



Native Title Hot Spots

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Cases

New cases—Tribunal alert service

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Proposed determination of native title – Rubibi No 6

Rubibi Community v Western Australia (No. 6) [2006] FCA 82

Merkel J, 13 February 2006

Issues

This is a further judgment following on from *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (Rubibi No 5), summarised in *Native Title Hot Spots* Issue 16. The issues dealt with in this decision include:

- n the identification of the native title determination area;
- n the criteria for membership of the native title holding community;
- n the nature and extent of the native title rights and interests possessed by the native title holding community.

The findings in relation to self-identification as a requirement for membership of the native title holding group and in relation to succession under traditional law and custom are, among others, of interest.

Background

In Rubibi No 5, his Honour Justice Merkel found (among other things) that:

- n the Yawuru community was a recognisable body of persons who were likely to be the

descendants, on an ambilineal or cognatic basis, of the members of the Yawuru community at sovereignty;

- n it could be inferred that the Yawuru community had a continuous existence from sovereignty to the present time;
- n the members of the present Yawuru community are descended from the members of the Yawuru community at sovereignty in accordance with traditional laws and customs;
- n there were two legal traditions practiced in the area covered by the application – the southern and the northern tradition;
- n the source of the traditional laws and customs for both traditions was the *Bugarrigarra*;
- n the southern tradition was still acknowledged and accepted by the Yawuru community as governing all aspects of that community's traditional life;
- n the evidence showed the Yawuru community still acknowledged and observed the traditional laws and customs that have, since sovereignty, constituted the normative system under which the native title rights and interests in issue were claimed, despite some changes to, and evolution of, those laws and customs;
- n communal native title rights and interests were possessed only by the Yawuru community and not (as had been argued by some Indigenous parties) by the members of the clans of that community;
- n the evidence established a linkage between the law, the tribal and the linguistic boundaries created by the *Bugarrigarra* and spiritual connection to Yawuru country;
- n the co-incident linguistic, law and tribal boundary formed part of the relevant normative system at and since sovereignty—at [3] to [7].

Identification of the native title determination area

The area covered by the claimant application dealt with in this case was divided into the area south of Broome (the southern area) and the area in, adjacent to and north of Broome, extending to Willie Creek (the northern area). The parties disputed whether the northern area was the country of the Djugan rather than the Yawuru community. (It was not disputed that Yawuru community had an historical association and a connection with the southern area.)

The State of Western Australia submitted that the Djugan tribe, which practices the northern tradition, was a separate society at, and for some time after, sovereignty was asserted. Therefore, it was submitted, even if the Djugan subsequently lost its separate identity as a tribe and was ‘absorbed’ into the Yawuru community, this had occurred post-sovereignty. Therefore, the native title rights and interests of the Djugan could not become native title rights and interests possessed by the Yawuru community.

The Yawuru claimants argued that the Djugan were a clan or subgroup of the Yawuru and that, in order to prevent Djugan country becoming ‘dead country’, the traditional laws and customs of the Yawuru provided for succession to Djugan country, which had occurred.

The court noted the ‘difficulties involved in determining the identity and nature of the community occupying the Yawuru claim area at and since sovereignty’. While the earliest colonial contact took place late in the nineteenth century, ‘there was little reliable anthropological or linguistic research until the late 1920s and the 1930s’ which, while helpful, only incidentally touched on the relevant issue—at [23].

Therefore:

In an endeavour to determine the identity and nature of the Yawuru community, I have...given particular weight to...the views expressed by Aboriginal elders prior to the commencement of

the present native title claims...[because] those views are based primarily on the traditional laws and customs passed down to those elders from their elders and can be taken to reflect a traditional view of the matters being addressed. While I do not discount the more recently expressed views in relation to the same matters, it is inevitable that, to some extent, those views may have been influenced by the existence of the native title claims—at [24].

The Djugan tribe

Merkel J was satisfied that:

- n the Djugan were devastated by the colonisation of their land and by the early 1900s were struggling to survive as an identifiable group;
- n the sudden and early disintegration of the Djugan explained why the subsequent ethnography concerning the Djugan was so problematic;
- n in spite of the shortcomings of that ethnography, the Yawuru claimants were not able to point to any early ethnography that expressed a view contrary to that contended for by the state or which supported their claim that no significant distinction was to be drawn between the Djugan and the Yawuru at sovereignty;
- n some of the evidence supported there being no significant distinction between the Djugan and the Yawuru but this was consistent with the absorption of the Djugan community into the Yawuru community during the twentieth century, rather than being inconsistent with the views expressed in the early ethnography;
- n the early ethnography established it was more likely than not that the Djugan and the Yawuru practiced different legal traditions and were associated with different areas in the claim area at sovereignty i.e. northern for Djugan and southern for Yawuru—at [28] to [31].

However, his Honour was of the view that:

- n this did not necessarily mean that Djugan and Yawuru each possessed their own discrete

communal native title rights and interests at and since sovereignty in respect of the northern and southern areas respectively;

- n members of a 'community' may possess communal native title rights and interests, albeit that they are 'intramurally allocated' to different groups or subsets of the community;
- n it was necessary to consider the totality of the evidence concerning the Djugan and the Yawuru in order to determine whether, notwithstanding their cultural and other differences at and since sovereignty, the Djugan and the Yawuru were one native title holding community that had the necessary connection with Yawuru 'country' at a communal level—at [32] to [33].

Yawuru country

The court noted that there was 'extensive' evidence to the effect that there was only one native title holding community, including evidence given by senior law men and women, which had not been seriously challenged. Some of the evidence relied on clearly predated the native title claim. Some also came from law men belonging to areas adjacent to the application area.

This evidence was significant because:

[A] large portion of it is derived from senior Aboriginal elders whose views are based on their understanding, derived from their elders, of 'country' as laid down by the *Bugarrigarra*, which is recognised and accepted as the source of the southern and the northern traditions practiced in the claim area—at [43].

Merkel J considered that, viewed as a whole, the evidence supported a finding that the traditional laws and customs acknowledged and observed by the Yawuru community regard that community's 'country' as including the northern and southern areas—at [43].

