affected by a s. 29 notice—at [9].

From this, the court inferred that:

> [T]he legislature was well aware of the problems which may arise for claimants if registration is delayed. There is no suggestion in the Act however that the potential for loss is to be remedied…It cannot be inferred from its recognition of the problem, and its limited response to it, that…the court was to provide a remedy—at [9].

Keifel J was of the view that retrospectively registering the claim would not give rise to any questions as to the validity of future acts:

> It does not seem possible where the future act has been done and the requirements of the Act, in the circumstances then pertaining, complied with…The requirement in s. 25(2) is that negotiation be undertaken before the future act is done. There must necessarily be a registered claimant at that time for the provision to be operative. An order claiming registration to have occurred at an earlier date would therefore appear to be nugatory—at [10].

Decision

Her Honour declined to make orders back-dating registration of the claim to the date of the delegate's decision not to accept it.

Overlapping claims—splitting proceedings under s. 67

Kokatha Native Title Claim v South Australia [2006] FCA 838

Finn J, 30 June 2006

Issue

The applicant in a claimant application made on behalf of the Arabunna People sought orders in the Federal Court to ensure that the portion of their application that overlapped the Kokatha Native Title Claim would be heard in the proceedings to deal with the rest of their application. Only the State of South Australia opposed the motion.

Background

The motion arose from an 'overlap proceeding' created by an order under s. 67(1) of the *Native Title Act 1993* (Cwlth), which required the court to make orders to ensure that overlapping application are 'dealt with in the same proceedings', at least to the extent of the overlap. In this case, the orders made resulted in the whole of the Kokatha claim and parts of the Barngarla and the Arabunna Peoples' claim (to the extent that they overlap both the Kokatha claim and each other's claim) being set down to be heard in the same proceedings.
A third overlapping claim, the Kuyani-Wilyaru claim had been discontinued but a new application was foreshadowed. If made, it would overlap the other three claims. The common area of overlap was a relatively small (but not insignificant) area called Overlap Area 20. This was the only part of the Arabunna claim that overlapped the Kokatha claim.

On 8 September 2005, his Honour Justice Mansfield made orders under s. 67(1) to bring part of the Barngala and Arabunna proceedings into the overlap proceeding. At that time, the Arabunna indicated that they might later seek to have that part of their claim that overlapped the Kokatha claim excised from the overlap proceedings. If the Arabunna motion was successful, all of the claims to Overlap Area 20 would have to be determined in the Arabunna proceedings.

His Honour Justice Finn was of the view that both the orders of Mansfield J and the present motion invoked the jurisdiction of the court under s. 67, noting that:

> The policy informing s 67(1) is plain enough. Fully informed decision-making and finality in respect of determinations relating to the same area are central to it…[I]ts purpose seems clearly to be tied to facilitating the orderly and efficient administration of justice where claims overlap—at [5].

Decision

His Honour dismissed the motion for (among others) the following reasons:

- Mansfield J's orders were made to effectuate the 'imperative' of s. 67(1) in the context of dealing with the Kokatha claim;
- the issue of a lack of funding raised by Arabunna was common to all the claimant groups and a lack of funding could not be relied upon to 'freeze' or 'paralyse' the proceedings;
- while the Arabunna asserted Overlap Area 20 was of special significance to them, it was also part of the other claim areas and it was inappropriate at this stage to venture any view on the relative significance of the area to the rival claim groups;
- 'of particular importance' was that the retention of the Arabunna claim in the Kokatha overlap proceedings was both 'desirable and necessary' because the evidence given by all of the various claim groups in relation to Overlap Area 20 could well inform or assist in casting light on issues that might arise in relation to lands contiguous to the area where other claimant groups had overlapping claims;
- consistent with one of the policy imperatives informing s. 67(1) (i.e. informed decision-making), it did not seem to be appropriate or desirable to foreclose the opportunity of deriving possible assistance from material relevant to the Overlap Area 20 claim in making determinations in the remainder of the Kokatha overlap proceedings—at [9] to [12].

Replacing the applicant under s. 66B—Butchulla People

Butchulla People v Queensland [2006] FCA 1063

Kiefel J, 18 August 2006

Issue

The issue before the Federal Court was whether to make orders to replace the applicant to the Butchulla People's claimant application under s. 66B of the *Native Title Act 1993* (Cwlth)(NTA).

Background

The Butchulla People's application was filed in the court on 28 August 1998. The persons who jointly comprised the applicant (the current applicant) were the respondents in these proceedings, i.e. they opposed the replacement of the current applicant. In the claimant application, the current applicant was said to be authorised for the purposes of s. 251B via a contemporary process involving a combination of:

- consent of senior members of the native title claim group;
- seniority, based on those members of the native title claim group who have established the longest connection with the area covered by the application; and
- consensus, through debate and dialogue, through all members of the native title claim group.

On 9 April 2005, a meeting was held that purportedly authorised the removal of the current applicant and its replacement with a new group of people authorised to be the applicant in accordance with s. 251B. This was to facilitate the making of the application under s. 66B(1).

