Native Title Hot Spots

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De Rose appeal

De Rose v State of South Australia [2003] FCAFC 286

Wilcox ACJ, Sackville and Merkel JJ, 16 December 2003

Issue

Essentially, the issue before the Full Court of the Federal Court in these appeal proceedings was whether or not the appellants, as a native title claim group, held rights and interests in relation to land and waters over the claim area under the traditional laws acknowledged and the traditional customs observed by them—see s. 223(1)(a) and (b) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

The area concerned is in the far north-west of South Australia, within the eastern extremity of a large area of land described by the early ethnographers as the Western Desert region. At first instance, the application was dismissed on the basis that native title had ceased to exist because the claimants did not establish that they had a connection to the area covered by the application (the application area) as required by s. 223(1)(b) of the NTA—see *De Rose v South Australia* [2002] FCA 1342. The background to this appeal and the findings at first instance are summarised in Hot Spots Issue 4.

Ground of appeal

An appeal against the decision at first instance was filed by the claimants, in which it was argued that O'Loughlin J erred in concluding that they lacked the requisite connection with the claim area. Essentially the grounds were that his Honour:

- placed undue emphasis on the need for the appellants to demonstrate a physical connection with the application area and erroneously regarded physical absence for a period of time as being inconsistent with continuing connection;
- erroneously inquired into the reasonableness or otherwise of the 'excuses' offered by the claimants for not maintaining closer contact with the application area;
- failed to identify clearly the rights and responsibilities of *Ngururitja* (traditional owners) under the traditional laws and customs of the Western Desert Bloc in relation to the claim area and nearby lands, which led to erroneous assumptions such as that the relevant traditional laws and customs required *Ngururitja* to care for sites in order to maintain the requisite connection with the application area;
- erroneously imposed a requirement on the claimants not found in the traditional laws and customs of the Western Desert Bloc, namely that the appellants be part of a social, communal or political organisation that undertook activities amounting to an observance of traditional customs;
- overlooked or paid insufficient regard to evidence concerning both physical contact by the appellants with the claim area after 1978, including hunting visits, and complaints about threats to the integrity of particular sites—at [179].

The appellants submitted that the correct approach to determine whether they, or some of them, had the necessary connection for the purposes of s. 223(1)(b) of the NTA was as follows:

- the connection had to be established by the traditional laws acknowledged and the traditional customs observed by the claimants;
- if a person is *Ngururitja* for particular land by virtue of the traditional laws and customs of the Western Desert Bloc and they, as *Ngururitja,* have responsibilities for the land, the connection was established;
- the connection remained unless, by the relevant traditional laws and customs, it had been lost by virtue of the person's lack of contact with the land—at [180].

The appellants contended that:

- some of the findings of primary fact were sufficient to satisfy the statutory test of connection specified in s. 223(1)(b) of the NTA;
- as long as any one of the claimants was *Ngururitja* in conformity with the traditional laws and customs of the Western Desert people, and that person maintained a sufficient connection with the claim area pursuant to those traditional laws and customs, they were entitled to succeed;
- given O'Loughlin J's findings that those recognised as *Ngururitja* enjoyed exclusive possession and use of the claim area in the early twentieth century, the correct approach to the question of connection led to the conclusion that the appellants had established the necessary connection with the application area—at [181].

From these contentions, their Honours Wilcox ACJ, Sackville and Merkel JJ identified the preliminary issues as being whether or not O'Loughlin J:

- erred in attributing importance to the absence of evidence of a cohesive community or group on or near the claim area; and
- erred in concluding that the appellants had failed to prove the necessary connection to the claim area for the purposes of s. 223(1)(b) of the NTA.

If O'Loughlin J did make such an error, the questions then were:

- Should the Full Court undertake its own evaluation of the evidence relating to the question of 'connection'? and
- Should O'Loughlin J's decision be upheld on the ground that, on his Honour's findings, the appellants failed to establish that they acknowledged traditional laws or observed traditional customs and, therefore, did not satisfy s. 223(1)(a) of the NTA?—at [272].

The state submitted that:

- O'Loughlin J's findings of fact required the appeal to be dismissed. His Honour had taken an approach more favourable to the claimants than that required by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (Yorta Yorta, which was summarised in Hot Spots Issue 3, December 2002) because his Honour had been prepared to accept that laws and customs could be traditional without evidence of continual observance. Moreover, he was prepared to allow for the evolution of laws and customs due to the interaction with European presence;
- the appellants could only succeed if they could establish that the laws and customs observed today owed their origins to those in existence at sovereignty, that those laws and customs had been continually observed since that time and that the connection of the claimant group had continued substantially uninterrupted—at [182] to [190];

- while an Aboriginal society had once lived in the claim area, there was no biological connection between the appellant and those who inhabited the area pre-sovereignty.

Counsel for the respondent pastoralists pointed out that the appellants' case focussed on O'Loughlin J's finding that they lacked a current connection, both physical and spiritual, with the application area. They argued, however, that there was an anterior question raised by their notice of contention, namely whether the appellants ever held or possessed native title rights and interests. The question arose because the appellants' 'cohort' had migrated to the country of the claim area in the early part of the twentieth century—at [191].

The post-sovereignty 'usurpation' hypothesis

The Full Court noted that O'Loughlin J found there were historical 'migratory movements' of Western Desert Aboriginal people to and from the claim area and its environs. Their Honours rejected the submission of the pastoralists that the forebears of the claimants were newcomers who supplanted the original inhabitants and brought with them new sets of norms governing their society. While such an 'usurpation' argument would carry weight if it were supported by the facts, this was not the case—at [213] to [217].

Their Honours noted the 'usurpation' thesis carries with it overtones of the 'Eurocentric' notion of occupation. The term 'occupation' is not found in s. 223 of the NTA and its use in relation to the Aboriginal people of the Western Desert Bloc is apt to mislead:

> [A]s the evidence in the present case makes clear, the Western Desert peoples were comparatively few in number and led a lifestyle that required adaptation to the extraordinarily harsh conditions of the land. The relationship between them and the sites or tracks of spiritual significance to them is not readily captured by the familiar language of Anglo-Australian property law—at [219].

Continuity with original inhabitants

Most of the claimants came to the application area from country to the west by reason of drought, the search for food or shelter or because of marriage. For those few who were born on or near the application area, at least some of their forebears came from the west earlier in the twentieth century. The Full Court noted that the approach taken by the traditional laws and customs of the Western Desert Bloc to population shifts, and the extent to which those laws and customs recognised 'newcomers' or their descendants as *Ngurariţja* for sites or tracks on the application area, were essential to any finding of native title.

Their Honours concluded O'Loughlin J did find that the population shifts took place in accordance with traditional laws and customs of the Western Desert Bloc and that newcomers to the claim area could become *Ngurariţja* for the claim area under their traditional laws and customs—at [241]. The evidence supported such a finding—at [243] to [258].

Satisfying s. 223(1)(a)

To satisfy s. 223(1)(a) of the NTA, it was not enough to show that the appellants simply acknowledged or observed the traditional laws and customs of the Western Desert Bloc – because 'usurpers' and those attempting to 'revive the lost culture of their ancestors' could do that much. In the Full Court's opinion, it was necessary for the claims to show that, under the traditional laws and customs of the Western Desert Bloc, the claimants possessed rights and interests in relation to the claim area—at [233]. This was the 'critical question'. Similarly, they would fail if their claim to be *Ngurariţja* for the application area was founded on rules or norms developed since sovereignty that never formed part of, nor were recognised by, the traditional laws and customs of the Western Desert Bloc—at [233] to [237].

The Full Court was of the view that it was not necessary either that the appellants' claim be founded on traditional laws and customs unique to the Aboriginal people occupying the

application area at sovereignty or that they had biological or other links with the particular group of Aboriginal people who held native title over the claim area at sovereignty, other than those required by traditional laws and customs to establish that a person had acquired the status of *Nguraritja* for the area concerned. It was enough if, by those traditional laws and customs, the appellants had sufficient links to the original native title holders so as to acquire the status of *Nguraritja* for the application area, provided that they retained, by those laws and customs, a connection with the claim area—at [231] to [237].

Crucial to their Honours finding was the unqualified acceptance that:

- the Western Desert Bloc society had not ceased to exist at any time between European settlement and the present;
- the appellants themselves, whether or not they constituted a discrete social, communal or political group, were members of that society; and
- the traditional laws and customs asserted by the appellants were essentially the same as those that existed throughout the Western Desert region—at [236].

Inferences

Much of the connection evidence before O'Loughlin J was provided by the applicants. As to the acceptability of oral tradition, their Honours noted that, in *Yorta Yorta* at [59], the majority of the High Court endorsed the view that:

> [D]ifficulties inherent in proving facts in relation to a time when for the most part the only record of events is oral tradition passed down from one generation to another, cannot be overstated.

The Full Court went on to say that:

> For obvious reasons, the Aboriginal witnesses could not give direct evidence of the way in which pre-sovereignty population shifts were viewed by the traditional laws and customs of the Western Desert Bloc. The primary Judge was therefore forced to rely on inferences from necessarily incomplete evidence. Bearing that in mind, in our view, the evidence was sufficient to support the inference he drew, namely that population shifts to and from the claim area that occurred in the twentieth century were consistent with and recognised by the traditional laws and customs of the Western Desert Bloc, in the sense that, under those laws and customs, the newcomers could acquire the status of *Nguraritja* in relation to sites or tracks on or near the claim area—at [259].

Change and adaptation

Their Honours further noted that O'Loughlin J explicitly found that the four methods by which a person could become *Nguraritja* for particular country were recognised by the traditional laws and customs of the Western Desert Bloc, namely that the person had:

- been born of the claim area;
- a long-term physical association with the claim area;
- ancestors that had been born on the claim area; or
- a geographical and religious knowledge of the claim area; and
- been recognised as *Nguraritja* for the claim area by the other *Nguraritja—at* [260].

Furthermore, his Honour acknowledged the rules had changed over time and spoke of 'evolutionary traditional law'. In other words, O'Loughlin J saw the post-sovereignty adaptation of the *Nguraritja* rules as being contemplated by the traditional laws and customs of the Western Desert Bloc and found population shifts to and from the vicinity of the claim area to be consistent with the traditional laws and customs of the Western Desert Bloc. In their Honours view, these findings were consistent with the approach taken in the joint judgment of the majority in *Yorta Yorta—at* [268].

A distinct group

One of the questions posed by s. 223(1) of the NTA is whether the appellants possess rights and interests in relation to land and waters under the traditional laws acknowledged and customs observed by them. If the traditional laws and customs of the Western Desert Bloc allowed *Ngururaitja* to possess rights and interests in relation to land only if the *Ngururaitja* for a particular area constituted a discrete social group or community, the appellants would doubtless have had to show that they formed part of such a group or community.

The trial judge rejected that thesis on the ground that it was inconsistent with the evidence of the Aboriginal witnesses. Therefore, it followed that O'Loughlin J's findings to the effect that the appellants did not constitute or were not part of a social, communal or political organisation on or near the application area could not adversely affect their claim to a determination of native title. The Full Court said that, to the extent that his Honour thought otherwise, he was in error—at [283].

Connection – wrong question asked

Their Honours analysed in depth both the evidence of Peter De Rose (the 'dominant figure' in the presentation of the appellants' case), and the trial judge's findings in applying the principles in s. 223(1)(b).

In the light of the analysis of s. 223 in the joint judgment in *Western Australia v Ward* [2002] HCA 28 *(Ward (HC))* at [64], the Full Court found that the finding made by O'Loughlin J that Mr De Rose abandoned his connection to the application area did not conform to the language of s. 223(1)(b) of the NTA. The question posed by that provision is not whether the appellants, or any of them, have abandoned their connection to the application area. It is whether the claimants, by the traditional laws they acknowledge and traditional customs they observe, have a connection with the claim area—at [303], [315] and [329]. Their Honours inferred that his Honour identified the traditional laws and customs relevant to the question of 'connection' as those of the Western Desert Bloc, but did not explicitly ask whether by those traditional laws and customs, the claimants retained a connection with the claim area—at [310].

The Full Court noted that such an inquiry would have required his Honour to ascertain the content of the traditional laws and customs, to characterise the effect of those laws and then to determine whether the characterisation constituted a connection between the claimants and the application area. Their Honours suggested that O'Loughlin J, in deciding that the claimants had 'abandoned' their connection to the area by 'failing' for a considerable time to observe their responsibilities in relation to sites, was applying a standard that was not sourced in the traditional laws and customs of the Western Desert Bloc, but was rather 'a construct of his own'—at [310] to [312] and in *Ward HC—at* [17], [18] and [64].

The Full Court found that, in addressing the wrong question in relation to s. 233(1)(b), O'Loughlin J also placed too much emphasis on the absence of physical contact with the claim area after 1978, despite the fact that physical presence is not essential in circumstances where it is no longer practicable or access to traditional lands is prevented or restricted by European settlers. Their Honours noted the 'strong' evidence of Mr De Rose's spiritual links with the land had not been afforded the proper weight by the trial judge—at [316] to [320].

Intent

If continuity of acknowledgement and observance of traditional laws and customs has been interrupted, the reasons for the interruption are irrelevant. As the Full Court noted in this case, the judgment in *Yorta Yorta* also indicates that the reasons why acknowledgement and observance has been affected might influence the fact-finder's decision as to whether there was an absence

of continuity. So it is in relation to the question of connection. In determining whether there is a connection for the purposes of s. 223(1)(b) of the NTA, the reason why claimants have not sought to maintain a physical association with the land may be relevant.

As to a fear of the Fullers being a real factor in preventing the appellants from returning to the land after 1978, their Honours had difficulty reconciling O'Loughlin J's findings as to Doug Fuller's attitudes and behaviour with his ultimate finding that it was difficult to sustain the idea that Mr De Rose or any other Aboriginal people had any reason to be afraid to enter the property to hunt or carry on traditional activities because of the conduct of Doug or Rex Fuller—at [321] to [326].

Similarly, the Full Court was of the view that the fact that the Aboriginal people's movement away from the application area may not have been associated with their Aboriginal lifestyle, traditions or customs, but rather governed by aspects of European social and work practices, did not necessarily deny the presence of a continuing connection with the application area. The evidence showed that movement from traditional lands in search of regular food or shelter is not a new phenomenon or one unknown to traditional laws and customs of the Western Desert Bloc—at [328].

For those reasons:

> The upshot is that…the primary Judge did not address the correct question posed by s. 223(1)(b) of the NTA. His finding that Peter De Rose failed to satisfy s. 223(1)(b) is therefore flawed. We think that the findings relating to the other appellants, even though their circumstances were each different, were also flawed for the same reason—at [329].

Additional evidence required

Their Honours were reluctant to make their own evaluation of the evidence relevant to the question of 'connection'. This was largely because they were not taken to any evidence bearing on the significance, under the traditional laws and customs of the Western Desert Bloc, of a failure by persons who, under these laws, are *Ngurarityja* for land, to discharge their responsibilities in relation to that land. Therefore the Full Court found it was not in a position to evaluate this issue without the benefit of detailed additional submissions. O'Loughlin J's ultimate findings could be upheld, notwithstanding the flaw identified in his Honour's reasoning. Alternatively, depending on the content of the traditional laws and customs of the Western Desert Bloc, the evidence may well be sufficient for a court to conclude that Mr De Rose did satisfy s. 223(1)(b) of the NTA. However, the Full Court was not in a position to say—at [330] to [331].

Acknowledgment and observance of traditional laws and customs

The respondents contended that, even if O'Loughlin J had erred in his approach to s. 223(1)(b), the appellants' claim was bound to fail because his Honour had made findings indicating that they were unable to satisfy the requirements of s. 223(1)(a), in that they could not show that they had rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by them.

This submission was based on O'Loughlin J's observations that, because *Anangu* (Aboriginal) witnesses had not visited sacred sites in their country outside the boundaries of the application area, their 'adherence to (as distinct from knowledge of) traditional laws and traditional customs has eroded away'.

O'Loughlin J was also not convinced 'that they (the claimants) continue to acknowledge traditional laws and observe traditional customs in connection with the claim area'. And, after observing that there was no community that had a physical or spiritual connection with the claim area, his Honour found that there had been a breakdown in their acknowledgement and observance of traditional laws and

customs. The state submitted that these findings were fatal to the appellants' ability to satisfy s. 223(1)(a)—at [333].

The Full Court had difficulty with the following aspects of this argument:

- O'Loughlin J made no express finding that the appellants had failed to satisfy s. 223(1)(a) and, at one point, appeared to accept that Peter De Rose and other claimants were able to satisfy s. 223(1)(a) by reason of their status as *Ngurarityja* under traditional laws acknowledged and traditional customs observed by them;

- there was no analysis at first instance of the statutory concept of 'traditional laws acknowledged and...traditional customs observed' as his Honour did not make a finding that the appellants were unable to satisfy s. 223(1)(a). It was, therefore, difficult to determine the criteria applied by O'Loughlin J in making the general finding that there had been a breakdown in the acknowledgement of the traditional laws and in the observance of traditional customs. The Full Court found the sharp distinction drawn by O'Loughlin J between knowledge of traditional laws and traditional customs (which he accepted was present) and adherence to these laws and customs (which he thought had eroded away) difficult to reconcile;

- the conclusion about the breakdown in traditional laws and customs had been expressed in general terms, without relating that general finding to O'Loughlin J's examination of the position of each of the Aboriginal witnesses, undertaken 'for the purpose of determining whether the necessary connection [for the purposes of s. 223(1)(b)] exists'. The Full Court was of the opinion that the findings made in relation to the individual appellants did not necessarily support this conclusion, illustrating this point by reference to the findings concerning Peter De Rose—at [334] to [339].

Conclusions on acknowledgment of traditional laws and customs

Their Honours were unable to uphold O'Loughlin J's orders on the basis that his findings justified concluding that the appellants had failed to satisfy s. 223(1)(a). The findings could not be regarded as credit-based findings of fact that are entitled to deference on appeal but, rather, as inferences drawn from other findings of fact that were 'flawed by…errors and omissions'. Consequently, they found that the question of whether the appellants, or some of them, acknowledged the traditional laws and observed the traditional customs of the Western Desert Bloc, required further consideration—at [341].

Extinguishment

The pastoralists argued that the combined effect of the NTA, the *Native Title (South Australia) Act 1994* (SA) (NTA (SA)) and the *Pastoral Land Management and Conservation Act 1989* (SA) (Pastoral Act 1989) was that native title to the application area was extinguished—at [342] to [405].

Their submission hinged on the effect of transitional provisions contained in Div 3 of the Schedule to the Pastoral Act 1989, which they argued had the effect, in substance if not in form, of granting a new statutory lease in place of each of the three pastoral leases over the application area that were in force at the commencement of the Pastoral Act 1989. That being so, they argued that the effect of s. 33 of the NTA (SA), was to extinguish any native title that otherwise may have existed over the application area. Section 33 provides that a pastoral lease that is a 'category A past act' as defined extinguishes native title—at [346]. It was common ground that the three original leases had been granted before the commencement of the *Racial Discrimination Act* 1975 (Cwlth) (RDA) and so none of the grants of these leases was a 'past act' within the meaning of s. 228 of the NTA or the NTA (SA)—at [363].

Their Honours found that the Pastoral Act 1989 plainly contemplated that the existing leases would continue in force as pastoral leases. 'It would be a misuse of language to refer to an extension of the term of an existing lease, where the existing lease remains on foot, as the grant of a lease'—at [402].

Moreover the legislation did not say that the existing leases were to be terminated and new leases were to come into force in their stead. Nor did it say that the conditions and reservations of the existing lease would be incorporated in a lease granted or deemed to be granted under the Pastoral Act 1989. Rather, the conditions and reservations were 'not affected' by the conversion—at [309].

Proposed determination

The state accepted that, if the appeal was upheld and native title rights and interests were found to be held by the appellants, O'Loughlin J's draft determination should be made, subject to the following matters:

- the determination should provide that native title rights and interests did not exist in respect of improvements such as fences and roads—at [407];

- although O'Loughlin J had correctly held that the pastoral leases over the application area had extinguished any exclusive right to possession or general control of access by the appellants, he had erred in concluding that there was a separate right to control access and use by other Aboriginal people. This right was said to be inconsistent with the statement in the joint judgment in *Ward (HC)* at [52], that:

  > without a right of possession [against the whole world], it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put—at [408].

The Full Court thought it preferable for these contentions to be addressed after a final conclusion has been reached as to whether or not the appellants, or any of them, had native title rights and interests over the application area—at [409].

Decision

Given the Full Court's view that it did not have adequate submissions on the question of 'connection', particularly the significance of a failure by persons who are *Ngurariţja* for the land to observe responsibilities to the land under the traditional laws and customs of the Western Desert Bloc, it was found that it could not come to a view as to whether or not the evidence supported the finding that the appellants had 'connection' to the claim area as required under s. 223(1)(b). Thus the issue of whether native title exists in the area was not resolved—at [330] to [331].

Since O'Loughlin J has now retired, it was not feasible to remit the proceedings to him (as the Full Court would otherwise have been inclined to do), nor was it considered practical to remit the proceedings to another judge—at [410] to [411].

Instead, their Honours proposed that the parties, having considered the reasons for judgment, identify what issues, if any, remain in dispute and then submit further written submissions and, if necessary, oral argument on those issues. The Full Court would then address and resolve any outstanding issues by reference to their reasons for judgment, O'Loughlin J's findings (so far as they are consistent with this judgment) and any additional evidence provided by the parties. To facilitate the finalisation of this process, their Honours made orders that (among other things):

- the parties attend a conference convened and conducted by a Registrar of the court for the purposes of considering:

  - what issues remain for determination; and

  - the findings and evidence upon which any of the parties wish to rely, that are relevant to such issues—at [412] to [413].

Therefore, O'Loughlin J's decision stands unless and until it is varied by the Full Court at some future time. This arguably means the

appellants will, apparently, have no future act rights until the connection issue is decided (see s. 24FD NTA).

Proposed determination of native title

Neowarra v State of Western Australia [2003] FCA 1402

Sundberg J, 8 December 2003

Issue

The questions dealt with in the summary of this case are essentially:

- Does native title exist over an area in the north Kimberley region in Western Australia? and, if so;
- Is it held by a regional community (called the Wanjina–Wunggurr community) united by its adherence to a distinctive set of laws and customs, rather than by a language or clan estate based group?

Owing to the length of the decision and both the complexity and novelty of some of the findings in relation to ss. 223(1)(a) and (b), issues in relation to the extinguishment will be summarised in the next issue of *Hot Spots.*

Background

This decision relates to three claimant applications (the application area) in the Kimberley region of Western Australia. In each, a determination of native title was sought on behalf of 'those persons who hold in common the body of laws and customs derived from beliefs about' Wanjina and Wunggurr (see below). The area covered by the applications was divided into three sub-groups, each representing a different language group or country. Membership of the claim group was said to be by way of 'an inherited link through mother or father to a clan estate country (*dambun*) within the Wanjina–Wunggurr region'. That region was said to be more extensive than the area covered by the applications considered in this case.