Practice of the northern and southern Traditions in Yawuru country

Merkel J noted (among other things) that:

- n although the northern and southern traditions were distinct mytho-ritual

traditions, each was underpinned by, and derived from, the one source i.e. a common belief in the *Bugarrigarra*;

- n a significant number of the Yawuru men had gone through both northern and southern law;
- n Djugan and Yawuru skin section and kinship systems were substantially similar, 'if not identical';
- n it was appropriate to infer from the evidence that the traditional laws and customs acknowledged and observed by the Yawuru community provided for the practice of the northern and southern traditions in the whole of the Yawuru claim area—at [44], [48], [50] and [52].

Therefore, his Honour did not accept the state's submission that the court should infer there were different native title holding communities.

Yawuru language in Yawuru country

It was noted that:

An important incident of the traditional laws and customs in Yawuru country was the belief that under the *Bugarrigarra* each of the traditions gave the people Yawuru language in Yawuru 'country'. Under the mytho-rituals of the *Bugarrigarra*, a particular language is placed within a particular country, and that is so notwithstanding that various dialects of the language may be spoken—at [53].

After considering the evidence, in particular a doctoral thesis that was both researched and published before the native title application was made, Merkel J accepted linguistic evidence that regarded the Djugan as a local Yawuru group who spoke a dialect of Yawuru that was also spoken by members of other Yawuru local groups—at [65].

The contemporary Yawuru community

His Honour concluded that the oral history evidence pointed strongly to the Djugan being part of the contemporary Yawuru community. His Honour considered that the evidence

concerning the Djugan persons identified in the genealogy before the court supported the view that persons of Djugan descent appeared to regard Djugan, Yawuru and Djugan Yawuru as part of the one community. His Honour concluded that the earlier cultural distinctions between the Djugan and the Yawuru were no longer in existence—at [66] to [77].

The native title holding community for Yawuru country

Merkel J found that:

- n the normative system that determined the existence and possession of native title in the Yawuru claim area, both at sovereignty and at the present time, was the system acknowledged to have been prescribed by the *Bugarrigarra* in relation to the Yawuru country;
- n in determining the content of the normative system under which the native title rights and interests in issue were being claimed, the communal belief in the *Bugarrigarra*, and its role in providing for the southern tradition and the northern tradition in Yawuru country, must be taken into account;
- n when the common source of both traditions was taken into account, there was no reason why each of the traditions should not be taken as recognising and providing for the practice of the other tradition in the Yawuru claim area by local groups who are part of the community of Yawuru persons designated by the *Bugarrigarra* to be speakers of the Yawuru language in Yawuru country;
- n the evidence established that, notwithstanding their cultural differences, there were extensive traditional connections and commonalities between the Djugan and the Yawuru, the common source of which was the *Bugarrigarra* in so far as it related to ‘Yawuru’ country;
- n the practice of the two traditions did not impair the status of the Djugan as a local group that was part of the Yawuru community at and since sovereignty;

- n in that regard, the relationship created by the *Bugarrigarra* between Yawuru language and ‘country’ was of particular importance in supporting a finding that, at and since sovereignty, the Djugan and the other Yawuru local groups formed one native title holding community;
- n on the balance of probabilities, irrespective of whether in anthropological terms they were correctly designated to be separate tribes, the extensive connections and commonalities between the Djugan and the Yawuru (including their common Yawuru language) resulted in the Djugan being designated by the *Bugarrigarra* as a subset or subgroup of the Yawuru speaking community at and since sovereignty;
- n that community was united in and by its acknowledgement and observance of a body of laws and customs that each of the community’s members believed had been laid down by the *Bugarrigarra*, in so far as those laws and customs related to Yawuru country;
- n by those laws and customs, the Yawuru community established and maintained the requisite connection, at and since sovereignty, with both the northern and southern areas (including the intertidal zone) of the application area;
- n as a result of the absorption of the Djugan into the broader Yawuru community during the twentieth century, the practice of the northern tradition by descendants of the Djugan was likely to have been substantially replaced by the practice of the southern tradition by the Yawuru community throughout the claim area;
- n however, the cessation of the practice of the northern tradition by part of the Yawuru community was no more than a cessation of the acknowledgment and observance of some of the discrete traditional laws and customs acknowledged and observed by one of the subgroups constituting the native title holding community;

n continuity of the practice of the southern tradition provided a continuity of the practice of the traditional laws and customs that provide the foundation for the Yawuru community's entitlement to native title in the Yawuru claim area—at [78] to [83].

Therefore the court concluded that the community possessing communal native title at and since sovereignty is the Yawuru community, of which the Djugan is a subset or subgroup—at [84].

Succession

It was not seriously in dispute that, as a result of European contact, the Djugan disintegrated as an identifiable group and became unable to sustain their own legal and cultural tradition.

There were no substantial differences in the evidence of the three main anthropological witnesses on the principles allowing for succession under traditional law and custom. It was a process of 'gradual accession' that may take longer than one generation. In the interim, there were transitional or interim rights and the obligation to look after the country. A 'south to north' succession would be easy in theory because it would be transition within a single tradition. It was easier if a commonality of culture was expressed through religious belief, particularly where there was a degree of commonality of shared practices and beliefs. In a 1992 ethnographic survey of land north of Broome, information provided by the Yawuru elders indicated that principles of succession formed part of the northern and southern traditions practiced in the Yawuru claim area.

However:

Whether there has been such a succession is a question of fact, the answer to which will depend on the nature and extent of the connections and matters in common between the two groups claimed to be involved in the succession—at [93].

In this case, it was found that the extensive connections and commonalities between the

Djugan and the Yawuru, which led to the finding they were one native title holding community, also led to finding that, over time, the Yawuru community succeeded to any discrete or specific connection or association the Djugan had with the northern area in accordance with the traditional laws and customs acknowledged and observed by the Yawuru community (including the Djugan subset of that community)—at [94].

His Honour pointed out that:

In this context, I have used the concept of a connection or association, rather than that of a native title right or interest, because of my view that such rights and interests were communal, rather than group rights or interests. However if, and to the extent that, the Djugan had any such rights or interests, I am satisfied that the Yawuru community has succeeded to them—at [94].

Connection – s. 223(1)(b)

His Honour repeated his comment from Rubibi No 5 that there is no simple dichotomy between the traditional laws and customs that are connected with land and waters and those that are not before going on to find that:

[B]y almost all of the traditional laws and customs acknowledged and observed by the members of the Yawuru community, the members of that community have always maintained, at the communal level, the requisite spiritual, cultural and social connection to the land and waters in the Yawuru claim area. Thus, I am satisfied that the essential connection, at and since sovereignty, between the laws and customs being acknowledged and observed by the Yawuru community and the Yawuru claim area has been established by the evidence. Accordingly, the Yawuru community, by those laws and customs, has the connection required by s 223(1)(b) of the NTA to the land and waters situated in the Yawuru claim area– at [95].