Flawed notification?

The respondents submitted that:

- it had not been demonstrated that notification was given to all Butchulla People having an interest in the claim;
- in the absence of anthropological evidence or some other method of identifying those persons listed in the representative body's database who had been notified by letter and those attending the meeting as related to relevant ancestors and therefore members of the claim group, the court could not be satisfied that the authorisation was given by the remaining persons who constitute the applicant and the application should fail, relying on *Bolton v Western Australia* [2004] FCA 760, summarised in *Native Title Hot Spots* Issue 10.

Kiefel J distinguished that case for the following reasons:

- in that case, the public notice given bore the generic title of the claim but did not otherwise identify who might be members of the claim group, the connection of those attending the meeting with the native title claim group was not demonstrated in anyway and the process undertaken was effectively self-identification;
- in the present case, the apical ancestors were known and there was a 'connection' report and a previous authorisation meeting between members of the claim group had been held;
- it could be inferred that the database kept by the Gurang Land Council (the representative body) reflected the names of persons who had previously attended meetings and persons recognised as part of the families having a line of decent from the apical ancestors—at [27].

Attendance by persons who were not Butchulla

The respondent submitted that some of the people attending the meeting were Kubi Kubi people and not Butchulla. Kiefel J held that:

- sufficient steps were taken at the meeting to ensure that only members of the Butchulla group took part in the authorisation process;
- it was 'difficult' to believe that the respondents at the meeting would not have spoken out 'if they had observed persons outside the group taking part'—at [29].

Customary v contemporary decision-making—s. 251B

The respondents submitted that the process that the meeting was obliged to use under s. 251B was a customary process of decision-making. Kiefel J held that:

- this custom was one adopted by the one family, not the wider native title claim group, and s. 251B(a) did not refer to the custom of a sub-

group in a larger native title group but to the laws and customs of the whole group; and

- the claim group as a whole had no law or custom that must apply and so s. 251B(b) applied, i.e. authorisation was to be given via a decision-making process that was agreed to and adopted by the claim group;
- while the claimant application referred to the claim group adopting a contemporary process of decision-making, that process did not become an 'immutable' law or custom and could be changed by the process of agreement again;
- while the respondents submitted they were given no notification of the possibility that the decision-making process could change, there was no requirement that such a proposal be notified;
- the decision-making process discussed at the meeting could be seen to have been agreed upon by the majority of those attending and it could be inferred it was agreed that a resolution may be passed by a majority;
- the respondents' submission that the meeting required something approaching a unanimous resolution should be rejected—at [30] to [33].

Withdrawal of two newly authorised persons

At the authorisation meeting, 18 people were authorised to replace the current applicant. Prior to the making of the s. 66B(1) application, two of those people withdrew their consent so that only 16 people were included in the group of people who would replace the current applicant. The respondents submitted that, as those two persons had withdrawn, another authorisation meeting must be convened as 'the applicant' authorised for the purpose of the claimant application had a 'corporate' character and could not be viewed as made up of individuals. This relied on s. 61(2)(c), which states that the persons authorised to make a claimant application are 'jointly' the applicant.

The applicant submitted that the word 'applicant' may be seen to have more than one meaning and should not be confined for all purposes to the meaning given by s. 61(2)(c). Otherwise, the 'applicant' in native title claim proceedings would cease to exist if it transpired that just one of the persons making up 'the applicant' was not a member of the native title claim group, ceased to be a member of that group, ceased to be authorised or died.

Kiefel J held that:

- while s. 61(2)(c) permits representative proceedings, it did not create a legal entity 'which is itself capable of suing';
- while it obliged those authorised as representatives to co-operate with each other, it did not say that they are bound together in the way in which the respondent contended;
- the requirement that they act together did not imply that their ability to continue to act is dependent upon each other person authorised also continuing in the role;
- if that were the case, it must arise from the terms upon which the persons are authorised by the claim group;
- so far as the NTA was concerned, each person authorised is a representative of the entire claim group;
- the authorisation referred to in the NTA is not of the persons authorised collectively making up the 'applicant' but of each of them personally;
- the authorisation of these persons will continue until revoked and while they are willing and able to act in their representative capacity;
- it followed that the inability of one to continue did not necessarily affect the authorisation of the others (although as her Honour noted earlier, this would be a matter of fact in each case in that it would depend on the terms upon which they were originally authorised);
- ss. 66B(1) and 64(5), dealing with replacement and appointment respectively, should be read in a way consistent with this approach—at [32] to [45].

Comment

In relation to ss. 66B(1) and s. 64(5), her Honour was of the view that:

> The reference to the *'current applicant'* being no longer authorised would be taken to refer only to those persons whose authority has in fact been revoked. This may not be all persons comprising *'the applicant'*. The *'new applicant'* referred to in s 64(5) is each person who is

> authorised to make up the applicant when a change is made to one or more of them. The evidence that the subsection requires about their authorisation would be satisfied by those persons not newly appointed referring to their prior authorisation and the fact that it has not been revoked. For administrative convenience and clarity, their authorisation might also be ratified at the same meeting which authorises the new appointment or appointments, but this is not necessary—at [46].