Largely as a result of the impact of colonisation, many of the claimants now live, permanently or seasonally, at Mowanjum, a community near Derby that is some distance from much of the application area. However, there are several permanent and 'dry season' communities on the application area.

Evidence was given by fifty-nine Aboriginal witnesses on various parts of the region, including three from outside the Wanjina–Wunggurr region. Eleven expert witnesses also gave evidence. In all, the trial occupied fifty nine hearing days.

Basis of the claim group

The claimant group was said to be made up of the members of the Wanjina–Wunggurr community, which was a community with a distinctive shared body of beliefs, social and cultural traits and language affinities that bound them together and differentiated them from their neighbours.

Central to this was a body of beliefs about Wanjina and Wunggurr, both being distinctive elements of the native title claim group's traditional laws and customs. Wanjina refers to distinctive figures found in painting galleries located within the Wanjina–Wunggurr region that are associated with certain beliefs acknowledged and practices observed by the claimants. Wunggurr is associated with a set of beliefs in a creative agent sometimes called the 'Rainbow Serpent'. Other salient features of this 'distinctive, shared body of beliefs, social and cultural traits and language affinities' included:

- events of spiritual conception through which a child is associated with a place from which its body was entered *in utero* by a pre-existing spirit placed there by Wunggurr;
- a division of the entire region into *dambun* (sometimes referred to as estates), which were loosely bounded areas usually associated with one or more Wanjina, often represented as paintings in caves or rock shelters, or Wunggurr;

- *dambun* were classified according to a moiety system and ordered within a system of exchange (called the *wurnan*) in which objects, songs and valued knowledge were circulated through an established order of adjacent *dambun;*

- clan groups, each of which was associated with one of the *dambun,* where membership was determined by that of one's father;

- a kind of 'top-down' division of the world (human and non-human alike) into two complementary categories or moieties, with children being assigned to the opposite one to their mother's (usually the same as their father's);

- a system of kin classification through which clan estates are linked together in specific quasi-genealogical or affinal relationships (brother–brother, mother–child, husband–wife etc.);

- a distinctive form of marriage called patrilateral cross-cousin marriage.

Connection submission

The laws and customs observed by the claimants were said to establish a number of kinds of connections between them and areas within the Wanjina–Wunggurr region, including language countries, conception sites, and *dambun.*

The claimants' entitlements under traditional laws and traditional customs were said to exist 'as a complex set of cross-cutting and overlaid individual, groups and community rights and interests of various kinds' that were neither:

- undifferentiated across the Wanjina–Wunggurr region; nor

- held or shared equally by all claimants in relation to the whole of the Wanjina–Wunggurr region for all time and for all purposes.

Rather, they were said to be 'variously possessed' by the claimants i.e. as individual, group and community rights in accordance with the traditional laws and traditional customs of the Wanjina–Wunggurr cultural domain.

The claimants contended that, individually, collectively (in various groupings) and as a community, they had a connection with the claim area by the traditional laws they acknowledged and the traditional customs they observed, which was said to include historic, ancestral, social, physical, ritual, spiritual, traditional and economic aspects.

Submission on *dambun*

The applicants submitted that:

- *dambun* were not independent economic, ritual, residential or political units with exclusive rights and responsibilities in an estate's economic and cultural resources;

- *dambun* could undergo 'legitimate' fission and fusion under the traditional laws and customs of the Wanjina–Wunggurr cultural domain;

- there was a long history of co-residency among the claimants, a strong sense of common identity and a social network of multiple 'cross-cutting' ties.

Respondents on claim group

The state and several other respondents admitted that there were Aboriginal people present upon, or occupying, the application area when sovereignty was asserted i.e. in 1829. However, they argued (among other things) that:

- there was no such entity as the Wanjina–Wunggurr community either at sovereignty or at any time thereafter. Rather, if there was any basis for the claim to native title, it should have been based upon patrilineal, patrilocal clan estate groups associated with a language country, with each discrete clan group constituting an organised society; and

- non-Aboriginal settlement, particularly the establishment of mission settlements and pastoral stations, caused disruption of the

clan group organisation, relocation of Aboriginal people from their traditional clan lands and a decline in adherence to traditional laws and customs.

Genealogical evidence

Three anthropologists who prepared the genealogical charts and reports gave oral evidence and were cross-examined. Nearly all Aboriginal witnesses gave detailed evidence about their forebears and descendants which, for the most part, was not challenged.

Some of the respondents initially challenged the status of the genealogical evidence as 'expert' evidence. Had the challenges been sustained, the court would have rejected them on the ground that 'genealogies duly prepared by anthropologists employing their specialised skill and understanding of the structure and culture of a society represent an appropriate field of expert evidence'. The evidence given by the three anthropologists about how the genealogies were prepared satisfied his Honour that they had 'specialised knowledge based on their training, study and experience, and that the genealogies and the report accompanying them are substantially based on that knowledge'—at [42].

Sundberg J found that the genealogical evidence established who comprised the claimant group and the basis upon which those persons were members of that the group:

> The claimant group is described as the descendants of named people who were previous inhabitants of the claim area. The genealogies…link the claimants with previous inhabitants…Insofar as ancestors of the claimants cannot be traced back to sovereignty…, it is reasonable to infer that there have been no intervening events between 1829 and the time of the birth of the known ancestors of the applicants that stand in the way of a conclusion that the claimants of today are the descendants of the Aboriginal people present on the claim area in 1829—at [48].

The court concluded (among other things) that the genealogical evidence showed that:

- the traditional laws and customs acknowledged and observed by the ancestors of the claimant group did not impose a requirement of strict biological or patrilineal descent as a condition of membership of the group; and
- the members of the claimant group are the descendants of the Aboriginal people present on the area covered by the application at sovereignty (i.e. in 1829)—at [49].

Historical evidence

Having found that all three historians qualified as expert witnesses, Sundberg J found that:

- an inference should be drawn that the level of occupation by Aboriginal people of the application area in 1901 would have been the same in 1829 given the following:
  - Aboriginal people were seen in the Kimberley region before 1829;
  - in 1838, there was an organised Aboriginal society living close to the western boundary of the application area. The members of that society built structures and adorned their environment with paintings, including Wanjina paintings, made artefacts of wood and used stone to crush and grind seeds and to shape into spearheads;
  - in 1901, Aboriginal people were present over the whole of the application area, even though they appeared to be sparsely scattered in some places. Indeed, signs of their presence were 'everywhere';
- in the 1930s, Aboriginal people were present everywhere in the claim area where non-Indigenous people went;
- nothing in the documentary records up to the 1930s suggested any mass movement of Aboriginal people from the area and they

continued to conduct ceremonies and to travel long distances across that area;

- many settlers did not want Aboriginal people removed because Aboriginal labour was 'essential to the viability of the pastoral industry in the region from the 1880s to the 1970s';

- the involvement of Aboriginal people in station work meant they could live on or close to their traditional country and have their elderly relatives and children live on the stations. They supplemented their station rations with bush food and hunting and fishing—at [61].

Archaeological evidence

Most of the archaeological evidence related to areas within the Wanjina–Wunggurr region but outside of the boundaries of the application area. In relation to this evidence, the court found (among other things) that:

- there was much more evidence in the surrounding areas suggesting continuity of occupation because more research had been done in the surrounding areas;

- there was widespread evidence for cultural continuity in the surrounding areas from dated sites that show use from well before 1829 well into the late twentieth century;

- the more widespread evidence consistent with the pre- and post-contact use in undated sites in both the application area and the surrounding areas suggested that material evidence from cultural continuity over time was more widespread than the number of dated sites would suggest;

- there was evidence at two rock shelters in the application area of use and occupation 'well into the historic period';

- undated evidence of flaked stone artefacts was consistent with pre-contact use, with the presence of flaked glass artefacts and other European material attesting to post-contact use;

- there was substantial evidence for continuity in the form of flaked stone, flaked glass and ground iron, with the flaked glass and iron suggesting that European materials were used in ways consistent with Aboriginal technological traditions well into the historic period;

- minimum age estimates for a number of Wanjina rock art paintings in the Kimberley range from 600 to 100 years, with the distribution of those sites broadly congruent with the expanse of the claim area and the surrounding areas—at [70].

Anthropological evidence

The main point of disagreement between the anthropological experts was the level at which native title should be recognised in this case. The applicants' three experts were of the view that native title was held by the Wanjina–Wunggurr community through a complex system of cross-cutting ties. The state's expert argued that native title was held by clan estates (*dambun*) on the basis of 'recognition of the Ngarinyin people as both the owners of the language and the spiritual custodians' of the country in which their language was 'emplaced'—see [84].

The three experts for the applicants, Dr Alan Rumsey, Dr Anthony Redmond and Professor Valda Blundell, had all carried out extensive fieldwork in the claim region over lengthy periods. The state's expert, Professor Basil Sansom, had not carried out fieldwork in the Kimberley, which was found to give his opinions and conclusions a 'desktop or academic quality which renders them of less weight than those of experts who have immersed themselves in the day to day life of the claimant group'—at [120].

A joint expert report filed by the applicants was prepared Dr Rumsey and Dr Redmond, which, among other things, stated that:

- the earliest ethnographies for the region identified four features as being part of a 'cultural complex' that was distinctly different

from that found in neighbouring regions, namely:

- belief in a class of individually named ancestral creator beings known as Wanjina, who left themselves throughout the region as cave paintings of a distinctive sort, and/or as features of the landscape;
- a set of beliefs about Wunggurr, the primordial water-serpent, closely associated with Wanjina, rain, and with child-spirit countries from which children acquire a Wunggurr identity through a dream that comes to their father;
- named clan countries and groups, each associated with one or more named Wanjina creator beings, usually portrayed at rock shelters within the clan country;
- named exogamous patri-moieties (with cognate or overlapping sets of names);
- the 'ensemble of socio-cultural forms' among the north Kimberley peoples was not totally anomalous but was recognisable as a distinctive regional variant of more general patterns or institutions among Aboriginal people;

■ it was 'reasonable' to conclude that:

- this ensemble evolved through processes of continuous reproduction and transformation within a wider Aboriginal social field;
- given the continent-wide distribution of some of its basic elements, these processes had been going on for a far longer period than that of European colonisation, since the relevant features (exogamous, patri-filiative local-totemic groups, moieties, ideas about the rainbow serpent, etc) 'could not possibly have swept across Australia during the short interval between the arrival of Captain Cook and the first recorded observations of these features at widely scattered locales';
- on the basis of the ethnographic evidence alone, the state that the north Kimberley ensemble had reached in 1829 was probably very much like the one reported in the earliest ethnography a hundred years later;

■ One unique aspect of the culture was the use of a highly skilled technique of pressure flaking for making spear tips, a technique applied only across the north Kimberley region—at [75].

Linguistic evidence

The evidence given was that:

■ the north Kimberley languages were classified together as a distinct family of languages related by common descent from a single ancestral language;

■ geographically contiguous languages contrasted sharply with the north Kimberley ones in several respects;

■ the shared features of the north Kimberley languages were unlikely to be as a result of borrowing alone because:

- the resemblances among the languages were of a systematic nature; and
- they were shared among non-contiguous languages in the group but not with neighbouring languages outside of the group;

■ both the overall affinities within the group and the pattern of differentiation among the languages suggested that they have been developing *in situ* for a very long period of time;

■ the boundaries of the north Kimberley language family were fairly closely aligned with those across which all of the other features were distributed i.e. the moieties, the named clan groups each associated with the Wanjina, the set of beliefs about

Wunggurr etc., which suggested that there was a relatively distinct regional community of people in interaction with each other and evolving a set of institutions in close interaction with each other, which gave another kind of evidence that could be quantified in a way that the ethnographic evidence could not;

- while some of these languages were mutually unintelligible, one of the characteristics of the Wanjina–Wunggurr community was that many individuals continue to be multilingual-quadrilingual—at [76] to [77], [98] and [111].

Based on this evidence, his Honour found that:

- the evolution of the north Kimberley ensemble of socio-cultural forms took place on a time scale such that the state it had reached in 1829 was much like the one reported in the earliest ethnography 100 or so years later;
- pressure flaking was used across the entire north Kimberley region and was unique to it;
- the north Kimberley languages are a family of languages derived from a single ancestral language, and contrast sharply with geographically contiguous languages;
- the north Kimberley family of languages are different enough to be mutually unintelligible, though so many Aboriginal people are multi-lingual that the differences are of no practical relevance;
- the boundaries of the north Kimberley language family are closely aligned with those across which other elements of the ensemble are distributed (moieties, named clan groups associated with Wanjinas, Wunggurr beliefs)—at [120].

Claim group an anthropological construct

There was no Aboriginal name in evidence for the claim group. The state's expert argued that the Wanjina–Wunggurr 'cultural domain' on which the claim was based was an 'imagined and invented entity' and a 'novel creation that has no customary existence'. If traditional rights and interests in land existed, his view was that they would be held in common by those who can show connection with the estates or *dambun* of a particular language-country, three of which (Ngarinyin, Worrorra and Wunambal) extend into the application area.

His Honour accepted the evidence to the contrary, which was that:

- the secondary sources, the experts' fieldwork and the transcript of the Aboriginal evidence disclosed a set of laws and customs commonly acknowledged and observed by Ngarinyin, Worrorra and Wunambal people;
- although the term 'Wanjina–Wunggurr community' was an anthropological construct, Aboriginal witnesses did describe the inhabitants of the region as 'the three tribes' or 'the Wanjina tribe' and used the composite expression 'Ngarinyin, Worrorra and Wunambal' to describe the members of those tribes or that tribe;
- this anthropological construct was an expression that attempted to represent the emic (insider) view of another culture using an analytical language that others (such as anthropologists) with an etic (outsiders) view would understand;
- a small group of Aboriginal people in the north Kimberley formed around the core of a clan and occupying an estate would be too small a unit to maintain itself as a biological population;
- a shared kinship system, as in this case, is a clear indicator that people share a culture and constitute a people, because kinship is the glue that holds these types of societies together—at [91] to [110], [120] (25) to (28), [162] to [132].

Findings in relation to anthropological and linguistic evidence

In addition to those noted above, his Honour made the following findings in relation to the anthropological and linguistic evidence:

- the earliest ethnography showed a high degree of consistency regarding key socio-cultural traditions among the Ngarinyin, Worrorra and Wunambal peoples (Wanjina beliefs, Wunggurr beliefs, named clan countries each associated with its own Wanjina rock painting, exogamous patri-moieties);

- these four traditions (and others identified in later ethnography) are part of a cultural complex that is distinctly different from that found in all the neighbouring regions;

- Elkin's 'North Kimberley' was almost identical to the area of the Wanjina–Wunggurr region propounded by the applicants' anthropologists and his 'North Kimberley' map corresponded very closely with what he later mapped as the 'Boundary of Wanjina Cult Paintings';

- what was most distinctive of the north Kimberley region is the way in which moieties, patrifilial local groups and Wunggurr beliefs were intertwined with each other and with a particular kinship and marriage system and clan-based exchange system;

- particular places and regions in general have people related to them in more than one way —someone's Wunggurr place, another's clan country, another's relation's place, another's language country;

- to the extent that these various forms of social identification may be used to specify groups of people, the groups are neither mutually exclusive (since people belong to multiple more or less overlapping ones) nor undifferentiated in their identification with country, since the people in each group have multiple, cross-cutting ties to other country on other bases;

- people's identification with particular places and areas within the Wanjina–Wunggurr region is underwritten by their common adherence to the set of beliefs and practices regarding Wanjina and Wunggurr, beliefs pertaining to the entire region, notwithstanding the fact that they link people in multiple cross-cutting ways to specific places and areas within it;

- because of the high rate of endogamy within the region and the fact that clans are strictly exogamous, most of the people who are linked to specific places and locales in the region have specific links to at least two *dambun* within the region through their father and mother;

- in addition to these links, the great majority of people also have their Wunggurr place within the region and not necessarily within either of their parents' *dambun;*

- rights to specific places within the region are not held in common amongst the entire Wanjina–Wunggurr community but by certain members of it who are linked to a place or locale in specific ways. However, the entire community holds in common the set of culturally recognised forms of linkage in terms of which all such specific links to specific places and locales are established—at [120].

Partisanship of experts

The respondents argued that the three experts were too close to the applicants to be accepted as independent experts. Rather, it was said, they were advocates for the claimants.

Dr Rumsey had worked with many of the claimants over a period of a quarter of a century and admitted that:

- in his personal capacity, he supported the native title claim strongly;

- there was a danger that he had become too close to the claimants to offer an objective view in relation to the various aspects of their application but noted that he tried to

avoid it by remembering he was a professional anthropologist who had to take those factors into account; and

- consciously or unconsciously, it 'could well be the case' that these matters might affect his selection of material and opinions but noted that he tried to guard against it.

Dr Redmond, who had lived with the claimants for extended periods during his fieldwork, was also cross-examined on 'closeness' and admitted that:

- he had become bound up in the day-to-day lives, expectations and aspirations of the claimants 'to a degree' i.e. as an objective of his research in order to 'try and grasp the meaning, structures, and values that people attributed to their actions'; and

- as a private individual, he would feel some sense of disappointment if the claim failed.

He denied that a statement from his diary stating that Aboriginal people had been 'victims of a war of dispossession' meant that he could not 'dispassionately' express an expert opinion and said he was confident that his closeness to the claimants had not affected his professional work.

Having watched both witnesses giving evidence over a lengthy period of time and having read the transcript of their evidence several times, his Honour found that:

- despite Dr Rumsey's candour in acknowledging the risk inherent in 'closeness', his evidence and opinions were at all times entirely professional. Part of the reason he was 'eminently qualified' to give expert anthropological and linguistic evidence was because of his close involvement with the claimant group;

- Dr Redmond's evidence was dispassionate and professional. His closeness to his subjects endowed his evidence with particular value and he had struck the 'tricky balance' between becoming, in a sense, a member of the culture he was studying while maintaining his objectivity—at [112] to [115].

Professor Blundell's impartiality was challenged on the basis that she was defensive and, at times evasive, when being cross-examined and that she also acted as an advocate for the claimants, not as an impartial expert.

Professor Blundell is from Canada. She had worked in the Wanjina–Wunggurr region since 1971, had published a thesis that was 'an important contribution to the literature' and had done further fieldwork in 1976, 1977, 1996, 1998, 1999, 2000 and 2001. From 1978 to 1993, while in Canada, she published three articles on aspects of the region and its indigenous inhabitants.

Having noted that Professor Blundell's expertise could not be seriously challenged and that she was suffering from jet lag when she gave evidence, his Honour rejected the challenge, noting that:

> From time to time she became a little impatient at the lack of precision in counsel's questions, and the repetitive nature of the cross-examination. On a number of occasions she pointed out that a particular topic had been covered more than once, saving the Court from having to make that point. Several times…when she was complaining of tiredness, she professed to be unable to answer particular questions without being able to reflect on the proper answer. I did not see this as evasion, but as a genuine inability to provide the Court with a useful answer on the spot—at [119].

Claim area and language country areas

His Honour surveyed the evidence on relation to the languages spoken in the Wanjina–Wunggurr region (which included areas outside of the application area) and the 'language countries'. The court noted that the evidence indicated that the eleven languages associated with the region were known as the north Kimberley language family, which could

be divided into three branches:

- Ngarinyin and Wurla and Andajin in the east;
- Worrorra, Unggumi, Umide, Unggurranyu, and Yawijibaya in the west; and
- Wunambal, Gambere, Gwiinii in the north—at [121 to [125].

While six of these related to the application area, Ngarinyin language country covered most of it. However, the western and northern parts of the region were subject to two other claimant applications brought by the same claimants as the three considered in this case i.e. the whole Wanjina–Wunggurr region was being claimed by the same group, albeit in separate applications—see [151].

His Honour's conclusion was the evidence showed that the boundaries were 'conservatively' drawn in such a way as to ensure that the application area did not intrude on language countries said to be outside of the Wanjina–Wunggurr region (such as Bunuba, Gija and Nykina)—at [158] to [161].

'Traditional' laws and customs

His Honour noted that, for the purposes of s. 223(1)(a), the claimants must possess the claimed rights and interests under 'traditional laws acknowledged and traditional customs observed' by them, with 'traditional' having three elements:

- the laws and customs must have been passed down from generation to generation;
- they must have existed before the assertion of sovereignty and the claimants must establish that their laws and customs are the normative rules of a society that existed before sovereignty in 1829; and
- they must have had a continuous existence since sovereignty—at [162], referring to *Yorta Yorta v Victoria* (2002) 194 ALR 538 *(Yorta Yorta)* at [46] to [47].

Normative element

In relation to the requirement for a 'normative' element, his Honour noted that:

- a normative system containing a particular custom does not cease to embody that custom simply because some members of the society flout the rule—many people drive their cars in excess of the speed limit but do not thereby cease to be part of a society that requires compliance with speed limits;
- the dictionary definitions of 'normative' were as 'establishing a norm or standard' and 'concerning a norm, especially an assumed norm regarded as the standard of correctness in speech and writing' and of 'norm' as 'a rule or authoritative standard' and 'a standard, model, or pattern';
- a practice had a normative content if it 'lays down a standard of behaviour, and it was observed by the claimants';
- occasional breaches, when accompanied by strong indignation on the part of others may go to demonstrate the continuing viability of the rule—at [222], [257], [271] and [310].

'Washed away' v changed and adapted?

His Honour rejected a submission by one respondent group that what the witnesses in this case described was often a 'pure' form of the laws and customs that had been so diluted that the *traditional* law and custom had been 'washed away', noting that:

> [I]t is important to bear in mind that if what is asserted is a change or adaptation of traditional law or custom, the question is whether that change is of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws and customs of the Aboriginal people at sovereignty. If what is asserted is that there has been an interruption in the acknowledgment and observance of the law or custom, the question is whether that interruption is "substantial" or whether the acknowledgment and observance has continued "substantially uninterrupted"—at [163], citing the High Court in *Yorta Yorta* at [87] and [89].

Uniformity of evidence not required

His Honour rejected a submission that there had to be a 'uniformity of practice in respect of the law or custom on the part of the Aboriginal people' in order for something to qualify as a law or custom:

> Rather than presenting a "melange of confusion", the evidence shows that witnesses used their own language to describe different aspects of [their laws and customs in relation to] Wanjina history, tradition and meaning. That the witnesses do not all say exactly the same thing is not a matter for surprise in a society in which different levels of knowledge about laws and customs exist in different parts of it, and different people are…custodians of special items of knowledge—at [177].