Self-identification or choice

In dispute was whether persons who identified as Goolaraboolo were part of the Yawuru (and, therefore, the native title holding) community. The claimants argued that they were.

The descendants of a Nygina man called Lulu identified as Goolaraboolo. Lulu lived in the Broome area. The Jabbar Jabbar (who had moved to an area north of Willie Creek) passed custodianship of their lands to Lulu due to concerns about their dwindling population. Lulu subsequently assumed a 'significant role in protecting the heritage and the continuance of both the northern and southern tradition in and around Broome'. While several Yawuru witnesses were of the view that Lulu had the same rights as a person of Yawuru parentage, there was no evidence that he ever expressly identified as a Yawuru person—at [101].

Merkel J was prepared to accept the evidence adduced by the Yawuru claimants that a person who is not of Yawuru descent, but who has assumed the role undertaken by Lulu, may be regarded by community members as having been incorporated into the Yawuru community—at [104].

However, the question was whether:

[S]uch a person would be accepted as a member of the native title holding community under the community's traditional laws and customs if he or she has not self-identified as a member of that community—at [104].

The court found:

- n no serious challenge was made to evidence that self-identification or choice (e.g. to 'follow' mother or father) was regarded as criterion for membership of the Yawuru;
- n while the evidence did not explore the issue of 'choice' in detail, it was unlikely that a person of mixed parentage who had chosen or elected not to be a Yawuru person or community member would be accepted as part of the community that had a traditional connection with Yawuru country;
- n the traditional laws and customs that evolved in order to take into account cognatic or ambilineal descent must be taken to have included a principle of choice because it would otherwise be difficult to

accept that a person's traditional and spiritual connection to the country of that person's parent could be established;

- n such a principle would also be necessary to enable identification of the 'traditional' community claiming to have maintained its connection to its country and to hold native title for that country—at [105] to [106].

Therefore, for the purposes of a claim to communal native title under s. 223(1) of the NTA, save where both parents of a person are Yawuru, it is unlikely that a person could qualify as a member of the Yawuru native title holding community 'if by conduct or otherwise he or she has not genuinely elected or chosen to identify as a member of that community'—at [106].

His Honour found that Lulu was a Nygina man who did not identify himself as a Yawuru person or as a member of the Yawuru community. Nor did those of his descendants who did not have a Yawuru parent. Therefore, the basis for claiming that Lulu and his descendants (i.e. the persons referred to as the Goolarabooloo) are part of the Yawuru community was not established. It was noted that those Goolarabooloo with a Yawuru parent who are members of the Yawuru community must be so because of their own election or choice and not because they are also Goolarabooloo—at [109].

Adoption or incorporation

It was claimed that persons may be members of the Yawuru native title holding community by adoption or incorporation if, among other things, they were 'recognised' by, or by descendants of, the apical ancestors as members of that community in accordance with traditional laws and customs. While it was accepted that membership of the Yawuru community may arise by adoption or incorporation in accordance with traditional laws and customs, the court had some doubt about:

- n whether a principle of 'recognition' was established by the evidence; and

n how such a principle might work in practice—at [110].

As already noted, his Honour was of the view that a person said to have been adopted or incorporated into the community must firstly have ‘genuinely elected or chosen to have become a member of the community’. The parties have an opportunity to raise whether the evidence also established a ‘recognition’ principle—at [110].

Extent of native title rights and interests recognised, subject to extinguishment

It was found that:

- n the Yawuru community used and occupied the Yawuru claim area at and since sovereignty and had maintained its religious and spiritual connection with that area;
- n the evidence and the findings concerning that use and occupation, in particular that the Yawuru native title determination area is defined by the Yawuru linguistic boundary, show that native title rights and interests are possessed throughout the claim area, rather than in particular sites in that area—at [112].

On the question of whether there was a native title right to exclusive possession (excluding the intertidal zone and putting questions of extinguishment to one side), the evidence established that, under traditional laws acknowledged and traditional customs observed, the Yawuru community had:

- n the right to use and occupy the claim area;
- n the right to ‘speak for’ and ‘look after’ the claim area;
- n the right to hunt and use ‘bush foods’ and ‘bush medicine’ throughout the claim area;
- n the right to give permission to others to access the claim area; and
- n the right to recognition of the above rights by elders from neighbouring ‘country’—at [113] to [114].

The second and fourth rights are similar to those identified in the joint judgment in *Western Australia v Ward* (2002) 213 CLR 1;

[2002] HCA 28 at [88] as being required to be proven where claimants seek a determination recognising a right to possession and enjoyment as against the whole world (exclusive native title).

His Honour found that:

- n there was a traditional requirement for permission to be sought by strangers to access Yawuru ‘country’, sourced in the *Bugarrigarra*, but as a result of both colonisation and modern realities, the requirement could not be, and is not being, enforced;
- n however, the difficulty in practical enforcement of a native title right is not a proper ground for denying its existence—at [115] to [116], referring to Sundberg J in *Neowarra v Western Australia* [2003] FCA 1402 at [310] and [371] to [376], summarised in *Native Title Hot Spots* Issue 15

Therefore, subject to the issue with areas in ‘common use by the general community’ noted below, the evidence supported the inference of a native title right of exclusive possession and occupation of the Yawuru claim area (excluding the intertidal zone) where there has been no extinguishment.

Like French J in *Sampi v Western Australia* [2005] FCA 777 at [1072] (summarised in *Native Title Hot Spots* Issue 8) Merkel J was not prepared to ‘extend’ the right to include the ‘broader’ concepts of ‘use and enjoyment’ and was of the view that the right to exclusive possession and occupation subsumed the right to ‘speak for’ the determination area—at [117] to [118].

The Yawuru claimants were invited to address the issue of whether the purposes for which the application area (including the intertidal zone) were traditionally accessed and used extended to a general right of commercial exploitation.

Exclusive possession in areas of common usage e.g. public beaches

As the application covers parts of the Broome

townsite and its surrounds that are subject to public or common usage, such as beaches, Merkel J had:

[S]ome concern as to how a [native title] right of exclusive possession and occupation can operate in any practical way in urban and other areas in common use by the general community. However...the difficulty in practical enforcement of a native title right is not a proper ground for denying its existence—at [117].