In relation to s. 64(5), in the Explanatory Memorandum to the Native Title Amendment Bill 1997 [No. 2], it was said to be that:

> When a claimant application…is amended to replace the applicant with a new applicant, that new applicant must provide an affidavit showing authority from the group (and the basis for that authority) to deal with matters relating to the application *[subsection 64(5)]. A new applicant may be required*, for example, if…*one of the group* of persons that *together make up the applicant*, becomes *incapacitated or dies*: at [25.42]—emphasis added.

It would appear that the requirement in s. 64(5) for an *amendment* to the claimant application itself and an affidavit in relation to the authorisation by those who remain as 'the applicant' was intended to apply even where only one of the group named as the applicant needed to be removed. The court's recommendation that authorisation of those who remain might be ratified at any meeting which 'authorises the new appointment or appointments' and, one could add, authorises the removal of deceased or incapacitated members, is commended to avoid any doubt about the continuing authority of 'the applicant': see *Daniel v State of Western Australia* (2002) 194 ALR 278; [2002] FCA 1147 at [13] and [16] to [17]. It also appears, with respect, that her Honour's reading of 'current applicant' may not entirely align with the view expressed in the Explanatory Memorandum. In any case, the view expressed by Keifel J is not necessarily correct in all cases. The terms upon which a person or persons are authorised is a matter of fact which needs to be determined on a case-by-case basis.

Decision

The notice of motion under s. 66B(1) to replace the applicant succeeded and orders were made accordingly.

Strike-out of claimant application

Hillig v Minister for Lands (NSW)(No. 2) [2006] FCA 1115

Bennett J, 22 August 2006

Issue

The issues before the Federal Court were:

- whether the applicant in a claimant application should be joined as a party to a non-claimant application over the same area;
- whether the claimant application should be summarily dismissed under s. 84C of the *Native Title Act* 1993 (Cwlth)(the NTA) or O20 r2 of the Federal Court Rules.

Background

A non-claimant application was brought by Peter Hillig, the administrator of the Worimi Local Aboriginal Land Council (the council). It covered land in the Port Stephens area that had been transferred to the council under the *Aboriginal Land Rights Act* 1983 (NSW)(Land Rights Act). At the time of the hearing of this case, a contract for sale of the land in question had been executed and awaited completion. However, the transfer of the land to the council was subject to ss. 40 and 40AA of the Land Rights Act, which provided that the council could not deal with the land unless it was the subject of an 'approved determination' of native title, as defined by s. 13 and s. 253 of the NTA. Mr Hillig sought a determination that native title did not exist in relation to the land to facilitate the completion of the contract for sale.

In February 2006, the Worimi claimant application (the Worimi application) was filed. The native title claim group described in that application, which was prepared by Mr Gary Dates (also known as Worimi) without legal advice, was:

> The female members of the Garuahgal people who are descended from Mary Mahr born in 1847…being those aboriginal people whose traditional lands and waters are situated in the Port Stephens area of New South Wales.

Worimi (Mr Dates) asserted that authority to make the claimant application was given to him as the custodian and protector of the Garuahgal women. He made application to be joined to the non-claimant application brought by Mr Hillig.

In May 2006, the council filed motions to be joined in, and to strike out, the Worimi application. The hearing of those motions commenced on 13 June 2006 but was adjourned when the court was notified that Worimi was unwell and could not attend. When it recommenced, Worimi was legally represented.

Counsel for Worimi accepted that the original application was deficient, failed to comply with the NTA and was liable to be struck out but opposed such an order on the basis that her client should have the opportunity to file a further application. A proposed application was prepared and tendered during the hearing in support of an application for an adjournment to file a further application. The proposed application was to be made by Worimi (Mr Dates). It specified a different native title claim group, made up of Worimi, his wife and their four daughters.

Application by Worimi for joinder in the non-claimant application

Her Honour Justice Bennett held that if Worimi (Mr Dates) had a claim to native title over the Port Stephens land on behalf of a native title claim group, subject to compliance with the NTA, he would have sufficient interest to be joined to the non-claimant application—at [18].

In terms of the original Worimi application, Bennett J held that there were a number of difficulties with the identification of the claim group, including that:

- it was described in various ways in the original application and in the affidavits filed in support of the application;
- Worimi was named as an individual who belonged to the claim group when the application was clearly made on behalf of the female members of the relevant group—at [21] and [29].

Her Honour held that:

- it was apparent that the native title claim group had not been clearly identified, contrary to s. 61(4);
- Worimi (Mr Dates) was not a member of the claim group as required by s. 61(1);
- the evidence on authorisation was insufficient and established that some of the women of the Worimi nation and the Maaiangal clan, including Worimi's mother, did not authorise the application—at [29], [30], [37] and [80].