On the contrary, if witnesses from different parts of such a large territory had given evidence in identical terms, Sundberg J would have found it 'suspicious'. In this case, the Aboriginal evidence was 'spontaneous', with 'each witness giving his or her account in the witness's own fashion with differing degrees of proficiency in English. At the end of the evidence the mosaic is there to be assessed as a piece'—at [177].

Distinctiveness of law or custom not required

Similarly, his Honour was of the view that there was no requirement in s. 223(1) that a law or custom of the claimant group must be distinctive, in the sense that no other Aboriginal group had that law or custom. For example, while beliefs about conception occurring from spirit-substances in the vicinity of major water-holes are 'widespread' throughout Aboriginal culture, this was no bar to that belief being a law or custom of the claimant group in this case—at [182].

Identification of laws acknowledged and customs observed

His Honour considered at length and in turn each of the laws and customs asserted. What follows is a brief summary of the major points in relation to each.

Belief in Wanjina

According to his Honour, the 'mosaic' of evidence presented in this case disclosed a belief that Wanjina created the land and waters and what lives on or in them and laid down laws and customs around which the claimants constructed their lives. The evidence of the continued prominence of Wanjina beliefs uniquely held by the claimants included:

- those who first heard Wanjina stories from their elders said they now pass those stories on to their own children and other young people;
- beliefs about Wanjina—his travels, the placing of Wanjina images in the landscape, the rules laid down by Wanjina, the consequences of breaking the rules and the transmission of those rules from one generation to the next—were confirmed by many witnesses from across the 'three tribes' i.e. Ngarinyin, Worrorra and Wunambal;
- *dambun* (clan estates) were often associated with one or more Wanjina painting sites in the area—at [177] to [184].

In relation to the appropriateness of the communal nature of the claim group, it was noted that:

- there was evidence that neither Wanjinas or Wanjina-derived laws existed outside of the Wanjina–Wunggurr region;
- there was evidence that the rules governing the region that were laid down by Wanjina applied to all three tribes and transcended language boundaries—at [177] to [184].

One respondent group submitted that traditional practices to do with Wanjina and *dambun* had ceased in contemporary times on the basis that:

- the failure of claimants to visit or tend to Wanjina paintings on *dambun* rendered the location of the painting 'simply coincidental and a matter of historical curiosity'; and

- in accordance with the practice in 'classical' times, the Wanjina paintings should be repainted or touched up annually.

Sundberg J, after noting that the secondary sources conflicted on this point, rejected this submission, preferring the Aboriginal evidence that obligation to visit and repaint arose when the paint was deteriorating—at [209].

Belief in Wunggurr

Sundberg J found that there was a great deal of evidence of beliefs about Wunggurr places, how they were acquired and that they gave claimants a link to country that may or may not also be their *dambun,* including:

- the fact that nearly every witness identified their Wunggurr place or that of their children or close relative; and
- knowledge of Wunggurr was passed on to children and grandchildren—at [178] to [184].

The failure of some witnesses to mention their Wunggurr places or those of their children and the fact that some witness were unclear about their or someone else's Wunggurr place, did not, 'when the evidence is viewed as a whole, demonstrate loss of the conception dreaming place law or custom'—at [184].

In relation to the appropriateness of the communal nature of the claim group, it was noted that:

- Wunggurr conception places are a custom of Ngarinyin, Worrorra and Wunambal;
- a person can have rights both in their own *dambun* and in another *dambun* if that person's Wunggurr place is located in the other *dambun*—at [180] to [181].

Belief in Wanalirri

The Wanalirri story, which was (essentially) that Wanjinas emanated from a site on Ngarinyin country identified as Wanalirri and dispersed to various places across the Wanjina–Wunggurr region, was mentioned by at least twenty witnesses. His Honour found that:

- this story was 'clearly central' to the culture of the Wanjina–Wunggurr region and all three 'tribes', as was the Wanalirri site itself; and
- it was known by both the older and younger generation—at [185] to [190].

Language knowledge and use

On this issue, his Honour found that:

- there was 'much' evidence establishing the Wanjina–Wunggurr peoples' knowledge and use of their group of languages;
- the relationship of language to country is another aspect of the peoples' language culture, noting that country is not 'Ngarinyin', for example, because that is where people speak that language. Rather, 'it is the land to which the language belongs';
- traditionally, language affiliation is inherited from a parent whether or not the inheritor speaks that language;
- there was evidence that language speakers moved from one language into another when they reached particular places, which were the 'hand-over points or take-over places where one language yields to another'—[192] to [198].

Moieties/skin system

His Honour noted that the division of society, people, animals and vegetation into one or other of the moieties *Jun.gun* and *Wodoy* was a 'constant feature of the evidence', which included that:

- one of the rules of the claimants was that a *Jun.gun* person could marry a Wodoy person but not another *Jun.gun* person;
- the moiety system and its application to marriage rules came from Wanjina;
- the moiety system and those marriage rules apply across the Ngarinyin, Worrorra and Wunambal 'tribes';

- while all Aboriginal groups in the north-west of Western Australia have some type of skin system, the claimants' system was distinctive relative to the surrounding groups—at [199] to [200].

Clans and *dambun*

The evidence was that the claimants' society was divided into clans through a patrifilial connection with a particular tract of country known as *dambun* (translated variously as 'own place', 'own block', 'camp', 'home', 'our country'), the characteristics of which included:

- membership determined by patrifiliation;
- often associated with one or more Wanjina painting sites in the area;
- often had a totem such as a kangaroo, small duck, wattle tree;
- membership carried rights in relation to the estate, expressed with different degrees of emphasis and exclusivity;
- classified according to the moiety system i.e. either *Jun.gun* or *Wodoy,* with same moiety *dambuns,* especially proximate ones, seen as closely related;
- related according to the marriage rules in the same way as individuals are related;
- ranked within the *wurnan* system—at [204].

His Honour accepted the evidence of those able to speak of their parents and grandparents times that, in the past, families travelled over extended areas in search of sustenance, and found that, while it was true that a group living on its *dambun* was likely to support itself by resort to local fauna and produce, there was no evidence that one's father's *dambun* was, as a matter of traditional law or custom, the area in which a person sought primary sustenance. The existence of clan clusters, the *wurnan,* and kinship relationships, involved entry, often as of right, to other *dambun.*

A submission that under traditional law and custom (as existed in 'classical' times), attachment or affiliation to dambun involved living on or near the area concerned was rejected as being too 'categorical and inflexible to form a secure base' for that conclusion:

> The respondents' approach ignores peoples' connection [as evidenced in some of the early ethnography as well as in contemporary times] with land other than their paternal or maternal *dambun*—a neighbouring same moiety *dambun,* a neighbouring other moiety *dambun* standing in a husband or wife relationship, a neighbouring *dambun* on the *wurnan* line, and the dambun of one's Wunggurr place—at [210].

Kinship, marriage and clans

It was submitted by one respondent group that the evidence disclosed that the moiety system no longer existed 'as a law or as a custom observed in respect of procreative partner selection' (i.e. that most marriages were 'wrong way'). On the evidence as a whole, his Honour found that:

- while there may be some departure from the marriage rule among younger members of the claimant group, this is severely frowned on by the more senior members of the community;
- the rule is still recognised by the older and middle-aged members of the group, though even among them, there have been some 'wrong way' marriages;
- breach of the rule does not show that there is no longer a rule. Occasional breaches, when accompanied by strong indignation on the part of others, demonstrates the continuing viability of the rule;
- despite departures from the rule, it has not ceased to be a core element of the society's culture—at [222].

His Honour went on to note that the marriage rule had not been 'washed away', as was alleged:

> We have not got so far down the track that it can now be said that there has been an interruption in its observance... [T]he rule has continued substantially uninterrupted from sovereignty to the present—at [222].

His Honour noted that the Aboriginal evidence provided 'many examples of clans joining or clustering together as a result of kinship/marriage ties', including evidence of clan fusion i.e. one clan having been reduced to a single member fusing with the adjacent same moiety clan to become a single clan group—at [223] to [226].

Ceremony and ritual

While there was evidence that initiation or 'man making' ceremonies were held from time to time, it was not clear how frequently they were held. His Honour noted that the issue was not whether they took place 'regularly' but whether 'the traditional custom is still enacted whenever the occasion arises to do so' and found that the evidence established that it was—at [228].

In response to a submission that initiation ceremonies were not 'in relation to land or waters', his Honour said that: 'As I read s. 223(1), it is not the laws and customs that must be in relation to land or waters, but the rights and interests in land or waters that are possessed under the laws and customs'—at [229].

When evidence was taken at several Wanjina sites, senior claimants called out to alert the Wanjina to peoples' approach before they entered the sites. Visitors were also 'smoked' at various sites, which involved walking through the smoke of a small fire. Evidence was given to explain the 'rule' behind these rituals. Evidence was also given about the origin, composition, performance and inter-generational transmission of *junba* (i.e. songs for public performance), with the court attending a *junba* performance in which old people, middle-aged people and young children participated—at [230] to [236].

Widow law and mourning rules (baran)

The evidence was found to establish the existence of rules (called *baran*) in relation to what a person must do on the death of their spouse, with his Honour noting that the kinship system of the Wanjina–Wunggurr community was such that the death of a classificatory husband (e.g. a brother in law) activated the 'widow' rule for women—at [237] to [243].

Traditional burial

The evidence indicated that neither of the two types of traditional burial had, with one recent exception, been employed since the late 1940s or early 1950s because the claimants and their predecessors 'was bossed by the white people'. The exception was a burial in the late 1990s, conducted after permission to use the traditional method was obtained from the relevant authorities. His Honour found that the custom of traditional burial had not died out, pointing to the recent employment of that custom, and noting that the resistance of 'churchmen' and 'the state' was the cause of any hiatus—at [244] to [249].

Avoidance relationships *(rambarr)*

The court found that the claimants shared a *'rambarr* rule' that precluded a person from speaking to or looking at a person who falls within the concept of *rambarr* (mother-in-law, father-in-law, son-in-law). During the trial, avoidance was facilitated by erecting partitions—at [250] to [251].

Wudu

There was evidence that Ngarinyin, Wunambal and Worrorra people had a distinctive practice called *wudu*, where female relatives warmed various parts of the bodies of young children while reciting rules and prohibitions (e.g. no swearing, no looking at young girls), with there being a relationship between the parts of the child's body warmed and the particular prohibitions or rules—[253] to [254].

Avoiding names of deceased people—normative?

The claimants declined to utter the name of a person who had recently died when giving

evidence. One respondent group argued (among other things) that this was not a law or custom because it did not derive from any mandatory obligation but was rather a practice, like not swearing. In effect, the submission was that this was not a rule 'having a normative content'—see *Yorta Yorta* at [42].

His Honour, having noted the dictionary definitions of 'normative' and 'norm', found that the witnesses who declined to mention the name of a person who had recently died did so because of the existence of a *rule* that said they must not say the name.

The court noted that when there was the occasional lapse, it was greeted by a 'murmur of disapproval'. This was sufficient to give the 'practice' of avoidance a normative content, in that it 'lays down a standard of behaviour, and it was observed by the witnesses'. If it were necessary to do so, his Honour would, in any case, have characterised the practice as having a mandatory or obligatory quality—at [256] to [257].

Use of 'bush' names

The evidence indicated that children were given bush names, with their Wunggurr place often being one of them but that not all of the witnesses used such names. Nevertheless, his Honour was of the view that the custom of having and using such a name continued, even though not everyone practised it—at [260].

Wurnan—sharing and trading resources

According to the evidence, there was a complex system of exchange and reciprocity in the region, called the *wurnan.* Detailed claimant evidence was given about the *wurnan,* including that:

- the things traded on the *wurnan* included spear points, boomerangs *(marndi),* bamboo *(milinggin)* and hair belts *(naga);*
- a lot of 'good rules, pretty strong rules too' applied to the *wurnan;*
- there were four *wurnan* lines, with one running into the Northern Territory;
- the *wurnan* functions throughout and outside the Wanjina–Wunggurr region;
- things are sent rather than 'ordered' on the *wurnan* e.g. receipt of red ochre from outside of the region had to be responded to by sending something back e.g. a kangaroo;
- *wurnan* had its origins in a story about sharing resources and operated over both long distances and at the local level e.g. the *wurnan* was 'followed' locally when distributing parts of a kangaroo;
- that *wurnan* pathways are reflected in the layout of contemporary Aboriginal communities, such as Mowanjum near Derby, where many of the claimants now live—at [261] to [269].

In relation to the sharing of food, his Honour found that there was ample evidence of this practice and that it was 'clearly' traditional. Further, contrary to submissions made:

> There is no requirement that it be an invariable, mandatory or obligatory practice, so long as it is normative-rule based…There is evidence that not to share is severely frowned on. I find that the sharing practice has the required normative character—at [269].

It was also submitted that the use of the wurnan to transmit ceremonial objects was not a law or custom because it was not considered mandatory or obligatory. After referring to his earlier finding that a practice had a normative content if it 'lays down a standard of behaviour, and it was observed by the witnesses' and to evidence, including that there were 'pretty strong rules', Sundberg J found that the transmission of ceremonial objects via the *wurnan* had a normative character—at [271].

Transmission of cultural knowledge

Many witnesses gave evidence about transmitting knowledge, custom and rules to the younger generation—at [272] to [273].

Being from or belonging to country

There was evidence as to whether someone 'came from' or 'belonged to' certain places e.g. Wunggurr and *dambun* are Paddy Neowarra and Tiger Moore. Sometimes 'belong to' was used or explained 'so as to convey ownership'. Others used the word 'own'—at [274].

Speaking for country

A right to speak for, speak about, talk for or talk about country was often used by witnesses 'without any indication of what this amounted to in practical terms'. Sometimes the context indicated its meaning, which included:

- the right to permit a mining or tourist company to use the land, amounting to ownership of the country;
- the right to make decisions about the country and to stay there;
- the responsibility to look after the country—at [275].

Painting country

The laws and customs relating to repainting Wanjinas overlapped with 'being from', 'speaking for' or 'owning' country, with laws and customs about repainting being described as a process of renewal of a fading Wanjina.

Wanjinas are now reproduced on canvas. The evidence was that:

- the laws and customs that applied in relation to reproductions on canvas had their origin in the laws and customs relating to renewing Wanjinas;
- only those people with appropriate connection to the area of the Wanjina can renew it or authorise others to renew it;
- retouching or repainting the Wanjina paintings ensured that rain would fall and animals and plants would be replenished. There were often thirty to fifty layers of paint as a result of this practice;
- there was concern about unauthorised and unsupervised persons, such as tourist operators, damaging Wanjina or Wunggurr places—visitors having to ask permission to visit sites, was so that those looking after the sites could be there to show them around and ensure the safety of the sites—at [277] to [283].

His Honour found that if (as had been submitted), in 'classical' times, Wanjina were touched up annually but retouching later came to be carried out when needed, then this would be a modification or adaptation of a traditional practice, not a 'discontinuance'—at [283].

Looking after country and places—not site specific

The evidence was that the general obligation to look after country primarily rested on those with a close connection to it (e.g. their *dambun* or Wunggurr) and those who could 'speak for' country or were accepted as having the right to make decisions about it. The obligation was not usually limited to specific sites but related to 'country'.

The state submitted (among other things) that lack of evidence about visitations to a site was fatal to recognition. This was rejected because it failed to acknowledge the 'central role' played by Wanjina and Wunggurr places in the applicants' culture and society. Both Wanjina and Wunggurr give rights and impose obligations in respect of the country in which they are located, not just in the 'bounded area of that specific place'—at [289].

The state also submitted that visitations for the purpose of the native title claim should be disregarded. His Honour found that:

> It is not easy to quarantine these visits [for the claim] from the laws and customs that govern Aboriginal behaviour. For example, while the applicants visited Wanjina sites in preparation for giving evidence about them and in some cases in preparation for the Court visiting the sites, the purpose motivating the visits could not be achieved without observing traditional laws and customs about warning the Wanjina of the approach of strangers, and carrying out the smoking ritual—at [299].

His Honour also found that the fact that the claimants lived outside the application area did not show that they no longer looked after country. While some lived permanently away from the area, others moved back and forth to various communities, many of which were on the application area—at [301].

Permission to access

Almost all witnesses spoke about a requirement that they be asked and give permission to those who want to come onto country, with the only general rule being that a 'stranger' must always seek permission, i.e. anyone not under the 'umbrella' that extended beyond those who 'belong' to the country to cover family members from another tribe. Indigenous people who are not under that umbrella are 'strangers'. The need for permission was found to relate to country generally and not to particular sites—at [302].

The evidence was that while the witnesses expected non-Indigenous visitors (e.g. tourist companies) to seek permission, they rarely did. The respondents submitted that:

- the evidence indicated that there was no practice of seeking permission and no expectation on the part of members of the claimant group that permission would be sought for access to the claim area;
- there was never a traditional law or custom pursuant to which access could be denied to others or, if there was, it is no longer observed or acknowledged by the claimant group or anyone else;
- to the extent that members of the claimant group have an expectation that they will be spoken to by anyone—especially non-Indigenous people—prior to entry, that expectation is so as to ensure that such people do not inadvertently desecrate or disturb a painting site;
- the belief that permission should be sought cannot be a law or custom because there is no mandatory requirement to seek permission;
- if it existed, then the right to be asked for permission for access to country had been 'significantly diminished', was not in place in all parts of the claim area, was largely unenforced and in many cases was not practicably enforceable because those entitled to enforce it no longer lived on or near their country—at [307] to [309].

His Honour found that:

- the 'permission rule' had a normative quality and, at sovereignty, applied to Aboriginal persons who were 'strangers' to a *dambun;*
- it was clear that relatives did not need to ask permission for access and that 'relationship' is a broad concept;
- the general tenor of the evidence was that Aboriginal strangers usually did seek permission and non-Aboriginal strangers usually did not;
- apart from non-Aboriginal strangers, the system appears to operate in accordance with the normative rules of the society;
- non-Aboriginal strangers may or may not know of the requirement under traditional law to seek permission before going on a person's land and, even if they did, compliance with it may be difficult;
- it would be extraordinary if non-Aboriginal intrusion onto land, without permission, should cause this Aboriginal law or custom to be lost—at [309].

His Honour went on to say that, in determining whether the custom of being asked for permission to enter a stranger's land has been modified or terminated, it was appropriate to take into account all the circumstances in which claimants are placed, including:

- dispersion of the claimants from their traditional locations consequent upon European settlement;
- their migration to church and government settlements;
- the lack of significant employment opportunities outside the pastoral industry;

- the trend towards living in Aboriginal communities; and
- the nature and extent of the claim area.

In all these circumstances:

> [I]t would be unworkable and unreasonable to expect the observance of a custom such as being asked for permission to enter land, which was established when Aboriginal people lived next to other Aboriginal people in the adjacent dambuns, all of whom acknowledged the relevant custom, to continue unaltered in the changed situation of uneven Aboriginal distribution across the Kimberley and the intrusion of white people who are strangers to the society. A normative system containing such a custom does not cease to embody that custom simply because some members of the society flout the rule. Most Aboriginal people respect it, though the dispersal of the community resulting from the changed face of the Kimberley means that there are often practical difficulties in the way of observing it…The permission for access custom is still observed for the purposes of s. 223(1)(a). It would be wrong to approach the analysis on the basis of whether or not non-Aboriginal people respect the custom. Certainly, many Aboriginal witnesses complained, with different degrees of heat, about the non-observance of the custom by white people, thereby asserting the existence of the custom and deploring its non-observance by white intruders—at [310].

Inheritance of country/succession

The evidence disclosed that a process of succession existed to deal with the case where a clan ceased to exist. For a clan to take in this way, it must have the same skin as the people who previously held ownership—at [312] to [314].

Living on, using and enjoying country

The evidence that the claimants lived on, used and enjoyed many parts of the claim region included:

- that 73 of the 134 Aboriginal sites in the Wanjina–Wunggurr region (most of which were on the application area) had been visited for painting, hunting, fishing or some other use;
- Aboriginal occupation, use and enjoyment of the areas around station homesteads;
- Aboriginal occupation, use and enjoyment of the various Aboriginal communities and surrounding areas;
- occupation, use and enjoyment of at least 130 other places spread across the Wanjina–Wunggurr region, most in the application area, visited either while footwalking, hunting, fishing or mustering.

The evidence of use and enjoyment of country was found to 'substantially' cover the application area, with the pattern of use making it 'easy' for the court to infer use and enjoyment over parts of the application area that, 'geographically, lent themselves to such activity'—at [320].

It was submitted that use and enjoyment of Aboriginal communities established under the laws of Western Australia after a process of negotiation with non-Aboriginal people could not be relied upon to support a traditional right to live on, use and enjoy country. This was rejected because it failed to distinguish between non-indigenous property rights and native title:

> The applicants claim native title over the whole of the claim area, including the communities. They rely on what they do at the communities to establish use and enjoyment of the claim area. The fact that, unless they obtain a favourable determination of native title, they must deal with pastoral lessees and the State in order to establish their communities, says nothing about their claim to native title based on the existence of those communities. To put the matter another way, it does not follow from the fact that the communities are situated

on land having a particular status for non-indigenous purposes, that members of the communities cannot have a right arising from traditional law and custom to live in the claim area—at [322].

Laws and customs passed down

For law and custom to be 'traditional', they must have been passed down from generation to generation. His Honour found that this requirement was satisfied because nearly all the claimants who gave evidence said they had received instruction about the laws and customs from their parents and grandparents. Given that the age of the most senior witnesses was between 70 and 80, this would have happened circa 1875. Given the evidence that the current laws and traditions were the same as those that existed before 1829, the court inferred that the grandparents of the senior witnesses received their instruction in the same way as had the witnesses—at [336].

Normative rules of a society that existed before sovereignty

His Honour found that the laws and customs relied on by the claimants originated in the normative rules of the societies that existed in the application area before 1829 for the following reasons:

- the principal Aboriginal witnesses were in their 70s and 80s, which meant they were told things by their parents and grandparents in about 1930. As those parents and grandparents were passing on practices and customs learned from their old people, it could be inferred they received comparable instructions circa 1875 to 1900;
- the early ethnographers (Elkin in western Ngarinyin country from 1927–28, Love in Worrorra country, mainly 1927 to 1940, Hernandez and Lommel in Wunambal country in 1934 and 1938–39 respectively) all recorded many of the customs and practices of which the witnesses spoke, including *dambun* with patrilocal membership, intermarrying moieties, totems, the rules for granting access, the existence of Wanjina, Wunggurr and the *wurnan;*
- the observations in the earliest ethnography accorded with the evidence of the senior claimants as to the customs and practices that came from their parents;
- such a complicated system of beliefs could only have grown up over an extended period of time;
- the archaeological evidence established that the minimum age of the Wanjina predated sovereignty 'by a long stretch'. As many of the laws and customs described were 'Wanjina-derived', it was reasonable to infer that the practices laid down by the Wanjina are at least as old as the images themselves;
- the early ethnography showed a high degree of consistency regarding the four key socio-cultural traditions among the peoples they describe;
- the evidence showed both that Wanjina–Wunggurr cultural complex developed over a long period of time out of a combination of things that were already in place and that each of those things must have been there for longer than 200 years because they are attested so widely around the continent;
- the state's expert anthropologist was also of the view that the 'whole of the claim area was subject to a form of traditional title prior to 1829'—at [323] to [335].