The court was of the view that, since use is ‘closely linked’ with extinguishment, the existence and extent of the native title right to exclusive possession is to be considered in that context, rather than in the context of practicality:

There may be some areas which have been in common usage but in respect of which native title may not have been extinguished. Accordingly, I propose to consider whether an exception in respect of exclusive possession is to be made for areas of that kind in my decision on extinguishment—at [117].

In this context, see s. 212(2) of the NTA, which allows the states, the territories and the Commonwealth to ‘confirm’ any existing access to, and public enjoyment of, (among other areas) beaches and ‘areas that were public places at the end of 31 December 1993’. The state has passed legislation to confirm such access (see Pt 3 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*). Any confirmation does not extinguish native title rights and interests: s 212(3). These provisions have not been subject to judicial consideration to date.

Intertidal zone

His Honour pointed out that:

[A]part from the fact that the rights claimed in the intertidal zone are not exclusive and are necessarily more limited than the rights claimed in the land areas, I see no proper basis for otherwise distinguishing between the native title rights and interests in that zone and in the land.

No such distinction was drawn in the evidence or in the traditional laws and customs acknowledged and observed by the Yawuru community—at [120].

Extinguishment and settling the terms of the determination of native title

The court will determine the extent of extinguishment, any remaining issues and the terms of the determination of native title in a further decision that (at the time of writing) is to be handed down on 28 April 2006.

Determination of native title by consent – Western Yalanji

Riley v Queensland [2006] FCA 72

Allsop J, 17 February 2006

Issue

The issue before the Federal Court was whether to make a determination of native title and other orders pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) over an area of land and inland waters on Cape York Peninsula in Queensland. The determination was to be subject to the registration of three Indigenous Land Use Agreements (ILUAs) within six months of the date of the order or such later time as the court may order.

Background

The application for a determination of native title made on behalf of the Western Yalanji was lodged with the National Native Title Tribunal on 22 September 1998 pursuant to s. 61(1) of the NTA. Leave to amend was granted in 2000 and again in 2002. On 28 September 1998, native title was recognised in an adjacent area in a determination relating to an earlier claimant application brought by the Western Yalanji People.

Mediation

The application was referred to the Tribunal for mediation on 8 August 2000 pursuant to s. 86B of the NTA. While noting it was not appropriate for the court to disclose the

conduct of any mediation, his Honour Justice Allsop said:

[I]t is not inappropriate to recognise...the success of the mediation process brought about by the skill of the Tribunal and the goodwill and the skilled and constructive efforts of the parties and their advisers. All are to be congratulated—at [8].

In mediation, the parties had reached agreement upon the terms of a draft determination recognising the existence of non-exclusive native title rights and interests held by the Western Yalanji People in relation to the determination area.

Court's power to make orders – s. 87

Section 87 empowers the court, if it is satisfied that such an order is within its power, to make an order in, or consistent with, the terms of the parties' written agreement without holding a full hearing. Where the court makes an order in which a determination of native title is made, s. 94A requires the court to set out details of the matters mentioned in s. 225 in the order in question—at [12] to [13].

Material before the court

The court had access to an affidavit and anthropological reports dealing with the connection of the Western Yalanji claim group to the determination area based on a genealogical report, consultation with officers of the State of Queensland, consultant anthropologists and elders of the native title claim group—at [15].

Allsop J noted that the anthropological report filed on behalf of the claimants:

- n illuminated, 'with some clarity, the existence of organised Aboriginal occupation and possession of the determination area extending back beyond the imposition of British sovereignty over the area'; and
- n 'confirmed the continuity of an identifiable society of Aboriginal people having a connection with the lands and waters of the determination area in accordance with

traditional laws which they acknowledged and traditional customs which they observed'—at [18].

The report stated (among other things) that:

- n the earliest written records (dating from around 1872) showed that, when European explorers arrived in the area, it was 'fully subject to an Aboriginal pattern of occupation and use';
- n the early ethnography (dating from the 1880s to the 1930s) confirmed that the occupants of the application area were Kuku Yalanji;
- n there had been a 'cognatic reworking' of descent which tended to either 'blur or dissolve the matrilineal-patrilineal distinction and the internal divisions of a country into clan estates';
- n the membership of the language-named group now asserts 'relatively undifferentiated joint rights in the group's country as a whole' and in the contemporary Aboriginal law of the region, 'this joint tribal title is conceived as essentially the right to possession inclusive of all beneficial rights and interests';
- n the fundamental principle on which the claimants' native title rights and interests are based – traditional ownership of the claim area by a language-named group that is now known as Western Yalanji – is attested to by both the early ethnographic records of the 1880s and 1890s and by the later ethnographic surveys of the 1930s—at [19] to [23].

In considering this report together with the underlying anthropological and genealogical material, the court bore in mind that:

[O]ther learned and experienced anthropologists and historians retained by the State...have been closely involved in the mediation of this application and thus in the bringing forward of this consent determination.

In that context, and in the absence of contest about the material which has been placed

before me, indeed with the expressed views of the State...that I should accept the material that has been placed before me, it is appropriate that I act on the material—at [24] to [25].

Determination made

In the light of the above, the court found that:

- n native title exists in relation to the determination area as agreed to by the parties; and
- n the Western Yalanji People have a long standing connection to the determination area under traditional laws acknowledged and traditional customs observed by them—at [25] to [26].

The court was satisfied that it was within the power of the Court to make the orders sought and that those orders could appropriately be made to give effect to the parties' agreement without a full hearing of the applicant's claim—at [10].

His Honour noted that:

This is a very significant day for the parties, in particular the applicant and the claim group. The recognition of native title takes place under the Act. It is the recognition by Australia and its laws (through orders made by the judicial arm of the Commonwealth) of the reality of the historical occupation of country by the Western Yalanji People and of the existence of their traditional laws and customs in relation to country long before European settlement. This recognition is not only an event of enduring importance for the Western Yalanji People, the applicant and the claim group, but it is also an event of enduring importance for all Australians. That is so because, one hopes, it is one part of the creation of a new national legacy within the framework of legislation of the Commonwealth of Australia—at [37].

Native title holders

The Western Yalanji People were determined to hold the native title rights and interests in accordance with the traditional laws acknowledged and the traditional customs observed by them. The Western Yalanji People are defined as:

[T]hose Aboriginal people who are descended from certain named ancestors or recruited by adoption into one of those descent groups in accordance with the traditional law and custom of the Western Yalanji People.