In terms of the proposed application, Bennett J identified significant problems:

- authorisation of the original application may not extend to an abandonment of the native title claim group's claim as a result of Worimi substituting himself, his wife and their daughters for the current claim group;
- the proposed application formulated a claim that was contradicted by the evidence of the applicant as to the identity of the correct claim group and the nature of the original claim;
- the proposed application asserted individual or group native title rights and interests on behalf of Worimi, his wife and their children (the proposed claim group);
- this was not a case of identifying the earlier claim group with more certainty—rather, the intention was to change the persons on whose behalf the application was brought;
- the claim group did not include all the persons who hold the common or group rights and interests as required by s. 61(1)—it had not been shown that the proposed claim group alone possessed rights and interests in the Port Stephens land;
- the requirements of ss. 61 and 251B relating to authorisation had not been met because the identity of the native title claim group was uncertain;
- therefore, it could not be said that all the persons who hold the common rights and interests had authorised the bringing of the proposed application—at [51] to [52], [56], [66] and [70]. See also s. 61(1).

Claimant application struck out

Bennett J was of the view that, if the description of the claim group in the proposed application, as a matter of construction, could not comply with the NTA and could not be cured by amendment or further evidence, then there was no good reason to grant an adjournment. Therefore, the original claimant application should be struck out—at [46] and [72].

Application for adjournment

Her Honour held that it was not appropriate to permit Worimi (Mr Dates) to file the proposed application as an amended application because of the inconsistencies in the claim groups of the original and proposed application and issues in relation to authorisation of the proposed claim group. Nonetheless, he was given a further opportunity to present his case—at [81] to [82].

Abuse of process

Mr Hillig's argument that the claimant application was an abuse of process brought only to prevent the sale of the land and ventilate complaints about the conduct of the land council was rejected:

> [T]here is…evidence from Mr Dates [Worimi] of his independent concern for the Port Stephens land and his claim to native title and for the women whom he has asserted have an interest in the land. In the context of a non-claimant application for a declaration that no native title exists…, Mr Dates' [claimant] application…and his application to be joined to the [non-claimant] application does not, of itself, constitute an abuse of process, whether or not his concern is to prevent the sale of the land—at [85].

Decision

Her Honour struck out the Worimi application, relying on s. 84C of the NTA, and dismissed it under O20 r2 of the Federal Court Rules. Worimi (Mr Dates) was ordered to file and serve any further claimant application and any further evidence in support of his application to be joined to Mr Hillig's non-claimant application.

Party status—peak fishing body denied

Dann v Western Australia [2006] FCA 1249

French J, 18 September 2006

Issue

The issues in this case were whether:

- the Western Australian Fishing Industry (Inc) (WAFIC) should be joined as a party to two claimant applications;
- the court should make a springing order to remove inactive respondents from claimant applications in the Geraldton/Pilbara region.

Background

WAFIC made applications under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA) to be joined to two claimant applications. It described itself as the peak industry body for the fishing industry in Western Australia. WAFIC had been joined as a respondent to other claimant applications but, as noted, that was done without contention. The application for joinder in this case was referred to a judge because his Honour Justice Lindgren refused to join the Chamber of Minerals and Energy of Western Australia in *Harrington-Smith v Western Australia* [2002] FCA 184. The crucial question here was whether WAFIC had an interest that may be affected by a determination in the proceedings—at [15].

His Honour Justice French referred to earlier relevant decisions, including the Full Court of the Federal Court in *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1 (*Byron*). In that case, Black CJ said that:

> [A] body that represents the interests of others whose members have interests that may be affected, does not, for that reason alone, become a person whose interests are affected…[but that]…is not to deny that a corporation may have interests that may be affected by a determination of native title if, for example, its activities might be curtailed or otherwise significantly affected by the determination—*Byron* at 9.

French J went on to note that:

> It is clear from the authority…in *Byron*…that WAFIC cannot acquire party status by reason of the possible effects of a native title determination on the interests of its members. It asserts, however, that it has an affected interest by reason of its participation in statutory committees advising government in relation to managed fisheries, some of which exist in the claim area—at [26].

His Honour rejected this submission because:

- this function could not, apparently, be compared to that of a statutory authority with direct responsibility for the management of an area the subject of a native title determination application;
- there was no evidence logically linking WAFIC's economic interests to a native title determination or to demonstrate 'any real basis upon which WAFIC's capacity to participate in the committees to which it has referred would be affected'—at [26].

Decision on joinder

Joinder was refused. It was noted that WAFIC was acting as an agent for fishing interests in other cases and that did not require the intervention of the Federal Court: 'Under s 84B a party to a proceeding can appoint an organisation as its agent'—at [27].

General springing orders refused

An application from the representative body in the Pilbara and Geraldton regions for general springing orders to remove inactive respondents was refused. French J did not consider such a 'global order' as appropriate but left open the possibility of such orders in respect of particular applications because they may be 'helpful…where evidence is put before the Court to support the practical utility and justice of such a direction'—at [32].