Continuous existence since sovereignty

His Honour found that:

- the applicants' laws and customs, 'while modified and to some extent diluted by the changed circumstances of the older applicants and their forebears, have had a continuous existence since sovereignty'; and
- any changes and adaptations were not of such a kind that it could no longer be said

that the rights and interests the applicants assert are possessed under the traditional laws and customs that existed in 1829—at [337] and [364].

Adaptation and change—movement off country

The adaptations involved in 'relocation' to Mowanjum, a community outside of the application area, did not involve a change of such a kind that the rights and interests in land asserted by the applicants were no longer possessed under the traditional laws and customs, for the following reasons:

- Mowanjum was not always a place of permanent residence—people moved around, some to communities on the application area, while retaining a family base at Mowanjum and there were other permanent settlements on the application area used by the claimants, as well as several others used during the dry season;
- the people who moved into earlier missions and who now formed the Mowanjum community were basically the claimants or their ancestors—the Ngarinyin, Wunambal and Worrorra;
- the distribution of housing at Mowanjum reflected the location of Ngarinyin, Wunambal and Worrorra territories;
- there was 'much traffic' from Mowanjum into the application area along the Gibb River and Kalumburu Roads. Traditional life was not a sedentary *dambun*-based existence. It often involved lengthy travels in search of sustenance, to visit relatives, and to accommodate the wet and dry seasons. Movement between settlements and country is the 'modern day' equivalent of the earlier excursions on foot—at [338] to [339].

Selling paintings—traditional?

The evidence was that:

- at sovereignty, the claimants' ancestors painted on rock surfaces and renovated the paintings either annually or as required;
- while some renovation was still carried out, the remoteness of many Aboriginal people from their Wanjina sites prompted some claimants to start painting on canvas;
- this involved change in the law to enable artists to paint at Mowanjum rather than on their various 'countries', which was done for educational reasons, i.e. so that children would see what their ancestors did and carry on the tradition;
- only an authorised person could paint for particular places. Despite a change in where the painting was done and the medium employed, this aspect of the law as at sovereignty was unchanged; and
- some of the artworks produced were sold commercially.

The state submitted that painting artworks was not 'traditional' because they were sold. His Honour found that:

- the sale of the artworks was 'an incidental spin off';
- the educational rationale for painting on canvas at Mowanjum meant that the practice was 'traditional' as required by s. 223(1); and
- it did not lose that character because it had an incidental economic advantage—at [341].

Connection via succession is traditional

A submission that one claimant's connection with a particular area was not traditional but based solely on long-term residence was rejected. (This was based on the fact that the people for that language country (the Ungummi) were all 'finished up'). His Honour found that:

> It is a custom of the Wanjina–Wunggurr community that the country of people who are finished can be taken over by those in a neighbouring territory, and that one of the group that has taken over country…can become recognised as entitled himself to pass it on—at [343].

The young don't know law and custom

One respondent group submitted either that only the 'elderly' people acknowledged and observed traditional law and custom or that there were no traditional laws and customs acknowledged and observed by the applicants, relying upon evidence from some of the claimants that young people:

- don't listen to the old people;
- eat food that under traditional law should not be eaten by young people;
- go to 'danger places' where they should not go; or
- don't want to go into the bush and learn about country.

His Honour rejected the submission for, among other things, the following reasons:

- as the older members of this Aboriginal society are the main holders of stories, laws and customs, it was 'natural' that they should give evidence of those matters;
- in this culture, comparatively few people were fully informed about all the laws and customs and different people were familiar with different aspects of the cultural heritage;
- there was ample evidence that there remains 'a vital society and lifestyle in which significant social pressures of various forms still exist that encourage and support normative behaviour', including evidence of:
  - the initiation of boys;
  - the practice of *wudu* ritual;
  - young people's participation in *junba;*
  - senior people complain about non-compliant behaviour, provide role models and impart knowledge of traditional rules and customs—at [345].

Sundberg J noted that:

Witnesses who spoke of the indolence of youth did so in a condemnatory manner. There is no reason to think that young Kimberley Aboriginal people are any different from young non-Aboriginal people in a tendency to rebel against authority and question the settled practices of their elders—at [345].

Connection with land or waters—s. 223(1)(b)

Section 223(1)(b) requires that the Aboriginal peoples making an application for a determination of native title must, by the traditional laws acknowledged and the traditional customs observed by them, have a connection with land or waters.

It was noted that whether there is a relevant connection depends upon the content of traditional law and custom and upon what is meant by connection 'by those laws and customs'—at [353], referring to *Western Australia v Ward* (2002) 191 ALR 1 (Ward High Court) at [64]. See also Full Court in *De Rose* at [169] to [171], summarised above.

According to Sundberg J, it is not necessary:

- that there be any acknowledgment or acceptance by others of that connection; or
- to show continued use of land or waters to establish a connection therewith—at [347], referring, respectively, to *Commonwealth v Yarmirr* (2000) 101 FCR 171 at [307]; (2001) 208 CLR 1 at [307] and Ward High Court at [64].

His Honour found that the evidence in this case was much like that noted by the Full Court in *Western Australia v Ward* (2000) 99 FCR 316 (Full Court in Ward) at [241] i.e. that European settlement brought major changes in that:

- the Indigenous population was substantially reduced in numbers;
- land uses introduced by the settlers killed or frightened off much of the resources the

Indigenous inhabitants depended on for sustenance; and

- in some areas of concentrated settler activity, it could be inferred that Aboriginal presence became impracticable, other than as labour on pastoral enterprises;

- in this case, Aboriginal people came out of the bush to live in missions and government settlements and the impracticability of some of them visiting their country was due to its distance from the community in which they now lived—at [348].

However, as the relationship between Aboriginal people and their country was 'primarily' a spiritual affair:

- connection could be maintained by continued acknowledgment of traditional laws and continued observance of traditional customs, evidenced by the fact that traditional practices and ceremonies were maintained, so far as possible, off the area and that the ritual knowledge underlying traditional law and custom continued to be maintained and passed down from generation to generation;

- evidence of current knowledge of the boundaries to traditional lands provides evidence of continuing connection through adherence to their traditional laws and customs;

- whether or not connection has been maintained in the absence of physical presence is a question of fact to be assessed in the circumstances of each case;

- the fact that some claimants live out of the application area did not necessarily mean that their connection with it has been broken. This is relevant to the sizable population living at Mowanjum and those who live in Derby—at [348] and [351].

Little required to show connection

His Honour was of the view that, given what was accepted at first instance and by the Full Court in *Ward* being sufficient, 'little is required to constitute a continuing connection' (although a great deal of evidence was required to show the existence of traditional law and custom for the purposes of s. 223(1)(a)—see summary above).

The matters noted from *Ward* included:

- evidence identifying the boundaries of traditional country and that present members of the community had maintained connection with the country through adherence to their traditional laws and customs;

- in relation to an area where it was impracticable to engage in physical activities, evidence that a spiritual relationship was maintained by continuing to acknowledge and observe traditional laws and customs involving ritual knowledge, ceremony and customary practices;

- in relation to islands, some of which had not been visited by claimants, a claimant's continued assertion of a relationship with the islands was sufficient;

- where evidence of physical presence was minimal, the fact that none of the Aboriginal witnesses said their connection with the area had been lost was sufficient to support a finding that connection had been substantially maintained so far as it was practicable to do so—at [350].

Connection at 'general' level

Sundberg J found that many of the traditional laws and customs shown to exist were connected with land or waters. His Honour was of the view that observance of those laws and customs by the claimants gave them a connection with land or waters. Therefore, the court concluded that there was 'ample' evidence that the claimants were connected to the land or waters in the application area 'by' their laws and customs—at [353].

This conclusion was based firstly on the evidence that:

- Wanjina are physically present on land throughout the claim area;
- Wunggurr places are identifiable locations;
- the languages of the area are related to the land—they are language countries, not merely languages spoken by people who live on the country;
- clans have clan estates i.e. areas of land;
- moieties have their own countries i.e. *Jun.gun* and *Wodoy;*
- claimants travel over the country and practise their laws and customs there;
- the *wurnan* is directly connected to land i.e. there is *wurnan* rank and *wurnan* location or direction;
- rituals, such as initiations and *junbas,* are carried out at special sites;
- *baran* (the widow law) has a physical relationship to land in that the widow must leave her camp and live elsewhere for a time.

Secondly, connection on the basis of each of these laws and customs was 'deepened' by the fact that there was a network of connections:

> On the one hand are places (e.g. Wunggurr) and areas of country (e.g. *dambun*) and related groups of areas of country (e.g. families of clan countries, *wurnan* neighbours) and areas having various forms of common or overarching identity (eg moiety, language, Wanjina). On the other are individual members of the claimant group and various groupings of individuals (eg families, close kin, *wurnan* partners, communities, moieties, language groups). The strands of this network are multiple and cross-cutting—at [352].

Thirdly, connection 'was amply' demonstrated by the evidence used to prove s. 223(1)(a) (i.e. continued acknowledgment of traditional laws and observance of traditional customs) in that:

- traditional ceremonies are enacted at Mowanjum and other settlements;
- ritual knowledge is passed on from generation to generation;
- children are taught the laws and customs by their parents and grandparents;
- stories from history are passed on and widely known;
- many senior claimants were able to give detailed descriptions of the boundaries of their ancestral countries and language areas; and
- there was evidence of the *wurnan* routes—at [353].

Connection maintained when living off country

Where physical connection had not been maintained with country, Sundberg J was satisfied that this was mainly due to practicalities, such as distance, the location of many claimants far from their country, the age of some claimants and the difficulty of accessing rough terrain—at [353].

In relation to claimants living permanently in Mowanjum, a community outside of their country, the court was satisfied they had maintained the requisite connection because they:

- practised their laws and customs at Mowanjum; and
- asserted claims to country inherited from their forebears and had that assertion respected by their peers (based on a finding that it was a characteristic of the claimants' laws and customs that a connection with country can be maintained by way of that assertion and acceptance)—at [353].

Connection at *dambun* level

While satisfied that the evidence demonstrated a general connection between the claimants and the application area, his Honour went on to find that the evidence also established a connection by traditional law and custom at

dambun level. (Since the level of recognition was the major objection put by the state, this was presumably to assist any appellate court, should the matter go on appeal on this point). There is an extensive survey of each *dambun,* which is not summarised here. However, some of the matters going to show connection in this regard were knowledge of *dambun,* Wanjina and/or *wurnan* locations, one dambun's relationship to its neighbours, who had rights of entry, who had entitlements to *dambun* and the source of those entitlements—at [354] to [355].

Conclusion on connection

On the basis of the foregoing, Sundberg J was satisfied that, by their laws and customs, the claimants had a connection with the land or waters of the claim area, whether viewed in a general way or on a *dambun*-by-*dambun* basis—at [356].

Distinguished from De Rose

One respondent group submitted that it would be difficult to establish connection where absence from land is extensive, referring to *De Rose* at first instance (the Full Court's judgement in the appeal had not been delivered at the time of this decision). His Honour distinguished that decision on the facts:

> The *De Rose* Aboriginals entirely left the claim area. They were "scattered to the four winds". They did not stay together as a group. Many of the claimants in the present case have established communities in various parts of the claim area. It is true that [many] are mainly based at Mowanjum. But they are there as a community… Some…have bases in the claim area as well. Some resort to Mowanjum [only] during the wet season…Many…visit other settlements [that are on their country]. The communities at Mowanjum and other places in the claim area are cohesive societies or groups. They hold ceremonies—initiations and *junba*—and some sites are looked after. In these important respects *De Rose* and the present case are distinctly unalike—at [362].

Native title rights and interests

Section 223(1)(a) requires that the rights and interests claimed are possessed under the traditional laws acknowledged and the traditional customs observed by the claimants, which gives rise to three issues:

- the way in which 'rights and interests' are to be viewed;
- that the rights and interests must be rights and interests in relation to land or waters; and
- that those rights and interests must be 'possessed under' the relevant traditional laws and customs.

Must be viewed from claimants' perspective

His Honour was of the view that the rights and interests claimed must be looked at from the perspective of the claimants or, as the anthropologists put it, from an emic as opposed to an etic perspective. This is because they must be possessed under their traditional laws and customs—at [364].

Support for this view was found in s. 223(1)(c), in that the 'rights and interests' referred to in s. 223(1)(a) that are viewed emically must pass the test posed by s. 223(1)(c) i.e. the Aboriginally-viewed rights or interests must be capable of being recognised by the common law of Australia. His Honour noted that these 'Aboriginally-viewed' rights and interests did not require recognition by someone other than the person who asserts them in order to retain their 'vitality'. Nor was a system of enforcement necessary—at [364] to [365].

Meaning of 'possessed under'

The requirement that the rights and interests be 'possessed under the traditional laws ... and customs' means no more than that the rights and interests arise or exist under the traditional laws and customs i.e. those laws and customs must be the source of the rights and interests—at [365].

Possession, occupation, use and enjoyment as against the whole world

The rights and interests claimed included rights to:

- possession, occupation, use and enjoyment of the application area as against the whole world;
- make decisions about the use and enjoyment of the application area;
- control the access of others to the application area (essentially through the 'permission system').

The evidence established, amongst other things, that:

- the words 'belong to' a *dambun* or place was generally used to convey ownership;
- the assertion of the right to 'speak for' country usually meant:
  - the right to permit or not permit someone to enter land;
  - that the land belonged to the speaker or the speaker's people (in the sense of ownership);
  - the right to make decisions about the country;
- other terms subsequently reduced to the English word 'own' carried with them an obligation to look after country;
- 'ownership' (however expressed) extended to country as a whole i.e. was not limited to particular places on country such as Wanjina sites or Wunggurr places;
- country has to be looked after and its special sites protected from intruders so it can be passed on to the next generation unspoilt;
- the passing on of country to the next generation in Aboriginal custom is the same thing as the white man's custom of choosing where his property is to go on his death— 'he pick the right son to take this progression';
- strangers (i.e. non-Indigenous people and unrelated Aboriginal people) had to ask permission to come onto the country and Aboriginal people who required permission usually sought it. Someone entering without permission could be expelled;
- some witnesses assimilated unauthorised entry with the non-Indigenous concept of trespass.

Extinguishment not relevant at this stage

The state submitted (among other things) that it was not possible to assert a native title right equivalent to ownership when the area in question is subject to other interests, such as a pastoral lease or Crown reserve, that would extinguish any such right. This was rejected:

> [T]he first task for a court hearing a native title case is to determine the native title rights and interests that exist under traditional law and custom. Only then can issues of extinguishment be addressed. Only then does one have a right or interest that can be compared with the competing right or interest that is said to extinguish it— at [368].

Permission rule not universal

The state also submitted that there was no evidence demonstrating that the permission obligations applied as between the Wanjina–Wunggurr community and people who are not members of that community. His Honour noted that:

> [T]he applicants do not assert that the permission rule applies as between the Wanjina–Wunggurr community in a monolithic sense and non-members of it…Rather they claim that the rule applies as between *members* of the Wanjina–Wunggurr community and those who are not members, as well as within the community itself. The applicants have at all times stressed that their entitlements are…are variously possessed by the claimants for their respective individual, group and community rights according to their

> traditional laws and customs…[T]he underlying tenor of the permission evidence is that a "stranger" is…anyone who is not related to those to whom a particular *dambun* belongs, Aboriginal or non-Aboriginal. It would be surprising if "stranger" encompassed an unrelated member of the community but not some unrelated person from outside the claim region… who for those reasons is much more "strange" than an unrelated community member—at [373], emphasis in original.

Rule of general application

As to the state submission that the permission system was significantly diminished and not in place in all parts of the application area, his Honour found that:

> A large and persuasive body of evidence attests to the existence of a society with common traditions and customs, founded in the travels of Wanjina, that exists over the whole of the claim region. It is appropriate in those circumstances to infer that the permission rule is of general application within that society—at [374].

Interruption in exercise of right

His Honour noted the comment in *Yorta Yorta* at [84] to [85] that evidence of some interruption in the exercise of a particular right did not 'inevitably' answer the statutory questions, as these were directed at the *present possession* of rights and interests under traditional law and customs, not the *exercise* of them. In this case, as he was satisfied of both the existence of the right and its content, Sundberg J found that the right to be asked permission was still possessed under the traditional law acknowledged and traditional customs observed by the claimants, notwithstanding that changed circumstances had diminished the practical operation of the permission system—at [374].

Enforceability not required

The fact that the permission system was unenforced or practically unenforceable was not relevant: 'A right or interest does not require for its recognition some enforceable means of excluding from its enjoyment those who are not its holders'—at [375].

Exclusive possession

His Honour noted 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;

- the expression of these rights and interests in these terms reflects not only the content of a right to be asked permission…but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing—at [376], citing *Ward High Court* at [88].

Claim to common law equivalent

The applicants were 'acquitted' of the charge made by one respondent that they had extrapolated native title rights from 'a finding of the existence of a common law equivalent title'. Rather, Sundberg J noted that, in their evidence, they identified a collection of individual rights and then asked the court to see in them a native title equivalent to ownership and: 'Nothing said [by the High Court] in *Ward* is inconsistent with that approach'—at [377].

Rather, it was said that where the native title rights and interests:

> do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms…Rather... it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters—High Court in *Ward* at [51] to [52].

If, at this stage of the inquiry—i.e. prior to any consideration of extinguishment and for the purposes of s. 225(b)—the applicants successfully established rights and interests amounting to 'exclusive possession' there would be no need to list the activities they may conduct as of right on the land. In a case where the evidence establishes a 'more modest collection of rights and interests, it will be necessary to employ a form of words that may amount to a list of the rights and interests or a list of activities'—at [378] and [380].

Did 'own' mean exclusive possession?

One respondent group submitted that it would be 'ridiculous' to treat the use of the word 'own' by an Aboriginal witness as an assertion of non-Indigenous 'ownership', having regard to the limited grasp of English that many of the witnesses had. While some witnesses spoke better English than others, his Honour had:

> no doubt that those who used 'own' in relation to country thereby asserted that the country belonged to the witness or the person in question; that he or she was the "boss for it". Some witnesses had no difficulty in providing credible similes for words such as "own" in relation to interests in land…I reject the submission that those examples are not supportive of the applicants' exclusive possession case. Similarly I reject the submission that "speaking for country" does not support that case: at [378], citing *Ward High Court* at [88] i.e. 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.

The fact that the witnesses did not say that a pastoral leaseholder was a 'trespasser' was not surprising 'given the pastoralists' lawful occupation of their land and Aboriginal familiarity with and acquiescence in that occupation'—at [378].

Conclusion on exclusive possession

His Honour found that the rights and entitlements of which the Aboriginal witnesses gave evidence amounted to the common law expression 'possess, occupy, use and enjoy the land to the exclusion of all others' i.e. exclusive possession. In this context, it was noteworthy that Sundberg J was of the view that the absence of competing claims by other Aboriginal people strengthened the conclusion that the claimants in this case had rights and interests that were exclusive of those of any other Aboriginal people—at [379] to [380].

His Honour noted that the determination of a right to 'possess, occupy, use and enjoy the determination area' was set aside by the High Court in Ward:

> only because of extinguishment considerations. There was no suggestion that, absent any co-existing non-native title rights and interests, the Full Court's order was inappropriate—at [380].

His Honour concluded that:

- the source of the applicants' right to possession, occupation, use and enjoyment of the claim area as against the whole world is their laws and customs;
- the right was therefore 'possessed' under those laws and customs for the purposes of s. 223(1)(a);
- it was a right in relation to land and waters.

It was noted that, in the course of considering matters of extinguishment, it may be necessary to: 'unbundle this comprehensive right into the component parts asserted by the applicants, and to consider whether these components are in relation to land and waters'.

In relation to the requirement under s. 223(1)(c) that the rights and interests of Aboriginal peoples in land and waters must be 'recognised by the common law of Australia' in order to qualify as a native title right, his Honour noted that:

- paragraph (c) was not concerned with continuity of acknowledgment and observance of traditional law and custom;

- a right to possession, occupation, use and enjoyment of land to the exclusion of all others is a right that could be enforced and protected by the common law—at [383].

Notion of society

Sundberg J considered the comment by the High Court in *Yorta Yorta* that (among other things), in a native title context 'society' is to be understood 'as a body of persons united in and by its acknowledgment and observance of a body of law and customs', noting that their Honours chose the word 'society' rather than 'community' to emphasise the close relationship between the identification of the group and the identification of the laws and customs of that group.

In this case, his Honour was satisfied that:

- the evidence identified the relevant society as the Ngarinyin, Wunambal and Worrorra people who acknowledge and observe the laws and customs there described. They are the people who are 'united' by that acknowledgment and observance;

- there was no want of the anthropological evidence identifying a 'society' or 'community';

- the state's submission that no witness identified his or her country as extending 'beyond the local' failed to accommodate the evidence, including evidence about 'clan clusters' and 'families of clans', which were recognised by the state's own expert;

- in any case, the kinship evidence was 'fatal' to the *dambun*-based submission because of the evidence of Professor Blundell that:

  – kinship is the glue that holds these types of societies together;

  – a shared kinship system was a very clear indicator that people share, constitute, a culture, a people—at [394] to [396].

Hayes, Yarmirr and De Rose distinguished

Both *Hayes v Northern Territory* (1999) 97 FCR 32 and *Yarmirr v Northern Territory* (1998) 156 ALR 370 were distinguished on the basis that the issue that arose in this case (i.e. the appropriate level for recognition) did not arise in either *Hayes or Yarmirr*—at [397].

De Rose at first instance was distinguished on the basis that the notion of a community of Yankunytjara, Pitjantjatara and Antikurinjawa speaking peoples (the YPA community) within the wider Western Desert cultural block was rejected because it was:

- 'controversial and unique in the relevant [anthropological] literature' and was not documented in prior ethnography; and

- was not supported by the claimants' evidence.

While the Wanjina–Wunggurr community, like the YPA community, was an anthropological construct, his Honour noted that a community of Ngarinyin, Worrorra and Wunambal people was both documented in the prior ethnography and supported by the evidence of the applicants—at [398].