Nature and extent of the native title rights and interests

Subject to the qualifications and the other interests noted below, the native title rights and interests recognised in relation to the determination area are non-exclusive rights to:

- n be present on, use and enjoy the determination area by:
 - hunting, fishing and gathering for personal, domestic or non-commercial communal purposes;
 - conducting ceremonies;
 - being buried on, and burying native title holders;
 - maintaining springs and wells where underground water rises naturally for the sole purpose of ensuring the free flow of water;
 - taking, using and enjoying the natural resources for personal, domestic or non-commercial communal purposes;
 - maintaining and protecting from physical harm, by lawful means, those places of importance and areas of significance to the native title holders under their traditional laws and customs; and
- n inherit and succeed to the native title rights and interests.

Native title rights to water

The native title rights and interests recognised in relation to water are non-exclusive rights to:

- n hunt, fish and gather on, in and from water for personal, domestic or non-commercial communal purposes; and
- n take, use and enjoy water and natural resources therein for personal, domestic or non-commercial communal purposes.

Qualifications

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

- n the laws of the state and the Commonwealth; and
- n the native title holders' traditional laws and traditional customs.

The native title rights and interests:

- n do not extend to a right to control access to, or the use of, the determination area; and
- n do not confer possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others.

There are no native title rights and interests in, or in relation to, minerals and petroleum.

Other interests

The nature and extent of the other rights and interests noted in the determination area were:

- n those held under a special lease, an occupation license, various mining leases, exploration permits and fossicking permits;
- n those of the parties to various ILUAs;
- n the Cook and Mareeba shire councils' rights and interest both as local government and as entities exercising statutory powers; and
- n any other rights, interests and powers held by reason of the effect and operation of the laws of the state and the Commonwealth current at the date of the determination.

Prescribed body corporate

Native title is not held in trust. The Western Yalanji Aboriginal Corporation is the prescribed body corporate: see s. 57 of the NTA. After being entered onto the National Native Title Register, it will be a registered native title body corporate.

Determination ineffective until ILUAs registered or further order

The determination will take effect when three related ILUAs are registered on the Register of Indigenous Land Use Agreements. However, if they do not get registered within six months of the date of the determination, or such later

time as the court may order, the matter is to be listed for further directions.

Amendment to increase area a claimant application covers

***Turrbal People v State of Queensland* [2006] FCA 187**

Spender J, 2 March 2006 with corrigendum 10 March 2006.

Issue

The issue before the Federal Court was whether to grant leave to amend a claimant application to increase the area it covered. The increase would be as a result of including a number of reserves that were included in the original application but were subsequently removed when the application was amended.

Background

In *Turrbal People v Queensland* [2005] FCA 1796, the court decided to split the proceedings for dealing with the claimant application brought on behalf of the Turrbal People. The result was that Part A was programmed to trial and would be heard and determined separately from, and ahead of, the area contained in Turrbal Part B.

In relation to the application to amend dealt with in this case, his Honour Justice Spender noted that it 'had a somewhat unfortunate history'—at [2].

In the original application, filed in May 1998, the boundary of the area covered by the application (application area) was described. The application stated that native title was claimed only in relation to areas within that boundary that were unallocated State land, state forests, reserves (including timber reserves), national parks and areas held by the local city and shire councils used, or set aside for parks or similar purposes. However, any parts of those areas that were or had been 'subject to a valid grant of exclusive possession to a private party' or 'validly used in a manner that is wholly inconsistent with the

continued existence of native title' were excluded from the area subject to the application (the exclusion clause).

Subsequently, the application was amended to excise the reserves from the application area. A motion seeking to reinstate the reserves was later filed but then abandoned during the course of the hearing.

In relation to the proposed amendment to the application dealt with here, the applicant sought to include 68 of the reserves previously excluded but formally included in the application as lodged in 1998.

It was proposed that the 'exclusion clause' in amended application would state that:

- n the area covered by this application does not include any area where native title has been validly extinguished except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B;
- n this application does not include any areas subject to a previous exclusive possession act defined under s. 23B of the NTA save where the NTA and/or the common law allows those lands to be part of a native title determination application;
- n the application does not include a claim for exclusive possession over previous non-exclusive possession act areas as defined in s. 23F of the NTA save where the NTA and/or the common law allows such a claim to be part of a native title determination application.

Spender J was of the view that there was 'no identity' between what is said to be 'not claimed' in the amended application and what was said to be expressly excluded in the original application i.e. those parts that: 'are or have been... validly used in a manner that is wholly inconsistent with the continued existence of native title'. The latter described 'operational inconsistency', which the court found was not 'co-terminus with a previous exclusive possession act', a point that may

have 'significance' because s. 64 of the NTA deals with the amendment of applications— at [6] to [7].

Amendment of applications under s. 64

Subsection 64(1A) of the NTA provides that:

An application may be amended to reduce area covered by an application. (This subsection does not, by implication, limit the amendment of applications in any other way.)

The court noted that ss. 64(1) and (2) provide that an amendment of an application must not result in the inclusion of any area that was not covered by the original application unless, in the case of a claimant application, it is an amendment to combine that application with another claimant application or applications. It is noted in s. 64(1) that the Federal Court Rules provide for the amendment of application.

It seemed to Spender J that, having regard to s. 64(1), 'the possible difficulty' that flowed from the way the exclusion clause was expressed in the original application compared with the way it was expressed in the amended application, could be met by granting the application to amend in the terms sought but adding the proviso that:

No area or land that was not covered by the original application is to be included in the amended claim— at [8].

In his Honour's opinion:

[T]he reference to 'application' in s 64(1) (a) [sic, presumably a reference to s. 64(1A)] means the application as the application is from time to time. This is an application to restore to...a claim...[areas] which were in the original application but which are not in the application as it presently is before the court. There is therefore, in the present application, no right in the applicant to amend relying on s 64(1) (a) [sic, read s. 64(1A)]. This application falls to be determined, it seems to me, on the more general provisions of amendment under the Federal Court Rules, in particular O 13 r 2.

That conclusion is reinforced, in my view, by the reference in s 64(1) to the ‘*original application*’— at [9] to [10], emphasis in original.

His Honour noted that there was nothing in *Walker v Queensland* [2004] FCA 640 which ‘pointed away from’ that conclusion—at [11].