Party status—local council refused

Akiba v Queensland (No. 1) [2006] FCA 1102

French J, 18 August 2006

Issue

The issue before the Federal Court was whether to join the Torres Shire Council (the council) as a respondent to a claimant application.

Background

The Torres Strait Regional Seas Claim was filed in November 2001. It covers approximately 44 000 km2 seaward of the high water mark around certain islands and includes beaches, reclaimed areas and inter-tidal zones. The council sought joinder as a party to the proceedings on 22 June 2005.

Interests of the council

The council submitted that the interests it held within the application area may be affected by a determination of native title, with those interests being (among others):

- existing council infrastructure;
- operational interests including foreshore maintenance;
- community recreation and access, particularly in relation to beaches and the inter-tidal zone;
- the operation and enforcement of council's local laws which restrict and regulate activities within its local government area.

His Honour Justice French noted that:

- the council's interests would be sufficient interests for the purposes of s. 84 of the *Native Title Act 1993* (Cwlth) (NTA), referring to the requirement in s. 66(3) for notice of native title determination applications to be given to local government bodies for any area covered by such applications;
- however, in this case, those interests did not reflect any actual or proposed engagement or activity of the council in the area concerned—at [29].

Decision

French J exercised his discretion against the joinder of the council, relying on:

- the theoretical, abstract and limited character of the interests relied upon;
- the very significant and largely unexplained delay (more than three years) in seeking joinder;
- the fact that the State of Queensland could be expected to adequately represent the council's interests;
- any native title determination would 'inevitably' be subject to the valid laws of the state and its authorities;

- given that protection, it was difficult to see any further practical basis for the council's involvement—at [29].

Party status—PNG national refused

***Akiba v Queensland (No 2)* [2006] FCA 1173**

French J, 8 September 2006

Issue

The issue before the Federal Court was whether a Papua New Guinean national should be joined as a party to a claimant application.

Background

The applicant for joinder, Pende Gamogab, submitted that he, as part of a group called the Dangaloub-Gizra, enjoyed traditional rights of movement, ownership and use of resources in the Torres Strait region, parts of which are subject to a claimant application referred to as the Torres Strait Regional Seas Claim.

The Papuan New Guinean village of Kupere, where Mr Gamogab lived, was not one of the 14 'treaty villages' whose inhabitants are accepted, under an exchange of notes between Australia and Papua New Guinea (PNG), as beneficiaries of a treaty entered into in 1978 by Australia and PNG concerning sovereignty and maritime boundaries in the area between the two countries, including the Torres Strait. This meant that he was not recognised as a 'traditional inhabitant' with traditional customary rights under the treaty.

Whether the applicant should be joined as a party

His Honour Justice French listed the relevant elements of s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA) for the purpose of joining a party to the proceedings as being:

- whether the person has an interest and whether that interest may be affected by a determination in the proceedings;
- whether, in the exercise of its discretion, the court should join the person as a party—at [32].

PNG national could have requisite interest

French J was of the view that:

- it was possible that a PNG national living in PNG who is a traditional inhabitant of the claim area may have rights and interests capable of recognition by the common law;
- however, the definition of 'native title' and 'native title rights and interests' in s. 223(1) is, relevantly, 'the…rights and interests of …Torres Strait Islanders' and 'Torres Strait Islanders' is defined in s. 253 as: 'A descendant of an indigenous inhabitant of the Torres Strait Islands';
- this meant that a determination of native title could not be obtained under the NTA by PNG nationals on the strength of rights and interests possessed within Australian waters under the traditional laws acknowledged and the traditional customs observed by the society of which they are part;
- nonetheless, the rights and interests of such persons might limit or qualify the native title rights and interests of Torres Strait Islanders (e.g. as an element of traditional law and custom observed by the Islanders) and, on that basis, the applicant would be eligible for joinder as a party—at [35].

Interest may be affected by a determination in the proceedings

French J held the interests of traditional inhabitants of the Torres Strait regional claim area from PNG may be affected by a native title determination because such a determination:

> [C]ould render enforceable and protected at Australian law, rights and interests which accord no recognition to the rights and interests asserted by Mr Gamogab and his community—at [36].

Court should not exercise discretion to join

Having found that the first element of s. 84(5) was met (i.e. an interest that may be affected by a determination in the proceeding), the court considered whether or not to exercise its discretion to join Mr Gamogab. French J noted a number of relevant factors, including that:

- a consideration of the traditional rights and interests of PNG nationals who are traditional inhabitants of the claim area would lead to a more accurate definition of the native title rights and interests claimed;
- a native title determination under the NTA could protect the rights and interests of traditional inhabitants from PNG by limiting

the scope of the rights and interests of the Torres Strait Regional Seas Claim applicant and their communities—at [37] to [45].