Native title recognised at community level

His Honour noted that s. 223(1) defined 'native title' as the 'communal, group or individual rights and interests of Aboriginal peoples ... in relation to land and waters'. The applicants' case was that:

- the collective Wanjina–Wunggurr community was the relevant 'Aboriginal Peoples'; and

- the claimants held various rights and interests communally in the application area; and

- in various sub-groups and as individuals, they also hold various sets of rights and interests in various sub-areas of, and places within, the application area.

The court found that:

- there is nothing in the words 'communal, group or individual rights and interests of Aboriginal peoples ... in relation to land or waters' that is an obstacle to the way in which the applicants put their case—at [384], referring to the Full Court in *Ward*—at [160] to [161];
- the evidence showed that the claimants regarded themselves as part of a community inhabiting the Ngarinyin, Worrorra and Wunambal region and emphasised shared customs and traditions that transcended any particular *dambun* or language area;
- both the belief in Wanjina, which was central to this 'sharing', and Wunggurr tradition extended beyond the borders of the application area into the Wanjina–Wunggurr region, as did other practices and customs: moieties, the marriage rules, *wurnan, wudu, rambarr,* traditional burial, *dambun* and kinship rules;
- the evidence was inconsistent with any description of the group or groups that hold the native title rights other than those who are members of the Wanjina–Wunggurr community;
- many witnesses described their laws and customs as those of the 'three tribes' or the 'Wanjina tribe' or by using the words 'Ngarinyin, Wunambal and Worrorra' in combination, to indicate that the laws and customs are not those of a *dambun* or language country, but of a community consisting of the Ngarinyin, Wunambal and Worrorra peoples and countries;
- the evidence disclosed the existence of a community that transcended individual *dambun* or groups of *dambun,* and also individual language countries—at [386] and [393].

Recognition at *dambun* level was rejected because:

- it would not reflect the evidence that individual members of a *dambun* have kinship links with *dambun* other than their own;
- it would not reflect the succession laws, namely that on the death of the last member of a *dambun,* a neighbouring clan will take over the country, including rights and interests in it;
- it would not accommodate the evidence that close relatives of *dambun* members have rights and interests in the land, such as a right (or entitlement) to enter without asking permission;
- members of some neighbouring clans regard their neighbours as 'really the same as them';
- it was clear that a person whose Wunggurr place was in a *dambun* other than his or her own had rights and interests in the Wunggurr *dambun*. A *dambun*-based formulation of native title would not reflect that entitlement—at [387].

A language-based formulation was also rejected because:

- the evidence was that the claimants' laws and customs are not language based—they transcend the area of any one of the three tribes, binding them together as one;
- the language areas are not discrete—there is much evidence that in 'border areas' the country was 'mixed';
- a determination based on language would disenfranchise people who, not being, for example, Ngarinyin, have rights and interests in Ngarinyin country based on a Wunggurr place there, a mother's Ngarinyin language identity, or marriage ties to Ngarinyin country;

- the model advanced by the claimants accorded with the Aboriginal evidence and was supported by well-based and convincing anthropological and linguistic evidence—at [389].

Determination of native title in Ward's case

Attorney-General of the Northern Territory v Ward [2003] FCAFC 283

Wilcox, North and Weinberg JJ, 9 December 2003

Issues

Counsel for the parties identified seven issues on which they sought clarification from the court in relation to a proposed determination by consent:

- identification of the native title holders;
- statement of the native title holders' rights;
- the right to 'protect' sites;
- decisions about Aboriginal use and enjoyment of the determination area;
- rights and interests subject to traditional laws and customs;
- the use of the term 'include' in stating the nature and extent of the native title rights in relation to the determination area; and
- the right to water—at [14] to [32].

Background

This matter was remitted by the High Court to the Full Court of the Federal Court to resolve certain issues on 8 August 2002 (see *Western Australia v Ward* [2002] HCA 28 (Ward High Court). The background is explained in *Western Australia v Ward* [2003] FCAFC 124, summarised in Hot Spots No 6, August 2003.

After the remittal, Beaumont and von Doussa JJ withdrew from the Bench for reasons unconnected with this matter and the court was reconstituted so as to comprise the present Bench.

At a hearing on 1 October 2003, the court was asked to defer dealing with the issues concerning the Western Australian part of the claim area, pending further negotiations, but the parties wished the court to deal with the outstanding issues in relation to the Northern Territory part of the claim area (NT determination area). The parties had agreed on the form of a determination, subject to seven issues being resolved by the court.

The proposed determination—key elements

The proposed determination in relation to the NT determination area stated the common law recognition of non-exclusive rights 'to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement':

- the right to hunt on the land, to gather and use the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin, and to have access to and use of natural water on the land;
- the right to live on the land, to camp, to erect shelters, and to move about the land;
- the right to engage in cultural activities on the land, to conduct ceremonies, to hold meetings, and to participate in cultural practices relating to birth and death;
- the right to have access to, maintain and protect the sites of significance on the land of the NT determination area; and
- the right to make decisions about the use and enjoyment of the NT determination area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders—sub-clauses 5(a) to (e) at [11].

'These native title rights and interests do not confer possession, occupation, use and enjoyment of the land or waters on the native title holders to the exclusion of all others'—clause 5 at [11].

The proposed determination recognised native title rights and interests as being held by estate groups as follows.

> The land and waters of the NT determination area are part of three estates, namely, the Damberal estate, the Bindjen estate and the Nyawamnyawam estate, each of which are held by the members of the three respective estate groups, namely the Damberal estate group, the Bindjen estate group, and the Nyawamnyawam estate group, who, together with the Aboriginal people referred to in clause 4 below, are collectively referred to as "the native title holders"—clause 2 at [11].
>
> Each of the three estate groups includes members by reason of patrilineal descent and matrifiliates, who are members by reason of descent from the mother and mother's father (*djawidji*), and persons adopted into such descent relationships (the estate group members)—clause 3 at [11].
>
> 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, subject to the rights and interests of the estate group members including:
>
> (a) members of estate groups from neighbouring estates;
>
> (b) spouses of the estate group members; and
>
> (c) members of other estate groups with ritual authority—clause 4 at [11].

Clause 9 provided that in relation to three specified Aboriginal freehold areas (Aboriginal freehold areas), each held under a grant of a fee simple estate, the native title holders enjoyed an entitlement to possession, occupation, use and enjoyment to the exclusion of all others.

The Full Court's reasoning on the issues for determination

■ Identification of native title holders

Section 225(a) of the NTA requires determination of 'the persons, or each group of persons, holding the common or group rights comprising the native title'. It is not necessary to identify the native title holders by name; it is sufficient that the persons be members of an identified group or groups. Clause 4 of the proposed determination left open the 'impermissible' possibility that there are native title holders who are neither members of one of the three identified estate groups or of an identified group. Clause 4 should be turned into an exhaustive identification of the secondary native title holders by omitting the word 'including' and substituting 'such people being'—at [14] and [15].

■ Statement of holders' rights

The term 'occupy' in the opening words of clause 5 was omitted as it tended to imply the notion of 'control' and was therefore not consistent with the High Court's consideration of s. 225(e) in *Ward (HC)* at [89]—at [16] and [17].

The words 'including, as incidents of that entitlement' in clause 5 were replaced with 'being', so as to make an exhaustive list of claimed rights and interests, which was considered to conform with the High Court's consideration of s. 225 in *Ward (HC)* at [51]—at [19] to [22].

■ The right to 'protect sites'

Sub-clause 5(d) of the proposed determination was held not to imply any notion of entitlement to control access or exclude others, and remains in the determination—at [24] and [25].

■ Decisions about Aboriginal use and enjoyment of the determination area

The court determined that sub-clause 5(e) should remain. Their Honours noted that there is a clear distinction between a right to control access, generally and as a matter of law, and a right to make decisions about the use and enjoyment of land by Aboriginal people who

will recognise those decisions and observe them pursuant to their traditional laws and customs. The continued existence of the former right is incompatible with a pastoral lessee's right to determine access to the land. The latter right is not—at [27].

■ **Rights and interests 'subject to traditional laws and customs'**

The court saw no merit in including this formula in clause 5. Their Honours considered that clause 5 as it stood 'makes plain that the nature and extent of the activities that may be undertaken as incidents of the relevant native title rights and interests is governed by the native title holders' traditional laws and customs'—at [29].

■ **Use of the term 'include' in stating the nature and extent of the native title rights in relation to the determination area (clause 6)**

On the basis that s. 225(b) requires an exhaustive identification of the relevant rights, their Honours determined that the term 'include' in clause 6 be replaced with 'are'—at [30].

■ **The right to water**

All parties accepted that there were no exclusive native title rights and interests in flowing and subterranean waters. Specific reference to this in a separate clause 7B was deleted and a similar proviso added to clause 9, which gave exclusive rights over the three Aboriginal freehold areas—at [31] and [32].

Variation of determination

Their Honours noted the possibility of employing s. 13(5) of the NTA in the future if it is considered necessary to vary the determination by adding other native title holders or other specified rights and interests—at [15] and [22].

Decision

The court made orders (including a determination of native title by consent) in the form agreed by the parties, subject to their Honours' rulings on the identified issues.

Extinguishment in Daniel's case—further interim decision

Daniel v State of Western Australia [2003] FCA 1425

Nicholson J, 5 December 2003

Issue

These are the supplementary reasons of the Honourable Justice Nicholson addressing submissions on extinguishment made by the parties pursuant to the reasons for decision handed down on 3 July 2003 in *Daniel v State of Western Australia* [2003] FCA 666 (Daniel 2003).

Background

The *Daniel* 2003 decision gave the parties a limited opportunity to make submissions in relation to the preliminary views expressed by his Honour on inconsistency between extinguishing interests and the non-exclusive native title rights and interests found to exist as a matter of fact.

The *Daniel* 2003 decision is summarised in **Hot Spots Issue No. 6,** August 2003.

Right to access and to camp on pastoral leases

Submissions were made by the State of Western Australia, Telstra and pastoral interests.

■ **State**

The state submitted that the native title right (pursuant to the right to access) to 'remain' or (pursuant to the right to camp) to 'live' had been extinguished by the grant of the pastoral lease as such rights:

– are inconsistent with the rights of a pastoralist to run stock, maintain pasture and construct or establish improvements on any part of the lease area; and

– had an element of permanent residence or occupation (as distinct from transient access or camping) such that it would not be possible, in a practical sense, for a pastoralist's right to prevail over the exercise of those rights—at [5].

His Honour, noting the findings of the majority of the High Court in *Western Australia v Ward* [2002] HCA 28 (*Ward HC)* at [194] in relation to the possible extinguishing effect of pastoral leases beyond the issue of extinguishing control of access, considered that, where it is possible for the rights of a pastoral lessee to prevail over the exercise of the native title rights, those rights are not extinguished—at [11] to [13].

His Honour accepted the submission for the applicants that:

> a right is not to be considered as inconsistent or as extinguishing native title only because the tenure holder may want to exercise rights at the same location as a native title holder thus preventing the native title holder from exercising those rights at that location at that time. The true test is whether at that location at that time the exercise of the native title rights and interests would prevent the rights of the tenure holder prevailing—at [13].

Nicholson J also considered it appropriate, in considering issues of inconsistency, to have regard to the 'reasonable user' test propounded by Beaumont and von Doussa JJ in *Western Australia v Ward* (2000) 99 FCR 316 at 403 and 478 to be useful—at [14].

Nicholson J found that:

- it could not be said that the right to 'remain', pursuant to the right to access, would prevent the rights of the tenure holder prevailing because the right to remain cannot be exercised in such a way as would prevent the pastoral holder's rights prevailing; and

- whilst the right to live, read alone, conveys some sense of permanency, it is to be read in light of the 'right to camp, build shelters (including bough sheds, mias and humpies)…or to live on the area' as a whole. Such right is not a right giving or claimed as a right to live on an area independently of a right to camp and does not have about it the character intended to encompass permanent living. So understood, it cannot prevail against the reasonable needs of the pastoral lease holder—at [15].

■ Telstra

Telstra submitted:

- in respect of the right to access, that a right to remain on land where cabling is located is extinguished as it is inconsistent with Telstra's right to access the cabling for maintenance and given that Telstra's right to access and maintain the cabling cannot, in a practical sense, prevail over the right to remain. A similar submission was made in respect of its customer terminal sites and an optical fibre regeneration site;

- the right to camp, so far as it includes a right to live, is inconsistent with its right to access its cabling for maintenance so that the right to that extent is extinguished; and

- Telstra's right to occupy the land on which its facilities are installed free from interference and to access the facilities in order to maintain them is inconsistent with the right to camp and build shelters. Therefore, the right to camp is extinguished in relation to land on which its customer terminal and regeneration sites are installed—at [7] and [9].

His Honour found:

- it is not correct that the right to remain could not yield to Telstra's right to access and maintain its cabling;

- the right to 'remain' within the right to 'access (including to enter, to travel over and remain' is capable of yielding to the rights of Telstra to access and maintain its cabling and so is not inconsistent;

- the right to 'live', pursuant to the right to camp and understood in that context as

a right to live temporarily is not inconsistent with Telstra's right to service its cabling. The nature of any shelter built pursuant to the right is conditioned by the character of the right so that the shelter must be one against which the rights of Telstra, reasonably exercised, can prevail; and

– in respect of the customer terminal and regeneration sites, the right to remain and camp was inconsistent with those of Telstra, such that the rights to remain and camp were extinguished in relation to those areas—at [15].

■ Pastoral interests

The pastoral interests submitted that:

– an unqualified right of access is inconsistent with the rights of a pastoralist to use the pastoral property for pastoral purposes;

– the right of access should be limited to access for the particular purposes identified in the determination and relating the exercise of the right to access for the purposes of exercising the native title rights otherwise found; and

– a right to 'build shelters' is inconsistent with the pastoralist's right to conduct pastoral operations on any part of the lease area such that the right should be expressed as 'a right to camp temporarily on the area'—at [8].

Nicholson J found that:

– there was no basis on the evidence for redefining the native title right of access to be one limited to particular purposes to be identified in the determination; and

– understanding the right to camp in its proper context (refer above), there was no basis for finding that right to be inconsistent with the right of the pastoral leaseholder to conduct operations—at [15].

Right to take flora (including timber logs and grasses) on pastoral leases

The state submitted that the right to take grasses was inconsistent with the pastoralist's right to depasture stock and that it is not enough to say that the rights of the pastoralist to use the grass for depasturing stock will prevail, because it must be assumed that the pastoralist's interest is always to have as much pasture growing on the leases as possible. The pastoral interests also contended that the right to take timber logs should not be recognised in the determination because it was inconsistent with the pastoralists' rights to take timber logs for pastoral purposes, such as the construction of fences and yards—at [16] to [17].

Nicholson J found that there was no basis for finding inconsistency resulting in extinguishment on these issues as the right to take grasses and logs must be understood in light of the reasonable user test. There was no evidence before the court of any exercise of the right to take grasses or logs in any way which would have negated or had any significant impact on the right of the pastoral lease tenure holder to use grasses and logs—at [19].

Right to take ochre on pastoral leases

Nicholson J accepted Telstra's submission that the right to take ochre was extinguished, on the basis of inconsistency, to the extent that it involved digging beneath the surface of the ground where this was reasonably likely to interfere with Telstra's rights to maintain its cabling free from interference—at [20].

Right to access and to camp on mining tenements

Submissions by the state and various mining, gas and petroleum interests, were to the effect that any native title right to remain pursuant to a right of access, or to live pursuant to a right to camp, would be inconsistent with the rights of the tenement holder where the area is currently or historically the subject of a mining tenement—at [21] and [22].

The applicants submitted that mining activities do not extinguish the rights in question as mining activities may only occur over a small proportion of the entire tenement and when mining works need to be carried out, the rights of the miner can prevail, such that there is no necessary inconsistency and no extinguishment—at [23].

Nicholson J, referring to the majority in *Ward HC* at [308], considered the submissions for the applicants to accord with the evidence and to be correct in law. His Honour's view was that there would be no extinguishment so far as the exercise of the relevant native title rights do not interfere with the mining activities, that is, that they are exercised reasonably and there is no necessary inconsistency—at [25].

Right to engage in ceremony and ritual on mining tenements

Several respondents submitted that a 'right to engage in ritual and ceremony (including…to carry out and participate in initiation practices…)' was wholly extinguished in respect of mining tenements. The applicants submitted that the same principles as applied to the issues concerning the issue of inconsistency of a mining tenement to a right to remain or to live on an area should apply in the case of the right to perform ritual and ceremony. It was said this is particularly the case as the performance of ritual and ceremony might be quite intermittent and more confined in area and less frequent than access generally.

Nicholson J agreed with the applicant's submissions and found that they accorded with the evidence—at [26] to [28].

A right to cook and light fires on mining tenements

Several respondents submitted that the right to cook was wholly extinguished by the grant of a mining tenement. Nicholson J disagreed, finding that a right to cook and light fires should be viewed similarly to rights to remain and live on the land and, if exercised reasonably, was not inconsistent in any way with mining activity being carried out on the mining tenement—at [30] and [31].

Reserves for cemeteries

The *Daniel* 2003 decision at [693] stated that certain cemetery reserves 'effect extinguishment of all rights found other than the right of access...'. Various respondents submitted that this does not include the right to remain pursuant to a right of access.

The applicants submitted that cemetery reserves should not be construed as extinguishing all rights other than the right of access. They argued that the other rights listed in the draft determination were not inconsistent with there being such a reserve. Also, with particular reference to the right to perform ritual and ceremony, and in the context of a burial, they submitted that the right is not only consistent but is expected to be carried out in a cemetery—at [32] and [33].

Nicholson J noted it was right to accept that the place for the burial of the dead is likely to be a place given respect by all peoples of any belief behaving reasonably and that a reserve for a cemetery may or may not contain the dead or it may contain some dead and some land reserved for the burial of the dead—at [34] and [35].

His Honour found as follows in relation to each of the applicable listed rights:

- access—a right to enter and travel over such a reserve is not inconsistent with the purpose of the reserve and a right to remain is not necessarily inconsistent, given that it must be reasonably exercised and must yield to actual usage, in that the purposes of the reserve would prevail;

- ritual and ceremony—a right to engage in ritual and ceremony for the dead is not inconsistent with the purpose of a cemetery reserve. Otherwise such right is inconsistent so that extinguishment of the right occurs, save to the extent that it relates to ritual and ceremony for the dead;

- camping—the exercise of this right would be inconsistent with the purpose of the reserve;

- hunt and forage; collect and gather bush medicine and tucker; take fauna; take flora; take and use water—on the basis that these rights are exercised reasonably and yield to the right to provide for burial for the dead, the creation of the cemetery reserves in itself did not result in extinguishment of these rights;

- take ochre; cook and light fires—these rights are wholly inconsistent with the purpose of the reserve and are extinguished in relation to them if they exist within the geographic limitations of the right;

- protect and care for sites and objects—inapplicable in respect of cemetery reserves—at [36].

Country Areas Water Supply Act By-Laws—rights to access including right to remain; rights to camp; collect and forage for bush medicine and food; right to take flora

Daniel 2003 at [858] concluded, that native title is extinguished by the *Country Areas Water Supply Act By-laws* 36 and 40.

By-law 36(1) provides that:

> No person, body corporate or association or group of persons shall at any time camp or picnic within 300 yards of the high water mark or of any well or bore or any reservoir or feeder thereto.

By-law 40 provides that:

> The removal, plucking, or damaging of any wild flower, shrub, bush, tree, or other plant, growing on any land or reserve vested in the Minister, within half a mile of any reservoir or bore is prohibited.

The state submitted that by-law 36(1) extinguished any right to remain, pursuant to a right to access and that the right to camp was extinguished. The state also contended that by-law 40 extinguished the right to collect and forage for bush medicine or food as well as the right to take flora within the area covered by the by-law.

The applicants submitted that, given the decision in *Daniel* 2003 that native title is partially extinguished by the by-laws within their terms, any extinguishment must be strictly limited to the term of the prohibition—at [40] to [43].

Nicholson J, noting that the by-laws in question extinguished native title within their terms, held that:

- by-law 36(1) extinguished the right to remain pursuant to the right to access and the right to camp; and

- by-law 40 extinguished the rights to collect and forage for bush medicine and tucker and to take flora—at [44].

Nature reserves and wildlife sanctuaries—rights to hunt and forage; fish and take fauna from waters; take fauna

Daniel 2003 at [879] concluded that native title rights to take fauna were extinguished in nature reserves and wildlife sanctuaries created under the Wildlife Conservation Act prior to the commencement of the *Racial Discrimination Act 1975* (Cwlth).

The state submitted that the native title rights to hunt and forage, fish and take fauna from the waters and collect and forage for bush medicine for food were all extinguished. The applicants submitted that:

- any rights that are extinguished should be restricted to the right to take fauna; or

- in the alternative, if the general right to hunt and forage is extinguished, then there should still be a right to take flora and the right to collect and forage for bush medicine and bush food—at [45] to [46].

On the basis of the conclusion in *Daniel* 2003, Nicholson J found that:

- any right to hunt and forage was extinguished so far as it affects fauna;

- any right to fish was extinguished so far as it relates to fauna; and

- any right to take fauna is extinguished where inconsistent—at [47].

Jetty licences— right of access to remain; right to camp and build shelters

Daniel 2003 at [901] concluded that inconsistent native title rights were extinguished by the grant of a jetty licence except where the rights under the jetty licence were in the form of regulation. The state submitted that any native title right to remain or to camp would be extinguished by the grant of a jetty licence as they were inconsistent with the right of a licence holder to construct and operate a jetty—at [48].

Nicholson J agreed with the applicants' submission that none of the native title rights listed in the draft determination was necessarily inconsistent with the rights under jetty licences. This was because if the jetty licence area is not being used, then native title holders exercising their rights, including the right to camp or remain on the area, would not give rise to any inconsistency. If the area was being used, then the rights under the jetty licence would prevail while those activities are being carried out—at [50].

Decision

The court considered submissions, and made findings, in relation to extinguishment in respect of various tenures in the area of the proposed determination.

Review of registration test decision

Northern Territory of Australia v Doepel 203 ALR 385

Mansfield J, 28 November 2003

Issues

An application was made by the Northern Territory Government (the territory) under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) to set aside a decision of the Native Title Registrar (Registrar) to accept for inclusion on the Register of Native Title Claims a native title application covering parts of the Northern Territory. The territory contended the Registrar failed to comply with various requirements of s. 190B and s. 190C of the *Native Title Act 1993* (Cwlth) (NTA) in accepting the claim for registration.

Background

The 'Killarney Application' (D6028/02) for determination of native title in respect of certain land and waters in the Northern Territory was lodged with the Federal Court in September 2002 and was accepted by the Registrar for registration under s. 190A of the NTA in October 2002. The territory sought judicial review of the decision to register the application.

The native title claim group was described in the application as comprising four groups, the Wardaman, Liyi, Yingawurnarri and Narrwan groups who were then said to be comprised by all persons descended from thirty-one specified apical ancestors.