In his Honour’s opinion;

[A]s in s. 64 itself, the word “*application*”, unrelieved by the adjective ‘*original*’ or ‘*claimant*’, means the ambulatory application, that is, the application as it is at any particular time—at [12], emphasis in original.

The question of amendment therefore came down to one of discretion—at [13].

Factors going to discretion

There were a number of matters that the Court said were in favour of granting the amendment sought:

- n the reduction in the number of reserves, from 935 in the original application to 67 or 68 in the amended application, was the consequence of a great deal of detailed and considered work; and
- n there was no evidence before the court ‘to contradict the material going to the bone fides and the merits of the amended claims’—at [14].

The Court concluded that:

[T]he resolution of today’s question is in the context of a bona fide, credible claim, a claim that is not devoid of any merits of ultimate success. The matter simply falls to be determined on the basis of discretionary factors—at [14]

The State of Queensland opposed the amendment, contending that there was nothing to stop the applicants making a fresh claim in respect of the 68 reserves. It was accepted that a new claim would need to have work done on it in respect of the requirements of the NTA, such as notification and the likely involvement by other parties. There would also

be tenure history research in respect of those 68 claimed reserves which, according to the state, could take some 12 months. The state submitted it was better that the matter proceed unamended in respect of the Part A proceedings and then a second claim in respect of the proposed new reserves follow ‘down the track’— at [15].

The applicant conceded that, should some of the reserves be reinstated, delays in the current programming orders bringing Part A to trial would occur. However his Honour was of the view that:

The delays are, it seems to me, not inconsiderable and have to be weighed in the context of the whole history of the matter to date.

It seems to me that the fundamental matter to be considered is the desirability under the general law, and in particular by the provisions of the Act itself, to avoid a multiplicity of claims if that is at all possible— at [16] to [17].

The observations of Lee J in *Champion v Premier and Western Australia* [1999] FCA 581 (Champion), including, at [10], that ‘that it would be undesirable for multiple separate determinations of the native title interests of a native title claim group to be made in respect of the area over which native title is claimed in the application lodged by that claim group’, were cited with approval, although His Honour noted the application to amend in *Champion* was not opposed—at [18] and [19].

It was also noted that *Champion* dealt with combining 18 overlapping applications to reduce them to three, whereas this case was:

[C]oncerned...with the probability of successive proceedings to parts of the same non-overlapped area by a single claimant [group]. That seems to me to reinforce the desirability of giving effect to the avoidance of multiplicity of proceedings, recognising, nonetheless, that there will be a postponement of the final resolution of the matters—at [20].

Decision

The court ordered (among other things) that leave be given to amend the application provided the amendment was not to include any area of land or waters that was not covered by the original application and, after the correction of typographical errors, the amended application should be filed and served on the parties to the Part A proceedings.

Additional notice

The court exercised the power available under s. 66A(4) to direct the Native Title Registrar to give ‘additional’ notice i.e. in addition to any notice of an amended application that the Registrar must give under s.66A(1) and (2). So, in this case, the Registrar must give notice of the amended application to those referred to in s. 66(3)(a) who are not already parties to the application and notify the public ‘in the determined way’ i.e. as set out in the Native Title (Notices) Determination 1998 (the Notices Determination). There is no ‘determined way’ to give additional notice as directed by the court under s. 66A (4) in the Notices Determination but, presumably, notice given in accordance with Item 6(1) would suffice.

Comment

Walker’s case dealt with an application to reduce the area covered by the application, with the applicant relying on the ‘right’ to do so under s. 64(1A).

Further, no mention was made of *Kogolo v Western Australia* [2000] FCA 1036 (Kogolo). That was also a case where the applicant in a claimant applicant sought to reinstate an area that was included in the ‘original’ application but subsequently excluded by amendment.

In *Kogolo*, Lee J held that:

- n the ordinary meaning of the term ‘original application’ in s. 64(1) is ‘a source proceeding or initiating process’;
- n therefore, ‘on its face’, s.64(1) permits an amendment to include areas so long as they were included in the original

application i.e. the application in the form it was first lodged or filed;

- n if the draftsman of the NTA had intended that s. 64(1) should not permit an amendment to an application to increase the claim area, ‘that intention could have been effected by stating in simple terms that an amendment to an application must not result in the inclusion of any additional area of land or water’—at [9] and [16].

With respect, it appears that Lee J’s view in *Kogolo* is to be preferred i.e. that s. 64(1) rather than s. 64(1A) is the relevant provision in the circumstances.

Prescribed body corporate determination for Ngarluma people

Daniel v Western Australia [2006] FCA 271

RD Nicholson J, 21 March 2006

Issue

The issue in this case was whether it was appropriate for the court to determine the prescribed body corporate (PBC) to hold the native title rights and interests of the Ngarluma People when there were appeal proceedings on foot that may affect that corporation. This would finalise the Ngarluma/Yindjibarndi native title determination made on 2 May 2005 in *Daniel v State of Western Australia* [2005] FCA 536.

Background

In the Ngarluma/Yindjibarndi native title determination, the court determined that the Yindjibarndi Aboriginal Corporation was to hold the native title rights and interests of the Yindjibarndi People on trust for the Yindjibarndi People. The applicants were given six months to nominate a PBC for the Ngarluma People: see ss. 56 and 57 of the *Native Title Act 1993* (Cwlth).

On 26 July 2005, the Ngarluma People filed and served a notice nominating the Ngarluma

Aboriginal Corporation. They also filed and served a consent of the Ngarluma Aboriginal Corporation to the nomination as the PBC for the Ngarluma People. Notice of the nomination was given to the respondents and there was no opposition. The State of Western Australia filed submissions in support of the determination of the PBC.

The appeal proceedings

The state has filed a cross-appeal against (among other things) the manner in which the native title holders were described in the Ngarluma/Yindjibarndi native title determination i.e. by reference to 'Ngarluma People' and the 'Yindjibarndi People' without defining those expressions or providing a means of determining who is included within those terms. If it is successful, it may affect the validity of the rules of the Ngarluma Aboriginal Corporation. The Commonwealth has also cross-appealed against (among other things) the provision in the determination for more than one PBC, arguing that there should only be one PBC in respect of that part of the determination area where native title was recognised. If this is successful, a new PBC will have to be incorporated.