His Honour was of the view that:

> [I]t is reasonable [sic] arguable that the Commonwealth has an obligation under the Treaty to ensure that the traditional activities of traditional inhabitants in the Torres Strait which are protected by the Treaty are taken into account to the extent that it is proper to do so in the native title determination process—at [46].

It was held that:

- the question of whether a PNG village whose members are not treated as 'traditional inhabitants' by the executive governments of PNG and Australia under the treaty should also be so treated for the purpose of these proceedings was a matter for those executive governments;
- the joinder of Mr Gamogab may open the proceedings to debates between village communities in PNG about their respective interests in the Torres Strait Region Seas Claim area;
- these matters were best left to the courts of PNG or its executive government to resolve by agreement with the Australian Government under the treaty—at [47] to [48].

Decision

French J declined to exercise the discretion available to join Mr Gamogab and dismissed his motion for joinder.

Amendment of a claimant application

Wiri People #2 v Queensland [2006] FCA 804

Dowsett J, 19 June 2006

Issue

The issue before the Federal Court was whether the filing of a notice of motion seeking leave to amend Wiri People #2 claimant application satisfied an order of 6 October 2005 requiring that the applicant file and serve an amended application.

Background

On 6 October 2005, his Honour Justice Dowsett ordered the applicant file and serve an amended application on or before 14 October 2005 and, in default thereof, the application would stand dismissed. The matters of primary concern to the court at the time were the constitution of the claim group and the authorisation of the claim. On 14 October 2005, the applicant filed a notice of motion seeking leave to amend the application.

Non-compliance with the order

Dowsett J held that:

- a party who applies for leave to deliver an amended document does not thereby commit themselves to that document;
- by filing an application for leave to amend rather than an amended application, the applicant further deferred the time at which they committed themselves to a final form of application;
- the applicant therefore failed to advance the proceedings in a way contemplated in the order—at [6]

Extension of time

His Honour held that, if the applicant was in a position to commit *bona fide* to an amended application which complied with the *Native Title Act 1993* (Cwlth), it would be appropriate to extend time notwithstanding the failure to comply with the earlier order—at [7] to [10]

Leave to appeal the self-executing order for dismissal

Dowsett J refused leave to appeal from the order made on 6 October 2005 because:

- the applicant did not object to the order being made at the time;
- it would seriously undermine the case management system, in particular management of this case, if leave were granted to appeal at this stage; and
- there had been a delay since the making of the original order—at [7] and [8].

Decision

Dowsett J made the following orders:

- the self-executing order of 6 October 2005 had taken effect and the Wiri People #2 stands dismissed;

- leave to appeal the self-executing order of 6 October 2005 was refused;
- an extension of time for compliance with the order made on 6 October 2005 was refused. Leave to appeal from this order was granted.

Stay of order to dismiss application pending an appeal

***Wiri People # 2 v Queensland* [2006] FCA 1069**

Greenwood J, 15 August 2006

Issue

The issue before the Federal Court was whether to stay orders of his Honour Justice Dowsett made on 6 October 2005 and 19 June 2006 pending the determination of an appeal to the Full Court of the Federal Court.

Background

On 19 June, Dowsett J made the following orders:

- a self-executing order made on 6 October 2005 had taken effect and Wiri People #2 claimant application stood dismissed;
- leave to appeal the self-executing order of 6 October 2005 was refused;
- an extension of time for compliance with the order made on 6 October 2005 was refused;
- leave to appeal from the third order was granted—see *Wiri People #2 v Queensland* [2006] FCA 804, summarised in this issue of *Native Title Hot Spots*.

The applicant sought stay of the first and third orders pending an appeal to the Full Court of the Federal Court.

The operative order

The applicant contended that the operative order was the order of 19 June 2006, rather than the orders of 6 October 2005. His Honour Justice Greenwood held that:

- the order of 6 October 2005 was the source of the dismissal of the application; and
- therefore, the order made on 19 June 2006 was declaratory of the construction of the order of 6 October 2005 and not, therefore, an operative order—at [24].

The application for stay

His Honour:

- held that, since the first of the 19 June 2006 orders was not an operative order effecting a dismissal, he would not stay the operation of the declaration;
- refused to stay the third order made on 19 June 2006 because the refusal of an extension of time for compliance was the subject of leave to appeal;
- held that, if that appeal was meritorious, the court had the power to set aside the third order and extend time to enable an amended application to be filed, thus reinstating the application;
- considered that an application to stay a refusal to extend time was apt to be construed as an order extending time;
- stayed the first order from 6 October 2006 pending the determination of the appeal to the extent that the order of 6 October 2005 provided prospectively that the application stands dismissed;
- made the stay conditional upon an undertaking by the applicant to (among other things) expeditiously prosecute the appeal—at [26] to [27].

Costs—discontinuance of claimant application

***McKenzie v South Australia* [2006] FCA 891**

Finn J, 30 June 2006

Issue

The issue in this case was whether the Federal Court should allow a motion to discontinue a claimant application and, if so, whether there should be an order as to costs.