The Registrar's general duties regarding registration

Mansfield J observed that these duties are defined by s. 190A, s. 190B and s. 190C of the NTA:

> (The Tribunal's) task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application—at [16].

His Honour briefly outlined the range of different tasks imposed upon the Registrar by s. 190B and s. 190C—at [16] to [19], some requiring 'some measure of substantive (as distinct from procedural) quality control upon the application'—at [18]. The requirements upon registration imposed by s. 190B should be read together—at [126].

A contention that the Registrar misunderstood his functions in that he assumed the claimants are 'entitled' to access procedural rights under

the NTA upon demonstrating formal satisfaction of the requirements of the NTA and without (and in the absence of) logically probative evidence that those requirements are met—at [27] and [28], was rejected:

> I consider the Registrar's careful application of each of the requirements of ss 190B and 190C to the material before him indicates that he has understood properly the nature of the task imposed by the NT Act—at [30].

Consideration of the various parts of the registration test :s. 190C(2) Details and information etc required by sections 61 and 62

Subsection 190C(2) requires that the Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

In previous cases the Federal Court has held that the Registrar is required, as part of applying 190C(2), to be satisfied that the native title claim group is properly constituted as defined in s. 61(1)—see *Risk v Native Title Tribunal* [2000] FCA 1589 at [30] and *Quall v Native Title Registrar* [2003] FCA 145 at [29] and [30]. In both decisions the court has held that the Registrar is either entitled to, or is required to, have regard to material other than that in the application; *Risk* at [30] and *Quall* at [23] and [26]. This present decision, with respect, represents an appropriate retreat (to some extent) from those principles.

In this decision his Honour, 'with the benefit of the helpful contentions of counsel in this matter', distinguished his finding in *Quall* that the Registrar is entitled to have regard to material extraneous to the application for the purposes of addressing the requirements of s. 190C(2). Thus his Honour held that 'for the purposes of the requirements of s. 190C(2), the Registrar may not go beyond the information in the application itself'—at [39]. Subsection 190C(2) directs attention to the contents of the application and the supporting affidavits—at [35] and [39].

It was in the context of disputing the Registrar's handling of s. 190C(2) (and s. 190C(4)) that the territory raised certain crucial issues:

■ **Composite claim group argument**

The territory's attack upon the decision to register the application was in part because the Registrar accepted the claim for registration despite the appearance of what was described as 'a composite claim group' as a satisfactory description of the 'native title claim group' in s. 61(1) of the NTA—at [32]. Because of its composite character it was asserted that the claim group did not represent a single identifiable community living under its laws and customs and thus could not constitute a native title claim group as defined in s. 61—at [34]. In support of its argument the territory referred to material not constituting part of the application supplied directly to the Registrar by the applicants.

His Honour rejected the territory's argument on the following grounds:

- the Registrar is not entitled to have regard to material other than the application in applying the condition in s. 190C(2)—at [37] and [39]; and

- s. 190C(2) does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group—at [37].

However, his Honour earlier in the decision said that if the description of the native title claim group (in the application) were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s. 190C(2) would not be met and the Registrar should not accept the claim for registration—at [36].

Thus the basis upon which claim group composition is to be considered under s. 190C(2) has been substantially narrowed from previous decisions and is limited to

determining whether, on the face of the application, the claim group as described includes all the persons in the native title claim group as defined in s. 61.

■ The inclusiveness of the group

The territory also contended that the native title claim group, as described in the application, did not include all those persons or clan groups who may hold native title rights and interests in the claim area—at [42]. It was asserted that this was evident from the information provided in support of the application.

Mansfield J observed the fact that the existence or potential existence of a competing native title claim group in respect of some or all of the claim area is not itself an impediment to acceptance of a claim for registration—at [43]. It is only if those other persons or clan groups are in fact members of the native title claim group, but have been excluded from it, that the application might not comply with s. 61. If they are members of a competing claim group, for example with a claim to an area which overlaps the claim area, s. 61(1) does not require them to be included as part of the native title claim group—at [46].

His Honour held that the Registrar's function was to address the application and the affidavits filed in support of it—at [44]. The territory's contention was rejected on the basis that it did not assert the application does not contain the details about the native title claim group required by the table to s. 61(1) or was not accompanied by affidavits as to the nature of the native title claim group as required by s. 62(1)(a)(iv), and s. 62(1)(b) and (2)(e) of the NTA—at [44].

His Honour was of the view that if, in the alternative, the Registrar was required to consider all the material before him, that would raise questions about the nature of that undertaking. For example: What happens if the information is inconsistent; is a hearing required and if so how would it be conducted; would it require the Registrar to make findings of fact and would issues of procedural fairness arise etc? His Honour was of the opinion that there is no indication of a legislative intention that the Registrar should embark upon some general fact- finding exercise, balancing and weighing conflicting evidence, to determine whether to accept a claim for registration. The purpose of the 1998 amendments to Part 7 of the NTA was to impose a gateway to the statutory benefits which registration provides by identifying only those people with a credible native title claim. Such complexities reinforced his Honour's view that the Registrar's function under s. 190A is simply to determine whether the requirements of s. 190B and s. 190C are satisfied according to their terms, rather than generally to consider the accuracy of the information in the application—at [47] and [50].

With respect, it is not unusual for administrative decision makers to have to deal with inconsistencies in information, afford procedural fairness to parties and make findings of fact in relation to particular issues. Where a decision maker is required to be 'satisfied' of a particular matter the necessary facts have to be established on the balance of probabilities. Each of the conditions in s. 190B and s. 190C has to be examined to determine what is required of the Registrar. Subsection 190C(2) arguably requires no more than that the application and affidavits be complete. Thus the view that the Registrar has to be satisfied that the native title claim group is properly constituted is not supported by the words of the subsection. Even the narrow view his Honour takes in relation to subgroups etc. (see [36]) is, with respect, not about whether the application contains 'all the details and other information' required by ss. 61 and 62. Subsection 190C(2) is not the place to test substantive compliance with s. 61.

■ The authorisation issue

The territory contended that, despite the application being certified by the representative body for the area, the Registrar had to satisfy himself that the requirements of s. 61(1) as to authorised applicants (and also

therefore s. 190C(2)) are met ([103] of the territory's submissions). This appears to be an extension of O'Loughlin J's view in *Risk* that s. 190C(2) included consideration of substantive compliance with s. 61 (at least in relation to native title claim group composition).

Consistent with his opinion as to what s. 190C(2) requires, Justice Mansfield held that the Registrar is not required, when addressing that subsection, to consider whether as a fact the claimants are properly authorised by all the relevant members of the native title claim group—at [73] and [77]. What was required by s. 190C(2) in relation to authorisation was that the application was accompanied by affidavits sworn by the claimants that they are 'authorised by all the persons in the native title claim group' to make the application and to deal with matters concerning it and stating the basis for that authorisation (s. 62(i), (iv) and (v)—at [70].

In relation to the affidavits accompanying the application the territory contended that they did not comply with s. 172(2) of the *Evidence Act 1995* (Evidence Act). His Honour declined to determine whether the Evidence Act applied to the registration test process although he was inclined to find that it had no application. The issue, rather, was whether the affidavits met the requirements of s. 62. His Honour held, in the context of s. 190C(2), that the Registrar had not erred in this matter in being satisfied that the claimant's affidavits met the requirements—at [87] and [88].

His Honour did not think that the fact that one of the affidavits was dated some time before the application was filed and before the notifications given under s. 29 of the NTA (referred to in the application) changed the situation. Exigencies of distance and access and the detailed requirements of s. 61 and s. 62 may mean that there is considerable delay between authorisation of the applicants and the filing of the application. It was not necessarily the case that the applicants were unaware of the prospect of notices being given under s. 29 of the NTA—at [89].

s. 190C(4) Identity of claimed native title holders

This application was certified by the relevant representative body. His Honour held that the matter raised by s. 190C(4)(a) may be met on the face of the application, perhaps supported by the Registrar's information about the relevant representative body. If s. 190C(4)(b) applies, s. 190C(5) imposes requirements which must appear from the application itself—at [16]. This should be read in conjunction with his Honour's comments at [87] where he states:

> [had] the Registrar been required to address the condition in s. 190C(4)(b), the laconic nature of the affidavits may have been insufficient of themselves to satisfy the Registrar of that condition. Further material may have been needed by the Registrar.

The territory contended that the certificate of the representative body did no more than indicate to the Registrar whether to apply the requirements of s. 190C(4)(a) or s. 190C(4)(b) in deciding whether to accept the application for registration. It was argued, amongst other things, that the certificate did not obviate the duty of the Registrar to satisfy himself that the requirements of s. 61(1) as to authorised applicants are met—at [67]. This argument was rejected by the court in relation to s. 190C(2) (see above).

In relation to s. 190C(4)(a) the Registrar must be satisfied that the application has been certified under Part 11 by an appropriate representative body—at [70].

In his Honour's view the contrast between the requirements of s. 190C(4)(a) and s. 190C(4)(b) is dramatic. In the case of s. 190C(4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s. 190C(4)(b). The interactions of s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s.

190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given—at [78].

However, the Registrar was only required to consider s. 190C(4)(a). Section 190C(4)(a) requires the Registrar to be satisfied that the application has been certified under s. 203BE of the NTA by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that part. A certificate from the appropriate body had been evidenced.

The contentions of the territory related to whether the Registrar needed to have both evidence of the content of the traditional decision-making process by which the authorisation was given, and evidence that the traditional decision-making process had in fact been invoked. The argument was based upon what was said to be required to establish authorisation under s. 251B(a) of the NTA, rather than upon the terms of any particular subclause of s. 190B or s. 190C—at [62], and [63]. His Honour considered this imposed upon the Registrar a function beyond that required by s. 190C(4)(a)—at [81].

His Honour was satisfied that the Registrar did what was required under s. 190C(4)(a) namely to:

- identify the relevant native title representative body which may have needed access to material beyond that in the application; and

- be satisfied that the application had been certified by the representative body under s. 203BE. In determining whether the certificate of the representative body was in accordance with s. 203BE, his Honour held that the Registrar correctly addressed the terms of the certificate and that it did enable the Registrar to be satisfied that it met the requirements of s. 203BE—at [80]. Paragraph 190C(4)(a) does not require the Registrar to consider the correctness of the certification by the representative body, only its compliance with the requirements of s. 203BE—at [82].

s. 190B(2)Identification of area subject to native title

This is a requirement which does not appear to go beyond consideration of the terms of the application—at [16].

The territory contended that there was an 'absence of certainty' because the particular rights and interests claimed vary within the overall area subject of the application—at [114]. His Honour held that it was open to regard the application as seeking a determination of the claimed native title rights and interests over all the claim area, so that, subject to ensuring the claim area was adequately and accurately described, the 'particular land and waters' over which the claims are made are identified with reasonable certainty—at [122]. The focus is upon the information and map contained in the application, as required by s. 62(2)(a) and (b). It is whether that material enables, with reasonable certainty, the assessment of whether the native title rights and interests are claimed in relation to particular land or waters. The Registrar was held not to have erred in any reviewable way in relation to this condition—at [122].

s. 190B(3)Identification of native title claim groups

This is a requirement which also does not appear to go beyond consideration of the terms of the application—at [16]. Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group—at [37].

Section 190B(3) has two alternatives, being either:

- the persons in the native title claim group are named in the application (s. 190B(3)(a)); or

- they are described sufficiently clearly so it can be ascertained whether any particular person is in that group (s. 190B(3)(b)).

The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group—at [51].

The approach taken by his Honour requires that the reference to 'native title claim group' in s. 190B(3) be read down so that it is not referable to the definition in s. 61, but rather to the group defined in the application. Another reading of the subsection is that it is necessary to first determine who should be in the native title claim group ('all those persons who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed') before it is possible to decide whether they are named or described sufficiently clearly in the application. On this view consideration of the constitution of the native title claim group would not be restricted to the application but would include all relevant material before the decision maker.

The interpretation given by his Honour, with respect, seems the preferable one, based on the context of the registration test and the focus of the subsection.

s. 190B(4) Identification of claimed native title

Subsection 190B(4) requires the Registrar to be satisfied that the description in the application required by s. 62(2)(d) is sufficient to allow the claimed native title rights and interests to be readily identified. His Honour was of the view that this is a further requirement which does not appear to go beyond consideration of the terms of the application—at [16].

The test of identifiability of the claimed native title rights and interests is that they are understandable and have meaning—at [99] and [115]. The claims must be tested against the decision in *Ward—at* [100].

The territory contended that the rights and interests accepted by the Registrar as being readily identifiable were contradictory when read with Schedule E pars 2, 3 and 4 of the application. In applying the condition his Honour held that it was a matter for the Registrar to exercise his judgment upon the expression of the native title rights and interests claimed. His Honour was of the view that it was open to the Registrar to read the application as a whole so, properly understood, there was no inherent or explicit contradiction between parts of the application—at [123].

Mansfield J accepted the Registrar's findings that the rights and interests in subpars 1(e) and (i) of Schedule E to the application were not readily identifiable as native title rights and interests—at [99]. The former by reason of *Wandarang People v Northern Territory* (2000) 104 FCR 380 at [124] and *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at [158]. The latter by reason of the decision in *Ward* at [64]. These claimed rights were respectively:

(e) to use and control the resources of the application area;

(i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area, where the traditional laws acknowledged and customs observed have a connection with the application area.

s. 190B(5) Factual basis for claimed native title

This clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s. 190A(3) may be relevant—at [16].

Section 190B(5) is carefully expressed. It requires the Registrar to determine whether the asserted facts can support the claimed conclusions—at [17] and [128]. In other words, there must be probative material to support the asserted native title rights and interests—at [103]. It does not itself require some weighing of that factual assertion. That is the task required by s. 190B(6)—at [127]. The Registrar is required to address the quality of the asserted factual basis for those claimed rights and interests, but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests—at [17]. The Registrar's role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

Section 190B(5) reflects the positive requirements of s. 62(2)(e). Section 62(2)(e) dictates a required content of an application for determination of native title—at [131]. His Honour held that the Registrar is not required to consider more than the three particular matters referred to in subparagraphs (a), (b) and (c) of s. 190B(5)—at [132].

His Honour also held that it was not necessary for the relevant material, for example, the Land Claim Reports, to address specifically and separately each of the claimed native title rights and interests for the Registrar to have been able to be satisfied in terms of s. 190B(5)—at [130]. He did not regard the necessity of the court to address each claimed right or interest separately when deciding an application for native title as illuminating the task of the Registrar under s. 190B(5)—at [132].

s. 190B(6) *prima facie* case

This also clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s. 190A(3) may be relevant—at [16]. It requires the weighing of the factual basis on which it is asserted that the native title rights and interests are claimed—at [127]. It involves a more onerous test than s. 190B(5)—at [132].

The Registrar addressed each of those rights and interests which he considered were properly identified in turn and concluded that on a *prima facie* basis, those rights can be established in relation to part or whole of the claim area—at [109].

The territory's contentions concerning the application of s. 190B(6) divided into two groups:

1. Whether those rights and interests claimed in pars 1(a), (b), (d) and (f) of Schedule E could, *prima facie,* be established—at [119]. Those claimed rights and interests read:

   (a) to possess, occupy use and enjoy the area claimed to the exclusion of all others;

   (b) to speak for and to make decisions about the use and enjoyment of the application area;

   (d) to control the access of others to the application area;

   (f) to control the use and enjoyment of others of the resources of the application area—at [95].

The territory contended that those rights relate to Crown land over which stock routes have been declared and gazetted. The Registrar regarded s. 47B as potentially applying to those parts of the claim area. The argument was that s. 47B cannot apply, even on a *prima facie* basis, to stock routes as they are declared under s. 96 of the *Crown Lands Act 1992* (NT).

Mansfield J observed that the extent or ambit of s. 47B(1)(b)(ii) has not been fully explored in decisions to date. His Honour did not consider it was incumbent upon the Registrar, in such circumstances, to resolve such a question. If on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie

basis—at [135]. His Honour contrasted the approaches taken by Nicholson J in Daniel at [967] to [968] with the application of s. 47B by Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32 as illustrating that this is not a settled area of law. Mansfield J indicated that he did not regard s. 47B(1)(b)(ii) as so clearly applying to the instruments by which the stock routes were established as to demonstrate legal error on the part of the Registrar in accepting, notwithstanding the stock routes, that *prima facie* the rights and interests claimed in par 1(a), (b), (d) and (f) of Sch E to the application can be made out—at [135].

2. While accepting those native title rights and interests claimed in pars 1(c), (e), (h) and (j) of Sch E as being, on present authority, capable of being established *prima facie*—at [120], the territory contended the Registrar erred in law in considering that those claimed rights and interests prima facie can be established because par 1 of Schedule E is expressed as being subject to pars 2 and 3 of Schedule E but the qualifications do not appear in the Register itself. The particular interests read:

   (c) to reside upon and otherwise to have access to and within the application area;

   (e) to use and control the resources of the application area;

   (h) to maintain and protect places of importance under traditional laws, customs and practices within the application area;

   (j) to determine and regulate membership of, and recruitment to, the landholding group—at [95].

The qualifications read:

2. The claimants acknowledge that:

   (a) their native title rights and interests are subject to all valid and current laws of the Commonwealth and the Northern Territory; and,

   (b) the exercise of their native title rights and interests might be regulated, controlled, curtailed, restricted, suspended or postponed by reason of the existence of valid concurrent rights and interests in others by or under such laws; and,

   (c) their native title rights and interests might have been partially extinguished by relevant valid laws of the Commonwealth, South Australia, and the Northern Territory.

3. Subject to Schedule L, this application does not claim that the native title rights and interests confer:

   (a) possession, occupation, use and enjoyment to the exclusion of all others;

   (f) [sic]the right to control the access of others to the application area; or

   (g) [sic]the right to control the use and enjoyment of others of the resources of the application area:

   in relation to any area regarding which a previous non-exclusive possession act under s. 23F of the NTA has been done—at [95].

His Honour considered it unclear whether the description of the native title rights and interests in the claim area which the Registrar, in applying s. 190B(6), considered *prima facie* could be established should be qualified in some way when recorded on the Native Title Register—at [137], and in any case, did not demonstrate that the Registrar erred in his consideration of s. 190B(6)—at [136]. In respect of right (f) the Registrar concluded that it should be limited to natural resources only, however, the Register did not reflect that conclusion. His Honour was of the view that the absence of such limitation on the Register was 'an inadvertent error' which can be addressed administratively—at [143].

In relation to s. 190B(6) which requires the Registrar to consider whether 'prima facie, at least some of the native title rights and interests claimed in the application can be established', his Honour observed:

> (i)ndeed it may be that the Registrar, upon being satisfied that some of the native title rights and interests claimed can, *prima facie,* be established, might not apply that evidentiary test to each of the claimed native title rights and interests—at [16].

This is a curious observation, since as the note to s. 190B(6) explains, only those rights and interests for which a prima facie case is established can form the basis for the 'right to negotiate' process. Section 186(1)(g) likewise takes an inclusive approach to the native title rights and interests to be included on the Register. Indeed his Honour, when later discussing the application of s. 190B(6) seems to adopt that interpretation—at [126]. Note also s. 190(3A) which allows for further information to be provided to the Registrar in support of registration of rights and interests asserted in the application but not originally considered by the Registrar to be *prima facie* established.

Subsections 190B(8) and 190B(9)(a) and (c)

The territory contended that the Registrar's conclusions about the conditions imposed by these sections were erroneous in law, in substance because the Registrar is said to have 'in effect' amended the application by amending the native title rights and interests claimed so as to enable a finding to be made that, *prima facie*, they are capable of being established and do not contravene those provisions—at [121].

His Honour held that it is necessary that the Registrar should interpret the application, having regard to the entirety of its contents, in order that the prohibitions contained in s. 190B(8) and s. 190B(9) could be addressed—at [138] and [139].

Decision

None of the grounds of review was found to be made out and the application to set aside the decision of the Registrar to register the Killarney application was dismissed.

The decision of his Honour is on appeal on all grounds.

Strike out application

Wharton v State of Queensland [2003] FCA 1398

Emmett J, 3 December 2003

Issue

This decision concerns an application under s. 84C of the NTA to strike out a claimant application, made under the old Act and subsequently amended, on the ground that the applicant was not authorised by the native title claim group to bring the proceeding.

Background

On 18 June 2003, the Honourable Justice Emmett heard the strike out application and concluded that the claimant application should be struck out for failure to comply with s. 61 of the NTA on the basis that the applicant was not authorised to bring the application by a process that satisfied s. 251B(b). However, before making orders in these terms, his Honour adjourned the proceeding to allow the parties opportunity to consider his conclusions and the reasons for them: *Wharton on behalf of the Kooma People v State of Queensland* [2003] FCA 790. The July 2003 decision is summarised in Hot Spots no. 6, August 2003.

These reasons addressed submissions by the applicant and the State of Queensland in reliance on item 21 of Schedule 5 to the *Native Title Amendment Act 1998* (Cwlth) (transitional provisions). Item 21 provides:

> Section 84C of the [N]ew Act applies where the main application mentioned in that section was made either before or after the commencement of that section. If the main application was made before the commencement, the reference in that section to section 61 or section 62 is a reference to section 61 or section 62 of the [O]ld Act.

The strike out applicants contended that item 21 had no application to the claimant application as that application had been amended after 30 September 1998 and was therefore required to comply with s. 61 of the new Act. In so contending, the strike out applicant relied on a principle said to be derived from the decision of O'Loughlin J in *Quall v Risk* [2001] FCA 378 (*Quall*).

It was common ground that the claimant application did not fail to comply with s. 61 and s. 62 of the old Act and there was no suggestion that the application did not comply with s. 61A.

Operation of item 21 of the transitional provisions

Emmett J found that the second sentence of item 21 is unambiguous in providing that, if the application was made before commencement, that is, 30 September 1998, the references in s. 84C to s. 61 or s. 62 are references to s. 61 or s. 62 of the old Act.

His Honour did not consider that the provisions of the NTA and item 11 of the transitional provisions concerning registration require a reading of item 21 that departs from its clear and unambiguous terms—at [28].

In relation to the protection afforded to old Act applications by item 21, his Honour stated:

> If an application were made under s. 84C to strike out a native title determination application filed prior to the commencement of the Amendment Act, item 21 of Sch 5 makes quite clear that the strike out application would fail if the main application complied with s. 61 of the Old Act, even if it did not comply with s. 61 of the New Act. That is so whether or not the application would pass the registration test. There is no reason to conclude that, just because an amendment were made after the commencement of the Amendment Act, the application would no longer have the protection clearly intended by item 21—at [23].