Submissions

The state submitted that, notwithstanding the cross-appeals, it was appropriate for orders to be made in the terms sought for the following reasons:

- n the Ngarluma/Yindjibarndi native title determination is taken to be valid and operational until overturned. It must be presumed, therefore, that the orders programming the nomination of a PBC for the Ngarluma People conforms with the determination and should proceed;
- n orders had already been made determining the Yindjibarndi Aboriginal Corporation as the PBC for the Yindjibarndi People, in conformity with the Ngarluma/Yindjibarndi native title determination. If either cross-appeal was successful, the Full Court of the Federal Court may need to make orders

dealing with the Yindjibarndi PBC determination. There was, therefore, no further disadvantage in also dealing with a Ngarluma PBC determination;

- n the Ngarluma and Yindjibarndi peoples acknowledged that an amendment to the rules of each PBC (to redefine the membership) would be required if the state's cross-appeal was successful. If the Commonwealth's cross-appeal was successful, new prescribed bodies corporate would have to be constituted in respect of both the Ngarluma and Yindjibarndi People—at [6].

It was therefore apparent to his Honour Justice Nicholson that the cross-appeals would not be prejudiced by the proposed determination of the Ngarluma PBC nor would the success of either cross-appeal occasion excessive or inappropriate inconvenience, particularly given that the Yindjibarndi PBC already existed—at [7].

Decision

The court was therefore persuaded that the application should be allowed and the order determining the Ngarluma Aboriginal Corporation to be the PBC for the Ngarluma People should be made—at [8].

Fishing 'under Aboriginal tradition' – s. 14 of Queensland Fisheries Act

***Stevenson v Yasso* [2006] QCA 40**

McMurdo P, McPherson JA and Fryberg J

Issue

The issue in this case was the application of s. 14 of the *Fisheries Act 1994* (Qld) (the Fisheries Act). That section provides (among other things) that 'an Aborigine may take, use or keep fisheries resources, or use fish habitats, under Aboriginal tradition'. Similar cases have appeared in other jurisdictions—see, for example, *Derschaw v Sutton* (1997) 17 WAR 419.

In a native title context, this case is of interest because of the approach the Queensland Court of Appeal took to issues such as the meaning of ‘native title holder’ and ‘Aboriginal tradition’. Only these issues are noted below. In particular, there is an interesting discussion by her Honour President McMurdo of the defence of ‘honest claim of right’ under s. 22 of the *Criminal Code 1899* (Qld) at [52] to [67] which is not summarised here.

Background

Riccardo Yasso was charged under s. 84 of the Fisheries Act with unlawfully possessing commercial fishing apparatus of dimensions greater than that prescribed, while not holding an authority to do so—namely a 53m long monofilament gill net with a 51mm mesh size.

In brief, the evidence was that Mr Yasso admitted to owning the net in question and to using it to fish on the day in question. He claimed that fishing in this way in the area concerned was a tradition of the Darumbal Aboriginal people, that he had been given permission to fish in this manner by a Darumbal elder and that the area concerned was the traditional country of the Darumbal. The elder concerned confirmed this in evidence. However, the evidence of use of nets—like the one Mr Yasso had in his possession—given in this case, only went back 30 years. Further, the chairman of a body claiming to act as the ‘representative’ of the Darumbal people, the Darumbal-Noolar Murree Aboriginal Corporation (the corporation), gave evidence that while nets were traditionally used by the Darumbal people for fishing, the corporation had met with the Marine Park Authority and agreed to stop the use of gill nets in the area where Mr Yasso had been fishing. However, there was evidence that not all Darumbal people considered they were bound by decisions of the corporation. Their Honours were divided on whether using a gill net was an acceptable modification of Aboriginal traditional (see below)—at [19] to [26], [50], [93], [115], [116] and [152].

In 2003, Mr Yasso was found not guilty in the Rockhampton Magistrates Court. The magistrate concluded that Mr Yasso was acting as an Aborigine under s. 14 of the Fisheries Act i.e. in the traditional way of an Aborigine taking fish by means of a net.

The respondent, an officer of the Queensland Department of Primary Industries, successfully appealed to the District Court, which held that:

- n section 14 of the Fisheries Act had no application to a charge under s. 84 of that Act;
- n if s. 14 did apply to s. 84, on the evidence Mr Yasso was not an Aborigine;
- n if Mr Yasso was an Aborigine, there was no evidence that he took fish under Aboriginal tradition;
- n the *Native Title Act 1993* (Cwlth) (NTA) had no application to a charge under s. 84 of the Fisheries Act—at [2].

The essence of Mr Yasso’s appeal was whether the District Court was right in overturning the magistrate’s finding that he was not liable under s. 84 of the Fisheries Act because of s. 14—at [9].

Section 14 of the Fisheries Act, headed ‘Aborigines’ and Torres Strait Islanders’ rights to take fisheries resources etc’ relevantly provides, subject to certain conditions, that an Aborigine may take, use or keep fisheries resources, or use fish habitats, under Aboriginal tradition.

The Court of Appeal approached the matter by examining several key issues, including:

- n the correct interpretation of s.14;
- n Mr Yasso’s Aboriginality;
- n the meaning of ‘Aboriginal tradition’

The correct interpretation of s.14

A majority of the court concluded that s. 14 of the Fisheries Act applied to an offence under s. 84 of the Fisheries Act—McMurdo P at [37]

and [81] and Fryberg J at [129], with McPherson JA dissenting.

Mr Yasso's Aboriginality

Mr Yasso identified with both the South Sea Islander community and the Darumbal Aboriginal community.

McMurdo P considered there was 'ample' evidence to support the magistrate's finding that Mr Yasso was an Aborigine:

That word should be given its ordinary meaning subject to the assistance given in the *Acts Interpretation Act 1954* (Qld) and relevant judicial interpretation. It does not require an ethnological inquiry of a scientific, historical or scholarly character...Pertinent considerations are whether the person said to be an Aborigine is of Aboriginal descent, identifies himself or herself as an Aborigine and is recognized in the Aboriginal community as being an Aborigine—at [38].

The President was of the view that there was 'undisputed' evidence of Mr Yasso's Aboriginal descent through his grandmother, a Darumbal woman, and that it could be inferred from other evidence that he identified as a Darumbal person and was recognised as Darumbal by Darumbal people. Therefore, the magistrate was reasonably entitled to find that Mr Yasso was an Aborigine—at [38].

McPherson JA and Fryberg J agreed, although both were somewhat less impressed with the evidence—at [81] and [133] respectively.