Background

The native title claim group represented by the applicant in this matter had already had a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA) struck out. Before it was struck out (for reasons relating to the identification of the claim group and the alleged authority of the applicant), the application was amended on a

number of occasions. Following the strike-out decision, a fresh application was filed in February 2006 resulting in the present proceedings—at [2] and see *McKenzie v South Australia* (2005) 214 ALR 214; [2005] FCA 22 (*McKenzie*), summarised in *Native Title Hot Spots* Issue 14.

The Aboriginal Legal Rights Movement (ALRM, the representative body for the area concerned and a respondent in these proceedings) notified the applicant of perceived deficiencies in the fresh application, which essentially related to the same matters that gave rise to the earlier application being struck out. Initially, the applicant's response was to simply amend the application. The court made it plain that leave to amend was required. ALRM opposed the grant of leave to amend on the ground that the fresh application would still be defective. The application for leave to amend was adjourned to allow the applicant to address the ALRM's concerns but, instead, he purported to discontinue the proceeding. Mr McKenzie subsequently conceded it was not within the applicant's power to discontinue as of right—leave of the court was required. Hence, the application for leave to discontinue dealt with in this decision.

The basis for discontinuance was that the applicant's solicitor had realised that an apical ancestor had been excluded from the claim group description without due consideration. The solicitor was therefore instructed by the applicant to discontinue the proceedings and lodge a fresh application to avoid any argument in relation to a perceived lack of authorisation in relation to the proceedings.

Decision
His Honour Justice Finn granted leave to discontinue, having determined this would occasion no injustice to the defendants, subject to the question of costs—at [5] and [11].

Costs
Section 85A of the NTA provides that, unless the court orders otherwise, each party to a proceeding must bear their own costs. Among other things, in the event of a party behaving unreasonably, the court may make a cost order against that party—at [6] to [8], referring to *Ward v Western Australia* (1999) 93 FCR 305, endorsed by the Full Court in *De Rose v South Australia (No 3)* [2005] FCAFC 137.

Finn J concluded that : '[I]t is…perfectly clear that a costs order should be made in favour of the two respondents' because, in this case, they had to perform a 'tutelary' function in relation to the conduct of the proceeding (which had been discharged, primarily by the ALRM but concurred with by the State of South Australia) 'in the interests of the orderly conduct of these proceedings and has assisted to that end'—at [9].

Costs—discontinuance of notice of motion

***Yalanji People v Queensland* [2006] FCA 1103**

Allsop J, 21 August 2006

Issue
The issue in this case was whether the Federal Court should make an order for costs after the discontinuance by the applicant of a notice of motion.

Background
This matter had been in mediation by the National Native Title Tribunal and subject to intensive case management by Registrars of the Federal Court for some years. The court was of the view that there was likely to be an agreed outcome based on a consent determination and a number of related indigenous land use agreements. However, by the end of 2004, when most other aspects were proceeding satisfactorily, a dispute between the applicant and some of the respondents over land at Cow Bay arose that 'appeared intractable and, to a degree, attended by personal animosity'. This was 'perceived by the applicant to threaten the prospects of an overall settlement'—at [4].

On 29 November 2004, the relevant respondents filed a notice of motion seeking discovery and particulars. The applicant filed a notice of motion in January 2005 seeking the removal of those respondents as parties or the separate determination of their interest in the proceedings. By late 2005, the parties had resolved many of their differences and the applicant proposed to discontinue its motion. However, the respondents would not consent to this without their costs being paid. The parties agreed to have the issue dealt with on the papers—at [8] to [9].

Decision

His Honour Justice Allsop noted s. 85A of the *Native Title Act 1993* (Cwlth), s. 43(2) of the *Federal Court of Australia Act 1976* (Cwlth) and the relevant authorities before concluding that:

- S. 85A removed the notion of costs following the event and, while unreasonable conduct was a ground for an award of costs, the discretion is not so limited;
- it did not appear that the applicant took an unreasonable stand and it was not possible to assess who, if anyone, was being unreasonable in the lead up to the filing of the respective motions;
- there should be no order for costs—at [13] to [15].

Right to negotiate applications

Notification under s. 29—validity challenged

***Dann/Western Australia/Empire Oil Company (WA) Ltd* [2006] NNTTA 126**

Member J Sosso, 25 August 2006

Issue

The issue before the National Native Title Tribunal was whether it was empowered to conduct an inquiry under s. 139(b) *Native Title Act 1993* (Cwlth) (the NTA) in relation to a future act determination application if a native title party challenged the validity of a notice given under s. 29(3).

Background

The native title party raised three main issues that potentially constituted a 'jurisdictional' challenge:

- whether the notice contained a 'clear description' of the area that may be affected by the act in accordance with the Native Title (Notices) Determination 1998 (Notices Determination);
- whether the notice was published in a print size that was at least as large as that used for most of the editorial content of the relevant newspaper, as required by the Notices Determination; and
- whether the notice complied with the requirement in s. 29(4)(b) that it contain a statement to the effect that persons have until three months after the notification day to take certain steps to become native title parties in relation to the notice.