In relation to the strike out applicants' contention that, if an amendment is made to an application (including one made under the old Act) the combined effect of the registration provisions and s. 64 is that the applicant must lodge with the court a fresh application that complies with all the requirements of s. 61 and s. 62 of the NTA, his Honour stated as follows:

> An amendment to the main application does not give rise to a new application. The scheme of the Act recognises that applications may be amended. There is nothing to suggest that, when an application is amended, it should thereupon be treated as a new application so as to lose the protection afforded by item 21—at [27].

Quall v Risk distinguished

In *Quall,* O'Loughlin J concluded that the scheme of the NTA relating to registration of native title claims indicates that an application that is amended 'by changing the particularity of the claimants' must comply with the provisions of s. 61.

In considering O'Loughlin J's reasoning, Emmett J stated that it was not entirely clear what O'Loughlin meant by reference to an amendment made 'by changing the composition of the claimants' and concluded that:

> There may be some justification for treating as a fresh application, an application purporting to be made on behalf of a native title claim group different in substance from the group named pursuant to s. 61(2) of the Old Act. Where there was an amendment to that effect, the application as amended might fairly be characterised as a fresh application—at [29].

His Honour distinguished *Quall* on the basis that, in the present case, there had not been a change in substance in the group on whose behalf the claimant application was brought—at [30] to [33].

Decision

Emmett J concluded that the strike out application should be dismissed. His Honour allowed the parties opportunity to consider his conclusions and the reasons for them prior to any orders being made—at [36].

Amendment application

Neowarra v State of Western Australia [2003] FCA 1401

Sundberg J, 8 December 2003

Issue

Whether the applicants should be granted leave to amend a statement of issues, facts and contentions after the conclusion of evidence in the case so as to specifically break general rights claimed into component parts.

Background

This decision was handed down in conjunction with the determination of native title in *Neowarra v State of Western Australia* [2003] FCA 1402, summarised above.

The applicant's proposed motion to amend was heard during closing submissions. The respondent disputed:

- a list of facts said to support the contention that the laws acknowledged and customs observed are traditional, adding a list of particulars of the applicants' 'distinctive, shared body of beliefs, social and cultural traits and affinities that bind them together and differentiate them from neighbouring regions'—at [3];

- the proposal to enlarge a paragraph already noting the claimed rights have 'internal dimensions' to specify that they include rights and interests as between members of the claim group in relation to various places, and that particular rights and interests are encapsulated within the generality of the right described—at [4];

- the proposal to add new paragraphs further enlarging on those 'internal dimensions', by referring to subgroups ('dambun' and moieties) and specific parts and places on the claim area—at [5]; and

- various other amendments consequential to the above.

The respondents argued these amendments were a belated attempt to introduce a new basis for the claim. The Wanjina–Wunggurr community was an anthropological construct and the claim should be cast at a language group or *dambun* level. The applicants had consistently rejected this. His Honour Justice Sundberg noted the case for the applicants was opened and argued from the position of making a communal or regional claim and not a language-based or *dambun*-based claim—at [6].

The applicants contended they were not so much putting an alternative case as 'uncovering and exposing all the detail which your Honour will need' to properly deal with the requirements of s. 223(1)(c) and s. 225 of the NTA following the High Court's rulings on extinguishment in *Western Australia v Ward* (2002) 191 ALR 1—at [9].

Sundberg J noted that:

- the proposed amendments did not introduce any particulars that had not been included in the experts' report or applicants' outline of their case—at [3], [14], [15]; and

- the notion of 'internal dimensions' of native title was not new. The proposed amendments merely particularised those internal dimensions—at [10] to [11].

The court's reasoning

In summarising the rationale for his ruling, his Honour noted that:

- the leave to make the amendments sought in the motion enabled the applicants to unbundle the general right of possession, occupation, use and enjoyment of the application area as against the whole world into its component parts, so that they will not be at risk of losing the general right in

the course of the extinguishment enquiry and having no other more specific rights to rely on; and

- the ruling did not enable the applicant to mount a case that any native title it established was held by anyone other than the members of the Wanjina–Wunggurr community, the native title claim group—at [21].

Decision

Leave was granted to further amend the amended statement in accordance with the applicants' motion, save for certain minor matters.

Anderson v State of Western Australia [2003] FCA 1423

French J, 4 December 2003

Issues

This decision primarily addresses an amendment application pursuant to s. 66B to replace the existing sixteen people named as the applicant with four people.

Background

The motion was brought against the background of the lodgement of a single Noongar native title determination application representing a combination of most of the active applications in the south-west region of Western Australia.

The amendment application sought to reduce the area of the Ballardong application to the extent of any overlap with the Single Noongar claim (the contracted claim to be referred to as the Nulla Nulla application), together with related amendments. An order was also sought to replace the existing sixteen named applicants (two of whom are now deceased) with four applicants who would be the authorised applicants for the Nulla Nulla application.

His Honour Justice French had before him evidence of two meetings relating to the Ballardong application convened by the South West Aboriginal Land and Sea Council (SWALSC) (the meetings). The purpose of the first meeting was to give native title claimants in the area an opportunity to discuss and make decisions in relation to the lodgement of the single Noongar claim, to consider its impacts on the Ballardong application and to authorise a number of individuals to bring the single Noongar claim. The purpose of the second meeting was to give native title claimants for the Ballardong application an opportunity to discuss and consider the proposed amendments to that claim and authorise the proposed named applicants for the Nulla Nulla claim.

The evidence comprised affidavits from two persons employed by SWALSC, and affidavits from nine of the fourteen living persons named as the applicant acknowledging that they were no longer authorised to make the Ballardong application. The three other named applicants in the Ballardong application who were to remain as the applicant in the Nulla Nulla application, together with a new named applicant, swore a joint affidavit. There remained two people named as the applicant in the Ballardong application from whom the court did not have evidence of their consent to the amendment or their removal (the dissenting applicants)—at [11] to [28].

Various resolutions were passed at each meeting. The same resolution as to the adoption of a decision-making process by way of majority vote was passed at both meetings. There was no evidence before the Federal Court that addressed the question of whether there was any applicable traditional decision-making method.

Application to amend to replace applicant—authorisation

French J noted that an amendment of an application for a determination of native title may be made pursuant to the general powers of the court under Order 13 r. 2 of the Federal Court Rules, subject to the constraints imposed by s. 64 and s. 66B of the NTA—at [36].

His Honour stated that there is no procedural requirement for any particular form of decision-making process by members of a native title claim group to authorise amendments to a claim outside the kind of amendment covered by s. 66B—at [37].

Section 64(5) deals with the case in which an application is amended to replace the applicant with a new applicant and requires that the amended application must be accompanied by an affidavit sworn by the new applicant that the new applicant is authorised by the native title claim group and stating the basis on which the new applicant is authorised. His Honour considered such affidavit to be 'simply a procedural requirement incidental to the filing of an amended application' and noted that it does not deal with the manner in which authority for the replacement of an applicant may arise—at [38].

Section 66B authorises members of a native title claim group to seek an order from the court that an applicant be replaced on the grounds of want or excess of authority by the claim group. In making an order under s. 66B, the court must be satisfied amongst other things, that the persons making the application under s. 66B are authorised by the claim group to make the application and to deal with matters arising under it—at [39].

French J considered that the amendment application, insofar as it sought to reduce the number of applicants, must satisfy the criteria set out in s. 66B.

His Honour, referring to his decision in *Daniel v State of Western Australia* [2002] FCA 1147, noted that:

- the definition of 'authorise' in s.251B, defines the decision-making process by which authorisation may be withdrawn for the purposes of s. 66B—at [41]; and

- in order to prove the relevant decision-making processes, it is not necessary to prove the making of individual decisions by all or most members of the group. It is sufficient if there be a decision by a representative or other collective body exercising authority on behalf of the group under customary law—at [40].

Whilst finding that, in the present case, there were those named as the applicant whose attitude to the amendment application was not known, French J noted as follows in relation to the want of authority condition in s. 66B(1)(a)(i):

> To the extent that an applicant is unwilling to continue as such it could be taken that the want of authority condition under s. 66B(1)(1) is satisfied. In my opinion, authorisation, of its very nature, is only able to be conferred upon a willing party. A party unwilling to continue as an applicant may therefore be replaced on the basis of an implied lack of authority. When a person who is an authorised applicant consents to being removed and replaced as an applicant that consent may be evidence that he or she, as a member of the native title claim group, recognises that authority has been withdrawn. That recognition may be probative of the fact of the withdrawal and may be sufficient, according to the circumstances of the case, to establish the condition under s. 66B for the making of an order—at [42].

French J substantially accepted the submissions of the State of Western Australia, that the decision-making processes supporting the amendment were inadequate or inadequately evidenced before the court—at [44]. His Honour was not satisfied that:

- the meetings were attended by persons representative of the whole of the native title claim group;

- the meetings were adequately notified with sufficient advance warning to provide a proper opportunity for members of the native title claim group to attend; and

- the resolutions passed at the meetings did not address the condition under s. 66B that the named applicants lacked authorisation or had exceeded their authority—at [45].

His Honour did not allow the application on the basis that the conditions for replacement of the applicant under s. 66B had not been made out—at [47].

As to the process of decision-making, his Honour observed:

> The adoption by a native title claim group of a decision-making process by way of majority vote will be justifiable if there is no traditional decision-making method applicable to the processes of authorisation associated with the making and conduct of a native title determination application. And it may well be the case, in connection with the procedural aspects of native title litigation, that there is no relevantly applicable traditional decision-making method. Native title litigation is not exactly a traditional activity. However, the evidence, beyond reporting the fact of the resolutions about the decision-making process, did not address that anterior question—at [46].

Should the court allow an amendment without the agreement of all those named as the applicant?

French J dismissed the application for the other amendments sought on the basis that, on the evidence before him, two of the named applicants did not support the proposed amendments, the application to replace the existing applicants should not be allowed and the other amendments were major amendments.

In so finding, his Honour noted that:

- the effect of s. 62A is that the amendment of an application, other than the replacement of applicants, may be dealt with by the named applicants;

- whether such an amendment should be allowed is always a discretionary issue;

- where a division arises between the applicants such that one or more of them is not prepared to support an amendment, it may be debatable whether the court has authority to allow the amendment (it was not necessary for his Honour to decide that question in this case); and

- where it is a major amendment that is proposed the dissent of some of the applicants to the proposed amendment is a powerful discretionary factor against allowing it—at [48].

In relation to the latter above, his Honour stated:

> In such a case whether the bar be legal or discretionary the proper remedy for the majority applicants is to go back to the native title claim group and obtain a decision that the group of applicants, in so far as it includes the dissentients, is no longer authorised by the claim group to deal with matters arising in relation to the application, and an authority for members of the native title claim group to apply to the Court under s. 66B. Alternatively, it may be that the authority conferred upon the applicants is conferred in terms that enable it to be exercised according to a majority vote. That would, however, depend upon the terms of the authority. I express no concluded view on the efficacy of such a procedure—at [48].

Stalemate—springing order

French J noted that, unless there is a resolution of this matter between the majority applicants and the dissenters, or satisfaction of the conditions for an application under s. 66B, then the Ballardong application is likely to be stalemated. On this basis, his Honour made a springing order that the application will stand dismissed unless by 31 March 2004, a motion for its amendment or for further programming directions, agreed to by all named applicants, has been filed in the court.

His Honour noted that such order would not preclude:

- the filing of a further motion to replace the applicants on proper evidence that the conditions under s. 66B have been complied with;
- (if it be the case that the application is dismissed pursuant to the springing order) a fresh application being filed covering the area which would have been covered by the proposed Nulla Nulla application;
- any continued mediation of the differences between the applicants, at least until the springing order comes into effect.

His Honour, noting the absence of a specific rule of court which covers the making of a springing order in a case such as this, considered that the general power conferred upon the court by s. 23 of the Federal Court of Australia Act 1976 (Cwlth) was sufficient to authorise the springing order—at [52].

Decision

The motion was dismissed and the court made a springing order that the Ballardong application will stand dismissed unless by 31 March 2004 a motion for its amendment or for further programming directions, agreed to by all named applicants, has been filed.

Validity of acquisition notice

State of South Australia v Honourable Peter Slipper MP [2003] FCA 1414

McKenzie v Honourable Peter Slipper MP [2003] FCA 1416

Selway J, 8 December 2003

Issue

Was the issue of a certificate by the Minister under s. 24 of the *Lands Acquisition Act 1989* (Cwlth) (LAA) and the subsequent acquisition of land by the Commonwealth valid?

Background

The South Australian Government opposed a nuclear waste facility in South Australia and attempted to defeat the Commonwealth's acquisition of that site by a Bill to enact the Public Park Act 2003 (SA) 2003 (Bill). The Bill, if enacted, would have established a public park at the site. Section 42 of the LAA provides the Commonwealth cannot acquire land in a public park without the consent of the relevant state or territory. The intended effect of the Bill was to prevent the Commonwealth from acquiring the site without the South Australian Government's consent or amendment to the LAA.

Before the Bill could be passed, the Minister purported to make a certificate under s. 24 LAA that he was satisfied that there was an urgent necessity for the acquisition of all interests, including all native title rights and interests (if any) and all mineral interests, in the land and that it would be contrary to public interest for the acquisition to be delayed. The certificate stated:

> [F]or the purpose of subparagraph 26(1)(c)(iii)(A) of the *Native Title Act 1993*, that the purpose of the compulsory acquisition of all native title rights and interests (if any) in relation to the land described hereunder is to confer rights or interests in relation to the land on the Commonwealth of Australia—at [10].

The Minister's reasons for decision stated the background to the significance of the site pursuant to the Australian Government's radioactive waste disposal policy and the urgency of the situation given the substantial chance that the Bill would soon be passed into law—at [11].

On 7 July 2003, following the making of the certificate, the Minister declared that the relevant interests in the site were acquired by the Commonwealth.

The state challenged the validity of the certificate, as did Mr McKenzie on behalf of the Kuyani People—at [14] and [15]. The two

matters were argued together although some arguments were not adopted by the other party. Only the native title issues are considered in this summary.

Right to be heard

Mr McKenzie submitted he had a legitimate expectation of a right to be heard arising from his status as a registered native title claimant. He argued that the Minister, in exercising his power under s. 24 LAA, failed to take into account a relevant consideration, namely Mr McKenzie's interest in being heard. The Honourable Justice Selway held Mr McKenzie could not have any higher expectation than that the Minister and the Commonwealth would comply with their legal obligations—at [27].

Just terms

Mr McKenzie argued that the procedure employed by the Minister failed to afford him 'just terms' as required by s. 51(xxxi) of the Constitution. Mr McKenzie argued just terms required the Kuyani People be given a fair hearing. Selway J held that s. 51(xxxi) is directed to the compensation payable upon an acquisition. It does not deal with the acquisition process itself. His Honour found there was no obligation to afford a fair hearing before the acquisition process is completed—at [28].

Native Title Act 1993 (Cwlth))

Mr McKenzie argued that the acquisition was invalid as the Minister failed to comply with

s. 26(1)(c)(iii)(A) of the NTA. Selway J reviewed the NTA scheme which establishes the pre-conditions for the validity of future governmental acts which affect native title—at [39] to [41].

It was accepted that the right to negotiate process had not been complied with. The Commonwealth argued it was not obliged to do so because of s. 26(1)(c)(iii)(A), which provides that Subdivision P of the NTA (the right to negotiate) applies unless:

> (A) the purpose of the acquisition is to confer rights or interests in relation to the land or waters concerned on the Government party and the Government party makes a statement in writing to that effect before the acquisition takes place—at [43].

Selway J accepted the acquisition was to confer rights on the Commonwealth and that the Minister had made a 'statement' as included in the s. 24 LAA certificate. Therefore, there was no requirement to comply with the right to negotiate procedure—at [44]. His Honour accepted that the statement was delivered to Mr McKenzie some days after the acquisition was purportedly completed—at [45].

Mr McKenzie argued that the word 'statement' in s. 26(1)(c)(iii)(A) implied communication and that, in the absence of communication, no statement was made. Consequently, the pre-condition to non-compliance with the right to negotiate procedure was not met and, in the absence of compliance with that procedure, the acquisition was invalid.

Selway J rejected this reasoning on the basis that the ordinary meaning of 'statement' does not imply any communication. He found no specific right or interest of a registered native title claimant is affected by the failure to communicate the relevant 'statement' prior to the acquisition. The claimant must become aware of the statement before taking legal proceedings to challenge the acquisition—at [46] to [49].

His Honour went on to find that there was no doubt that the Minister did intend to communicate his statement to Mr McKenzie at the time he issued the certificate and this was sufficient to satisfy s. 24 LAA. It was not necessary that the statement be received prior to acquisition—at [49].

Selway J found that his conclusion on the meaning of the word 'statement' in s. 26(1)(c)(iii) (A) made it unnecessary to consider whether it would be necessary for Mr McKenzie to establish that the Kuyani People hold native title over the relevant land and

whether their interests would be affected by the acquisition before they would be entitled to any relief for a failure to comply with the right to negotiate.

His Honour, citing *Lardil Peoples v Queensland* (2001) 108 FCR 453 at 474, 477, 485 to 487, noted that a relevant future act may not be invalid unless it is established that the relevant future act affects native title. His Honour went on to state that it may be that the right to negotiate can be protected by equitable remedies even where all that has been established is that the applicant is a registered native title claimant: see *Fejo v Northern Territory* (1998) 195 CLR 96 at 121, 123, 139; *Lardil* at 477—at [50].

Decision

The applications brought by the state and by Mr McKenzie were dismissed with costs.

Evidence —expert

Neowarra v State of Western Australia [2003] FCA 1399

Sundberg J, 8 December 2003

Issues

- Whether the 'basis rule' applies in relation to expert anthropological evidence.
- Whether the hearsay rule applies to expert's evidence of a previous representation admitted because relevant for a purpose other than proof of the fact intended to be asserted by the representation.
- Whether sundry objections should be upheld concerning 'gap filling' and relevance in the expert reports.

Background

This decision was handed down in conjunction with the determination of native title in *Neowarra v State of Western Australia* [2003] FCA 1402 and dealt with objections to a joint anthropological and linguistic report (the joint report) prepared by two anthropologists, as well as other expert reports filed in response to an order made by Lee J on 12 March 1999.

The objections dealt with by his Honour Justice Sundberg in the revised notices of objections totalled 326 from certain respondents and a blanket objection from the State or, in the alternative, 94 specific objections. Annexed to the judgment were 34 pages of Tables itemising the objections, including objections to other expert reports, and applying his Honour's reasoning.

The 'basis rule'

His Honour looked to discussion by the Law Reform Commission (the Commission) in its 1985 Interim Report No 26 Evidence vol 1 par 161 examining common law on the status of opinion evidence based on material that is not already admitted into evidence. The Commission concluded it was 'a matter of some controversy' and that there was uncertainty in the authorities as to whether the so-called 'basis rule' operated as a criterion for admission or merely went to weight. It considered the better view to be 'no such rule exists'. His Honour also noted that the 'basis rule' does not feature in s. 79 of the *Evidence Act 1995* (Cwlth) (Evidence Act)—at [16] to [22].

His Honour considered the weight of authority supported the proposition expounded by Gleeson CJ in *HG v The Queen* (1999) 197 CLR 414 that there is no requirement, as a condition of admissibility, that the assumed facts on which the opinion is based are established by the evidence. If, at the end of the evidence, they are not established, the weight to be accorded the opinion will be reduced, perhaps to nil. But it is not an issue of admissibility—at [25].

Hearsay by experts

His Honour reviewed recent case law in relation to the application of s. 60 of the Evidence Act to expert evidence: see *Daniel v Western Australia* (2000) 178 ALR 542; *Quick v Stoland Pty Ltd* (1998) 87 FCR 371; *Lardil v Queensland* [2000] FCA 1548; *Harrington-Smith v Western Australia* (No 7) [2003] FCA 893; *Lee v The Queen (*1998) 195 CLR 594 at 604 and *Welsh v The Queen* (1996) 90 A Crim R 364 at 368 which related to the similarly worded provision in the *Evidence Act 1995* (NSW).

Subject to the application of ss.135 and 136 of the Evidence Act, hearsay material on which an expert's opinion is based will qualify for admission as relevant to the basis upon which the expert holds the opinion i.e. 'a purpose other than proof of the fact intended to be asserted by the representation'—s. 60. If it so qualifies, then it can then be used as proof of the fact intended to be asserted. The weight to be accorded to that evidence is a matter for the court—at [38].

Decision

As to the 'basis rule' and expert hearsay, his Honour concluded that:

- the opinion provisions of the Evidence Act do not incorporate a basis rule requiring the facts upon which an opinion or conclusion is based to be established by admissible evidence;
- the weight to be accorded an opinion or conclusion that is founded on a fact that is not established by admissible evidence may thereby be reduced;
- while the Evidence Act does not contain a basis rule as referred to above, the fact that hearsay material may lie behind facts ascribed or assumed does not spell inadmissibility. Rather, it goes to the weight to be accorded the expert's opinion or conclusion;
- an expert's opinion that is based on hearsay is admissible under s. 60 of the Evidence Act in proof of the fact intended to be asserted, although the weight to be accorded the opinion may be reduced by the hearsay quality of the material and, either the hearsay material or the opinion may be excluded under ss. 135 or 136 of the Evidence Act;
- remote hearsay is not admissible under s. 60 of the Evidence Act in proof of the fact intended to be asserted—at [39].

As to objections to the entire document on the basis that the claimants did not give evidence supporting the experts' conclusions or opinions, his Honour decided:

1. it was more appropriate to resolve such a dispute in final submissions rather than on an objection to admissibility;
2. in any event, even if there was no supporting Aboriginal evidence, that did not result in the exclusion of the experts' evidence. It was always contemplated by Lee J's order that the Joint Report would be used in evidence. His Honour decided that this issue went to the weight to be accorded to particular conclusions or opinions where there was no Aboriginal evidence to support it—at [40].

An objection commonly made was that if a matter was the subject of primary evidence, restatement by the authors would be unnecessary. Furthermore, it was argued that evidence of the authors cannot be used to fill gaps in primary evidence. His Honour stated that where the experts cover the same ground as Aboriginal evidence, there is no 'gap'. The evidence may not be necessary and may be entitled to less weight than the Aboriginal evidence, but it is not inadmissible merely because it is in the same terms as that evidence. Given that the applicants were aware of the ambit of the expert evidence, the fact that Aboriginal evidence did not cover the whole of the relevant field may go to the weight accorded it but it did not render it inadmissible—at [41].

A similar objection to evidence in the Joint Report based on the experience of one of the experts in a local community within the application area was also treated as being appropriately covered in closing submissions and going to weight rather than admissibility—at [42].

Evidence —exceptions to hearsay

Neowarra v State of Western Australia [2003] FCA 1400

Sundberg J, 8 December 2003

Issue

Whether prior statements relating to traditional laws and customs made by the applicants are admissible in evidence as exceptions to the hearsay rule under s. 64 of the *Evidence Act 1995* (Cwlth) (Evidence Act).