Fryberg J commented that:

Mr Yasso gave evidence that he was a Darumbal person, and on that point he was strongly challenged [including by some Darumbal people]. His evidence was not particularly impressive. His grandmother was Darumbal (and therefore his father was half Darumbal) and, putting it at its highest, he himself identified as Darumbal in addition to his identification as a South Sea Islander. Against him was the fact that he had initially described himself when intercepted by the fishing

inspectors only as a South Sea Islander...although later in the conversation he described his ancestry as "aboriginal and South Sea Islander"; he had been accepted only as an associate member of the Aboriginal Corporation created to represent the Darumbal people, when he would have been accepted as a full member were he perceived by the Darumbal as one of themselves; and he seemed to have had little contact with the Darumbal people. As Mr Hatfield [chairman of the corporation] said, apparently with some vehemence:

[Mr Yasso]...didn't assert any Darumbal heritage that night...Why didn't he say that [he was Darumbal] when he applied for membership? All of a sudden he's caught fishing, he's in trouble and 'I'm a traditional owner, you know.' So, you know, you've really got to get your facts in order, eh?

Mr Yasso denied going to the meeting and denied that conversation. An adverse finding would not have been surprising. But the magistrate did not find adversely to Mr Yasso. He believed him. Mr Yasso was entitled to the benefit of that finding on the appeal to the District Court...There is no suggestion that the case falls into that unusual category where an appellate court may reverse a finding made at first instance based on an assessment of credibility—at [138], footnotes omitted.

The meaning of 'Aboriginal tradition'

Their Honours considered at length whether there was sufficient evidence that Mr Yasso was in possession of the net the subject of the charge 'under Aboriginal tradition' so that the prosecution had established the element in the charge of unlawfulness—at [39], [80], [82] and [134].

The evidence before the magistrate as to the traditional fishing rights on which Mr Yasso claimed to rely was not extensive. However, in McMurdo P's opinion:

[T]he definition of "Aboriginal tradition" in the *Acts Interpretation Act 1954* (Qld) does not require the establishment of native title under

the common law...but refers to “the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people”. The ordinary meaning, consistent with the dictionary, definitions of “tradition”, is “the handing down of statements, beliefs..etc...from generation to generation, especially by word or mouth or practice—at [47], footnotes omitted.

Fryberg J considered that this was not a case involving ‘situations where the very existence of an aboriginal [sic] tradition, as well as its characteristics, were in issue’. It was not a test case on native title:

This case involved a prosecution for a relatively minor breach of the Fisheries Act. It arose in a context where local aborigines [the Darumbal people], with the support of the Department [of Primary Industries], were trying to protect their traditional fishing ground from those whom they regarded as outsiders. It occupied less than a day in the...Magistrates Court. The magistrate delivered an *ex-tempore* decision, for which he is to be commended. The parties were under no obligation to turn the case into an expensive preview of proceedings which might be expected to take place on the hearing of the pending native title claim of the Darumbal people...This court should be astute to prevent the loser from belatedly attempting to widen the ambit of the issues, particularly when the attempt is made by fresh counsel on the basis of an error imputed to his predecessor—at [137].

His Honour was of the view that ‘tradition’ in the statutory context relevant to this case:

[N]eed not find its expression in or be sanctioned by rules; need not be traced back to any particular year (whether 1788 or 1828); and, most importantly, need not give rise to a right or interest or any kindred concept, or even be recognised by the common law—at [140]. His Honour is referring here to some of the elements of proof of a native title claim.

McPherson JA, in dissent, was of the opinion that the meaning of ‘tradition’ in the Fisheries Act must be read so as to be consistent with

the NTA, otherwise it would be invalid through operation of s. 109 of the Commonwealth Constitution—at [90].

Note that the NTA does not define ‘tradition’. Rather, it has been given its content in the context of the NTA through High Court interpretation—see for example, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (Yorta Yorta) at [46] and [87].

Whether Mr Yasso was taking or catching fish ‘under’ (which his Honour took to mean ‘by virtue of’) Aboriginal tradition was ‘the real question’. McPherson JA felt the evidence did not demonstrate:

[A]n Aboriginal tradition of using 50 m long drag nets to catch fish in 1828 or at any time prior to 30 years ago, and none at all to show that monofilament nets of the dimensions here in question (50m with a 51mm mesh size) were ever used as part of that tradition; or what quantities and for what purposes fish might be taken under that tradition—at [82] and [91].

His Honour was of the view that: ‘A generation is usually computed at 30 years...Thirty years of usage does not prove a tradition or usage that has passed from generation to generation’—at [90].

Burden of proof

McPherson JA and Fryberg J (McMurdo P dissenting) considered that the legislature intended to place the burden on Mr Yasso of proving on the balance of probabilities that he was an Aborigine acting under Aboriginal tradition—at [43] and [94] to [97].

Decision

The appeal was allowed with costs to be assessed.

Comment – s 211 and meaning of native title holder

Mr Yasso was not legally represented at any stage of the proceedings. His case at trial and on appeal was principally directed toward establishing that the Fisheries Act did not

prohibit him from having possession of the net because s. 211 of the NTA applied. Indeed, when originally confronted by a fisheries inspector, Mr Yasso produced ‘a laminated double-sided page’ containing a copy of s. 211 and indicated that he believed this entitled him to use the net in question—at [19], [112] and [156].

The prosecutor submitted to the magistrate that s. 211 had no application because Mr Yasso was not a ‘native title holder’ within the meaning of that Act and ‘you only become a holder once the Federal Court has made a determination or an agreement’s been reached ... by consent and the Federal Court has okayed it’: see s. 224 of the NTA. On the evidence there were only claimants under the NTA. Both the magistrate and the District Court judge accepted that submission,

despite the fact that Murrandoo Yanner successfully relied on s. 211 in High Court proceedings prior to any determination by the Federal Court recognising him as a native title holder—at [117], [119] and [155] and see *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA [53].

While the Court of Appeal did not decide the question of whether or not s. 211 applied, McMurdo P and, arguably, McPherson JA apparently agreed with the lower courts’ interpretation of ‘native title holder’. However, Fryberg J took the view that this was ‘wrong’ because: ‘A decision of the Federal Court on a native title application is declaratory of the existing position’ but his Honour said ‘nothing’ about whether or not a s. 211 ‘defence’ may have been available in this case—at [5], [73] and [155].

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