Member Sosso found a 'jurisdictional' issue was raised:

> There is a clear line of authority that the notification requirements mandated by section 29 are central to the effective operation of the right to negotiate. If there has not been proper notification of the proposed future act putative native title parties are potentially deprived of the valuable right to negotiate—at [18].

Therefore, the Tribunal had a duty to 'make due inquiry about whether it has that jurisdiction or authority', even where the challenge involves complex issues of fact or law or where it will necessarily delay proceedings—at [19], referring to *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467 and *Anaconda Nickel v Western Australia* (2000) 165 FLR 116 at 133.

Satisfying notice requirements

The Tribunal considered what was necessary in order to satisfy the notice requirements, referring to the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*) for the propositions that:

- an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect;
- the proper approach to determine if a public notice is invalid is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done;
- in determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'—at [23].

The Tribunal rejected the government party's contention that s. 109 (which provides that the Tribunal is not 'bound by technicalities') assisted with determining whether strict compliance with the notice provisions was necessary:

> The issue here is not the manner in which the Tribunal should operate when making a future act determination, but if the Tribunal has any legal basis for doing so—at [27].

The government party's submission regarding s. 25C of the *Acts Interpretation Act 1901* (Cwlth) was found to be irrelevant because:

> Section 25C has not been drafted to deal with situations where a clearly described form has not been prescribed but there are merely directions, albeit quite detailed directions, on the manner of completing a notice—at [28].

Clear description of the area

The first issue in contention is whether the section 29 notice complied with clause 6(5)(a) of the Notices Determination by including 'a clear description of the area that may be affected by the [doing of the future] act.' Member Sosso found (among other things) that:

- public notification of a proposed future act is intended to alert prospective native title holders and a failure to comply with the notification requirements prescribed in the Notices Direction potentially can result in such persons being deprived of the valuable right to negotiate;
- in accordance with the test promulgated in Project Blue Sky, consideration must be given to the place of the relevant provisions in the wider statutory scheme and the legislation must be construed, prima facie, to give effect to harmonious goals;
- whether there is a 'clear description' must be decided on a case-by-case basis as a question of fact and degree based on a common sense approach;
- the key issue was whether the public notice provided putative native title claimants with sufficient material to enable them to make an informed decision about whether or not to respond to the notice—at [37], [53] to [56] and see [45], [48], [49] and [51].

The phrase 'clear description' is not defined in either the NTA or Notices Determination. Member Sosso referred to Her Honour Justice Kiefel's decision in *Harris v Great Barrier Reef Marine Park Authority* (1999) 165 ALR 234 and the Native Title (Indigenous Land Use Agreements) Regulations 1999, which require 'a complete description of the agreement area', before finding that:

> A clear description…is either a written description solely, or a written description supplemented by a map, which alerts the reader of a proposed future act and the area of that proposed act…The public notice must contain sufficient information to inform the reader of the general locality of the proposed future act. In this case the government party has provided the public with information as to the area of the proposed tenement in terms of square kilometres, the local government body within which the area is located and a locality description which combines in general parlance the approximate location of the area…and a boundary box description utilizing longitude and latitude measures—at [71] and [79] and see also [82].

The Tribunal concluded that the government party had provided a 'clear description' of the proposed tenement—at [82].

Print size

The native title party submitted that the public notice did not comply with clause 9 of the Notices Determination, which required it to be 'published in a print size at least as large as that used for most of the editorial content of the publication'. Member Sosso concluded that the 'editorial content' of a publication included:

> [A]ll material which is included in an issue by the editor excluding material which is published on the payment of a fee by a third person or entity—at [87].

The government party was found to have failed to comply with clause 9 but this did not invalidate the notice because 'the extent of the failure to comply with the requirements of clause 9 in this case is, at most, marginal'—at [92] to [99].

Compliance with section 29(4) — the incorrect date issue

The native title party submitted that the public notice did not comply with s. 29(4)(b), which requires that the notice must 'contain a statement… that…persons have until 3 months after the notification day to…become native title parties'. The 'notification day' in this case was 15 December 2004. The notice went on to state that: 'The three month period closes on 16 March 2005'.

Member Sosso accepted that, 'for the purposes of resolving this issue…the closing date in the notice was incorrect'. However it was not necessary to deal with the submission because (among other things) a closing date was 'additional information… provided on a purely voluntary basis…and falls outside the requirements of either the Act or the Notices Determination'—at [104] to [106].

Decision

Member Sosso found the s. 29(3) notice considered in this matter:

- provided a clear description of the area that may be affected by the grant of the proposed tenement;
- was not published in a print size at least as large as that used for most of the editorial content of that edition but the degree of non-compliance was so minor that it did not invalidate the notice;
- was not invalidated by the voluntary inclusion of an incorrect closing date—at [107].

Therefore, Member Sosso determined the Tribunal was empowered to consider the future act determination application made by the government party—at [107].