Background

This decision was handed down in conjunction with the determination of native title in *Neowarra v State of Western Australia* [2003] FCA 1402 summarised above.

The prior statements in question were attributed to two of the persons named as the applicant and were contained in a book entitled *Gwion Gwion* which also contained photographs and text written by others. The statements had been collected over a period between 1992 and 1999 and related either to the recounting of stories recorded in the art work shown in the photographs or to accounts of practices and customs that had been handed down to the authors by their forebears—at [6].

The applicant sought only to tender the statements attributed to those two named persons and two now deceased persons, together with related photographs. The respondents raised no objection to the tender of either the statements of the deceased persons or any photographs related to those particular statements.

The two claimants said in oral evidence that the statements attributed to them in the book had been told by them to the person collecting the material for the book. They identified several photographs in the book. His Honour Justice Sundberg accepted that oral evidence—at [3].

The applicant relied upon s. 64(3) of the Evidence Act but made no submissions on this provision, did not explain their reliance upon it, and referred to no authorities. The respondents did not make any submissions.

Section 64(3) provides that in civil cases, if the person who made the [previous] representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given either by that person, or by a person who saw, heard or otherwise perceived the representation being made, if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

Sundberg J referred to *Graham v The Queen* (1998) 195 CLR 606, in which the High Court considered the term 'fresh in the memory of the person who made the representation' in s. 66 of the Evidence Act, which is similar in context to s. 64. His Honour considered the phrase related to applying the notion of contemporaneity to the 'occurrence of the asserted fact'—at [10].

In the present case, the two authors were recounting stories, rules, customs and practices handed down by their forebears. They were not speaking of facts that occurred ('the occurrence of the asserted fact')—at [11].

Decision

It was held that s. 64(3) of the Evidence Act did not apply to the statements in question. The book was admitted but reliance was limited to the statements attributed to the two deceased authors and related photographs and the photographs that had been identified in court by the two claimants.

Application to re-open case

Sampi v State of Western Australia [2003] FCA 463

Beaumont J, 1 May 2003

Issues

This decision relates to an application on behalf of the native title claim group for leave to re-open their case in relation to the facts and, in the event of the grant of that leave, all necessary directions for the hearing of further

evidence in light of the High Court decisions in *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2002) 191 ALR 1; and *Yorta Yorta v Victoria* (2002) 194 ALR 538.

Background

The evidence and submissions in the principal proceedings brought by the Bardi and Jawi People before his Honour Justice Beaumont concluded in November 2001, with the qualification that, by consent of all the parties, the parties reserved the right to make further submissions after the High Court delivered judgment in several native title cases then under consideration.

Following the decisions *Yarmirr, Ward* and *Yorta Yorta,* further instructions were obtained from six senior Bardi and Jawi law men and women who had previously given evidence, relating to:

- the existence or otherwise of a normative system of traditional laws and customs in relation to the land and waters of the Bardi and Jawi at sovereignty under which the Bardi and Jawi society existed and which remains in effect today;
- the detailed nature and content of the specific rights and interests in the land and waters possessed under those pre-sovereignty traditional laws and customs and which continue substantially unchanged today; and
- whether or not Bardi and Jawi society, by their traditional laws and customs at sovereignty, had what is described by the common law as 'exclusive possession' of their traditional land and waters—at [4].

The application for leave to re-open was accompanied by statements called 'substances of evidence' from 13 witnesses. It was conceded that the additional evidence had been, at all material times, available to the applicants and, to a limited extent, evidence of that kind had already been led orally. The evidence sought to be led dealt 'in significantly greater detail and particularity, with issues that are central to the … application for determination of native title'—at [7], [10] and [11].

Beaumont J had difficulty with the general way in which the basis of the submissions for leave to re-open were made. There was no attempt to refer any of the statements made in the 'substances of evidence' back to evidence already given, or perhaps, omitted to be given. In his Honour's view, such detail could be crucial for the Federal Court to decide whether the interests of justice required that leave be given at all, or in some respects only—at [14].

Therefore, given the advanced age of witnesses proposed to be recalled, his Honour considered the only feasible way to manage the litigation at this stage was to take the evidence in order to preserve it (preservation evidence) in the form of oral questions in chief, then to allow cross-examination and then invite submissions on what, if any, of this evidence should be allowed by way of re-opening—at [15].

Decision

Beaumont J stood the matter over to a date to be fixed for the purpose of giving any directions required for the taking of preservation evidence—at [16].

Party status

Adnyamathanha People No 1 v State of South Australia [2003] FCA 1377

Mansfield J, 28 November 2003

Issues

This decision relates to an application under s. 84(5) of the NTA by an Aboriginal incorporated association established to advance, promote and protect the interests of its members and more widely the Aboriginal communities in South Australia to be joined as a party to various native title determination applications.

Background

The Aboriginal Cultural Development Foundation Incorporated (ACDF) applied under s. 84(5) of the NTA to be joined as a

party to this application and in fourteen other native title proceedings.

The application was opposed by the Aboriginal Land Rights Movement (being the relevant representative body), the State of South Australia, pastoralists (where such a party group existed) and, in most instances, the applicant on behalf of the native title claim group.

His Honour Justice Mansfield applied the test outlined by the Full Federal Court in *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 and followed in other recent authorities as outlined and explained by Branson J in *Davis-Hurst v New South Wales Minister for Land and Water Conservation* (2003) 198 ALR 315. Those authorities concluded that an interest sufficient to qualify for the court's exercise of its party joinder power under s. 84(5) must, whilst not necessarily proprietary or even legal or equitable in nature, be 'capable of clear definition' and 'of such a character that they may be affected in a demonstrable way by a determination in relation to the application'—at [3] and [4].

The constitution of the ACDF stated the objectives of the organisation to relate to the regaining of traditional land, the preservation of traditional history and culture, the exploration of future conservation initiatives and to provide opportunities to Aboriginal persons to participate in those activities, develop their traditional expertise and to promote welfare and development. The objectives also include acting on behalf of Aboriginal people and organisations associated with the ACDF, and generally 'to promote the interests of Aboriginal people as they relate to the overall implementation of the policies of self-determination and self-management'.

The ACDF mission statement indicates it is 'a community organisation specifically created and incorporated to provide support for Aboriginal community and cultural development programmes across South Australia and elsewhere' through assisting in 'creating and implementing suitable programs for community ACDF's initiatives that recognise the individual needs and resources of particular Aboriginal application groups'. Many of these programs cover activities well beyond the boundaries of the claim areas—at [17] to [18].

Mansfield J could not discern from the constitution of the ACDF and its mission statement and objectives that it had interests in the proceedings that may be affected directly by a determination in any of the proceedings:

> Its general functions and purposes will not be directly impaired by such a determination …(T)he ACDF does not claim itself to enjoy native title rights and interests, or any other real and substantial interests, in the claim area in this or the other 14 matters in its own right. Such interests as it has are dependent upon, and exist only to the extent that, it has members who enjoy native title rights and interests in the claim areas. Its interests are self-declared, and dependent upon the attitude of those members who enjoy those interests. An association such as the ACDF does not qualify for party status in these applications simply by its establishment to enjoy, by the grant or consensus of the holder of native title rights and interests, the privilege of certain of those rights and interests—at [20].

Various particular claims based on 'legal considerations' were described by his Honour as 'cryptic' and 'hard to understand' and did not demonstrate any relevant way in which the ACDF's interests may be affected by a determination of native title—at [22] to [30].

Mansfield J similarly disposed of 'historical and environmental considerations' on the basis that any rights that may exist under these considerations are not enjoyed by the ACDF, which at best is the representative or mouthpiece for those members who claim their rights or interests may be affected. The representative role of the ACDF does not convert its members' claimed rights or interests into those of the ACDF—at [31] to [35].

His Honour was not satisfied that the ACDF has any interests which may be affected by a determination in any of the fourteen applications. Its contentions did not identify any particular claimed native title right or interest in respect of any of the claim areas which, if determined to exist, might affect any of its interests in the sense explained in the *Arakwal* case—at [36].

His Honour noted that the individual or groups of individual persons represented by the ACDF and whose interests may be affected by the determination sought may themselves seek to become parties to the proceedings. In such case, the application for joinder would need to explain the particular interest or interests which is said to be possibly affected by the determination in respect of that claim area with some precision, and how the determination may affect that interest or those interests: per Merkel J in *Rubibi v State of Western Australia* [2002] FCA 876 at [17], [18], [22] and [23]—at [34] and [35].

Decision

Mansfield J dismissed the application of the ACDF to be joined as a party to each of the proceedings under s. 84(5)—at [37].

Buru and Warul Kawa People v State of Queensland [2003] FCA 1435

Cooper J, 10 December 2003

Issue

This case deals with a notice of motion seeking joinder of a party under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA). The issue the Federal Court had to consider was whether the person seeking to be joined had an interest that may be affected by a determination of native title in this case.

Background

The application for determination of native title in this matter related to islands in the Torres Strait. All but one of the islands were reserved for departmental purposes, and vested in and placed under the control of the Corporation of the Director of Aboriginal and Islanders Advancement as trustee. The remaining island was unallocated state land.

Dennis Fritz filed a notice of motion seeking to be joined as an interested party to the claimant application, with an affidavit in support stating:

- he had been a party to an earlier claimant application in respect of two of the islands, which had been discontinued;
- he had an interest in the area of sacred ground where his ancestor was buried and by virtue of an ancestor's share in a coconut and pearl lease on one of the islands and that those interests were acknowledged by traditional elders of the region; and
- documents filed in the Federal Court on 6 October 1998 support that interest. (It was later revealed that the documents were filed in relation to the Torres Strait Regional Sea Claim.)

During the hearing of this matter, Mr Fritz raised additional interests stating that he had fishing interests in the area and also a legal interest to reside permanently on one of the islands given to him by certain elders under s. 12(2) of the *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management) Act 1978* (Cwlth) (Commonwealth Act). Mr Fritz also claimed recreational use—at [8] to [25].

The evidence indicated that in the period 1985 to 1998 Mr Fritz was not in the Torres Strait—at [26].

The Honourable Justice Cooper noted that Mr Fritz had previously sought to claim proprietary rights based on personal and customary attachment to two of the islands as either a non-Indigenous person or by succession from a German national who lived on one of them. Those claims were dismissed by Cooper J, and that decision was upheld on appeal. (See *Fritz v Torres Strait Regional Authority* [1999] FCA 183; [2000] FCA 1461)—at [7].

Requisite interest for purposes of s. 84(5)

Citing the decision of the Full Court in *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1, Cooper J made the following observations as to the requisite interest for the purposes of s. 84(5):

- it does not have to be legal or proprietary in nature;
- it must have a cogent and rational connection with the subject land which is capable of clear definition and which is genuine and not indirect or lacking substance;
- it must have such a character that it may be affected in a demonstrable way by a determination of native title;
- interests which are merely intellectual or emotional considerations in relations to a claimed area are not sufficient;
- the question of a sufficient interest for the purposes of s. 84(5) is to be determined by reference to, and will turn on, the facts of each case having regard to the interests claimed and the effect of any determination of native title on that interest; and
- an occasional, rather than a habitual or regular, user of an area is unlikely to have standing as a party—at [5] and [6].

Cooper J held the islands were not reserves under the *Torres Strait Islanders Act 1971* (Qld), nor 'trust areas' under the *Community Services (Torres Strait) Act* 1984 (Qld) and at all material times, were under the jurisdiction of the Torres Shire Council. It followed that the islands were not 'islander reserves' under the Commonwealth Act and the power of a council under s. 12(2) of the Commonwealth Act had no operation in respect of the relevant islands. There was nothing in the circumstances to support a right of Mr Fritz under s. 12(2) of the Commonwealth Act to reside, visit or engage on activities on any of the islands—at [16].

His Honour found that:

- Mr Fritz had made no recreational use of the islands since the 1970s to suggest an identifiable interest in respect of that use;
- Mr Fritz had no interest capable of a clear definition which involves a rational and cogent connection with the islands which will be affected by a determination of native title;
- the issue relating to the presence of the grave of an ancestor was, at best, an emotional one, and not one shown as being affected by any determination of native title;
- Mr Fritz was not a habitual or regular user of the islands for any purpose and, having regard to his past use, any present or past use is now remote and so insubstantial as to be speculative;
- the claim to the interest was not genuine but, rather, an attempt, by exercising a party's right to negotiate a consent determination, to seek to obtain rights for himself in relation to the islands which he does not have, and which he has, through various avenues, sought and failed to obtain; and
- Mr Fritz had no interest personal to himself as a licensed commercial fisherman or otherwise that may be affected by a determination of native title. Further, the Queensland Seafood Industry Association Inc was representing the existing fishermen parties, and if the interest they claim which will be affected is a public right of access over, or use of, any of the area covered by the application, then any like interests of Mr Fritz would be sufficiently represented. On that basis, joinder under s. 84(5A) was unnecessary—at [27] to [30].

Decision

The application was dismissed.

Right to negotiate applications

The determinations made by the Tribunal that are summarised below raise interesting points or develop the law relating to right to negotiate applications made under s. 75 of the NTA, i.e. objections to the application of the expedited procedure and future act applications. Significant Tribunal determinations are also reported in the Federal Law Reports. The full text of all Tribunal determinations is available at this web site at www.nntt.gov.au/futureact. For further information about right to negotiate proceedings, see the *Guide to future act decisions* on this web site at www.nntt.gov.au/futureact/Info.html.

Objection to the application of the expedited procedure

Freddie/Western Australia/Adelaide Prospecting Pty Ltd [2003] NNTTA 120

E M Franklyn DP, 27 November 2003

Issue

The Tribunal made comments about the level of evidence required on behalf of the native title party to support an objection to the application of the expedited procedure.

Background

This inquiry related to the grant of an exploration licence to Adelaide Prospecting Pty Ltd. The government party considered that the act attracted the expedited procedure. The native title party objected to the inclusion of that statement in the s. 29 notice.

The directions made by the Tribunal for the conduct of the inquiry required the native title party to provide, amongst other things, a statement of the community or social activities said to be likely to be interfered with as well as the nature and location of any area or site of significance, together with evidence identifying the relevant 'particular significance'—at [9].

Native title party's evidence —s. 237 conditions

The Tribunal noted that likelihood of interference 'directly with the carrying on of community or social activities of the persons who are the holders of native title' (s. 237(a)) or of the likelihood of interference 'with areas or sites of particular significance in accordance with their traditions' to such persons (s. 237(b)) only arises for consideration if there is evidence of the carrying on of the activities and/or of the existence of any such area or site—at [14].

The Tribunal found that the native title party did not comply with the directions as:

- it did not provide any evidence whatsoever of the community or social activities of the native title claimants of the nature referred to in s. 237(a). Rather, the evidence presented referred to obligations in respect of the land and of 'Dreaming Tracks' which criss-cross it, which the Tribunal found did not translate into a community or social 'activity'of the claimant group—at [12]; and

- there was inadequate evidence of the nature and location of relevant sites—at [13].

Such particulars are relevant to the issue of 'likelihood': see *Lapthorn/Western Australia/ Global Stone,* NNTT WO01/581, Hon. E.M. Franklyn, QC, 13 November 2002.

As to the condition in s. 237(c), the Tribunal found that the question whether there is a likelihood of major disturbance is to be determined from the viewpoint of the general community but taking into account the concerns of the local community as disclosed by the evidence. The mere assertion by the native title party that exploration activities are likely to involve major disturbance is not enough—at [15].

Decision

The Tribunal concluded that the grant of the exploration licence was not likely to involve a major disturbance or create rights of the nature referred to in s. 237(c) NTA and determined that the grant was one attracting the expedited procedure—at [15].

Future act determinations

Hughes/Western Australia/West Oil NL [2003] NNTTA 122

EM Franklyn DP, 12 December 2003

Issue

This decision concerned a proposed consent determination where one of the persons comprising the registered native title claimant had died prior to the commencement of the right to negotiate process and no death certificate had issued. The Tribunal considered evidentiary issues relating to affidavit evidence of a representative comprising largely hearsay and an affidavit of a registered native title claimant who could not read or write English.

Background

A s. 29 notice relating to the grant of a petroleum exploration licence was issued in November 2001. The negotiating parties reached agreement that the act may be done subject to conditions to protect the native title party's cultural heritage and the native title party and grantee party executed a site clearance agreement.

In August 2003 the native title party made an application pursuant to s. 35 of the NTA for a future act determination under s. 38. The native title party subsequently filed an amended application on the basis that, because of the death of one of the persons comprising the registered native title claimant (RNTC), they were not able to execute a state deed in accordance with s. 31(1)(b) of the NTA (deed) to give effect to the agreement. No death certificate had issued in respect of the deceased.

As a minute of consent determination signed on behalf of each of the negotiating parties was lodged, the Tribunal was required to hear the parties to satisfy itself that a consent determination was appropriate—at [7].

The Tribunal conducted a preliminary hearing into the application, as it was concerned as to the adequacy of two affidavits lodged on behalf of the native title party for the purpose of the proposed consent determination, namely:

- affidavit of the native title party's consultant negotiator which was comprised largely of hearsay (consultant affidavit); and
- affidavit of one of the persons comprising the RNTC confirming the death of the deceased (RNTC affidavit). The Tribunal was concerned, as the deponent's signature was represented by an 'x' without any information as to whether the deponent could read or that the contents of the affidavit had been explained to her and that she confirmed its truth—at [8].

At the hearing, testimony was given by another of the persons comprising the RNTC and referred to as the RNTC coordinator in the consultant affidavit (RNTC coordinator). The RNTC coordinator confirmed that the deponent of the RNTC affidavit could not read or write English and that the contents of that affidavit had been read and explained to the deponent prior to her affixing her mark by way of signature.

Testimony was also given about the explanation given to, and signing of the site clearance agreement and deed by the RNTCs other than the deceased—at [11].

Evidentiary issues

The Tribunal was satisfied that the member of the RNTC who had not executed the deed was deceased and that the other persons comprising the RNTC had understood and consented to the site clearance agreement and the consent determination—at [15].

Decision

The determination was made that the future act could be done.

Mt Gingee Munjie Resources Pty Ltd/Victoria/Thorp [2003] NNTTA 125

Hon CJ Sumner, 22 December 2003

Issue

This decision considered the preliminary issue of whether a faction within the persons comprising the native title party were a native title party with authority to assert that the grantee and government parties did not negotiate in good faith. The Tribunal also considered the requirements in respect of the obligation to negotiate in good faith where a native title claim group has split into two factions.

Background

A s. 29 notice relating to the grant of a mining lease was issued in September 1997. In July 2003 the grantee party made an application to the Tribunal under s. 35 of the NTA for a future act determination.

The native title claim group in this matter was split into two factions, known as the Gunai and Kurnai factions. The Kurnai faction alleged that the government and grantee party had not negotiated in good faith as required by s. 31(1)(b) of the NTA.

Preliminary point

The Tribunal considered the preliminary point of 'whether the Kurnai faction only was a native title party with authority to assert that the other parties did not negotiate in good faith'—at [10] and [13].

The government party contented that the native title party is a single entity and must act jointly and relied on earlier Tribunal decisions in which the Tribunal found that a native title party was the registered native title claimant (RNTC) acting on behalf of the claim group collectively, and not each individual person named as comprising the applicant and RNTC—at [14] to [19].

The Kurnai faction sought to distinguish the 'native title claim group' under s. 61(1) of the NTA, a collective non-severable entity, from the native title party in the right to negotiate provisions—at [21].

The Tribunal did not accept the Kurnai faction's submission, noting that:

- the sections of the NTA relating to making a claimant application and the right to negotiate are inextricably linked. It is indisputable, having regard to the definitions of 'the applicant' (s. 61(2)), 'registered native title claimant' (s.253) and 'native title party' (s. 29(2)(b) or s. 30(1)(a)) that the status of 'native title party' depends on there being a native title claim and a person or persons who are authorised to make the application on their behalf who are 'the applicant'—at [22];

- allowing individuals named on an application to require separate negotiations and agreements would impede the workability of the NTA—at [24];

- the Tribunal's interpretation has been supported in the Federal Court decision (Stone J) of *Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation for NSW* [2003] FCA 981—at [26].

It follows that if any of the persons comprising the native title party is not acting with the authority of the claim group, then it is not permissible to make a contention about a lack of good faith—at [29].

The Tribunal found:

- individuals comprising the applicant or factions within it are not a native title party and do not have standing to contend that another party did not negotiate in good faith unless they have been authorised to do so by the claim group;

- there was no evidence of such authorisation, and the other persons

comprising the native title party did not contend there was a lack of good faith; and

- as a consequence it could not be accepted that the native title party contests that the other parties negotiated in good faith—at [36].

Good faith

The Tribunal summarised the law in respect of the obligation to negotiate in good faith—at [42] to [48], and concluded that the split in the native title party was a highly relevant factor to whether the other parties had negotiated in good faith. The Kurnai faction had insisted on separate negotiations and the Tribunal found this position untenable and unacceptable in right to negotiate proceedings and to mean that the native title party had not negotiated in good faith. The Tribunal expressed the view that, having obtained the benefits of the registration test, the persons comprising the native title party must act in a cooperative way consistent with the basis for the registration when exercising the right to negotiate about future acts— [50] to [55].

On this basis, the Tribunal found that the government party and grantee party had negotiated in good faith as required by s. 31(1)(b) and stated:

> In the circumstances of this case I find that the content of the obligation is minimal. Where a Government party or grantee party have shown an intention to negotiate in good faith, commenced steps to do so and made proposals in relation to the matter and are confronted with a refusal by the native title party to negotiate unless those negotiations take place separately with persons named as the applicants or factions within the group the Tribunal is entitled to conclude in an almost summary way that the obligation has been fulfilled—at [55].

In case the Tribunal had erred in its interpretation of the law relating to who is 'the native title party', it went on to consider the negotiations over the period 1998 to 2003—at [56] to [83], and the Kurnai faction contentions—at [84] to [94].

The Tribunal noted that since mid-2000, the right to negotiate process in Victoria had been operated by a system of dual *pro forma* deeds and the policy of the native title representative body for the area (Mirimbiak) which discouraged the government party from active involvement in negotiations between the native title party and the grantee party (Mirimbiak policy)—at [73] to [77].

The Kurnai faction contended, amongst other things, that the government party had not participated in the negotiation process. The Tribunal considered that it was entitled to have regard to the specific practice which had developed in Victoria in relation to negotiation in good faith in assessing the extent of the government party's obligations and found that the content of the government party's obligation was understandably conditioned by that practice—at [84], [92] and [93].

Decision

The Tribunal found that the government and grantee parties had fulfilled their obligation under s. 31(1)(b) and the Tribunal had jurisdiction to conduct an inquiry.

For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.
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