# Communal or group claim—interim Rubibi decision

## *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025

**Merkel J, 29 July 2005**

**Issue**
The main issue in this case, which deals with three claimant applications in the West Kimberley region of Western Australia, was whether the native title claimed was 'communal' or 'group' native title, i.e. 'community' or 'clan' based. It was found to be community-based.

**Interim decision**
This is what the court called an 'interim decision'. The reasons for Justice Merkel taking this step after the matter was fully heard were:

- the parties thought a 'mediated compromise' could be reached after the hearing finished;
- the court was prepared to refer the matter to mediation but to 'resolve a significant number of issues relating to the existence and nature of any native title' to the area concerned, an 'interim decision' would be delivered;
- the general consensus of the parties was that this would help limit, and perhaps resolve, the remaining issues by agreement in mediation, which relate to proof of the particular native title rights and interests claimed, including questions of extinguishment—at [12] to [13].

**Postscript on mediation**
As at the date of publication, no further dates were set for further mediation and the matter had been referred back to Merkel J.

**Background**
The competing, overlapping claimant applications dealt with here were made by the Yawuru community (the Yawuru claim) on a community basis, and the Walman Yawuru clan (the Walman Yawuru claims) who claimed on a clan basis. The state also argued in favour of clan or estate-based native title.

Initially, those bringing the Walman Yawuru claim were respondents to the Yawuru claim: see *Rubibi Community v Western Australia* (No. 3) (2002) 120 FCR 512 at [18], summarised in *Native Title Hot Spots* Issue 1 . However, they subsequently filed two claimant applications, including one claiming 'traditional custodianship' of the land and waters of the Minyirr clan. According to the second Walman Yawuru application, the Minyirr people were the western neighbours of the Walman Yawuru clan but had 'died out' and so the area passed to the Walman Yawuru clan as custodians in accordance with traditional law and custom. Both of the Walman

Yawuru applications covered areas that were wholly within the area covered by the Yawuru application.

In an earlier determination over a reserve that was not affected by either of the Walman Yawuru claims, Merkel J determined that the Yawuru community had native title to the reserve, a ceremonial area known as Kunin: see *Rubibi Community v Western Australia* (2001) 112 FCR 409; [2001] FCA 607 (*Rubibi*) . Some of the evidence given in that hearing was adopted in this matter.

Merkel J noted that the competing claims to the communal title or group (i.e. clan) based native title were incompatible and that if the court concluded the Yawuru claimants' native title was communal native title, the Walman Yawuru claim for group native title must be refused—at [8] to [9].

**Some legal principles**

Merkel J considered s. 223(1)(a) and (b) *of Native Title Act 1993* (Cwlth) (NTA) and the case law on point, identifying, among others, the following principles:

- native title rights and interests must find their origin in a body of norms or a normative system that existed at sovereignty over the claim areas in 1829;
- the fact of significant alterations to traditional laws and customs does not prevent them from giving rise to native title rights and interests provided they are possessed under presently acknowledged laws and presently observed customs that can still be characterised as 'traditional' and some 'interruption' in exercise of rights and interests is not necessarily fatal to a native title claim;
- the community or group claiming native title must show it has acknowledged and observed those traditional laws and traditional customs that recognise them as possessing rights and interests in relation to the claimed land and waters;
- the 'connection' required under s. 223(1)(b) may be spiritual, cultural or social;
- there is nothing in the NTA that incorporates a requirement of a biological link between the claimants and the holders of native title at sovereignty;
- the relationship between Indigenous societies and their land and waters is holistic in character—at [17] to [24] and [29].

Merkel J noted (among other things) that in this case:

- the evidence clearly established that the traditional laws and customs relied upon by the Walman Yawuru claimants were the traditional laws and customs of the Yawuru community and that the traditional laws and customs observed by any of the clans of that community were 'entirely derivative and are indistinguishable from' the traditional laws and customs of the Yawuru community;
- the critical question was whether, under the traditional laws and customs of the Yawuru community, either that community or the Walman Yawuru clan group possessed the native title rights and interests claimed;
- the question of whether native title is community or clan-based could not be answered without considering all of the laws and customs relied upon to establish native title;

- the evidence established that there were few, if any, traditional laws and customs that had no direct or indirect connection with the native title rights and interests asserted—at [18] to [19], [25] and [30].

His Honour noted that:

> In order to apply the above [legal] principles, which can now be taken to be well established, it will be necessary to consider the laws and customs relied upon to establish the native title rights and interests claimed, to determine whether they are traditional laws and customs that have normative content and, if so, to determine whether the native title rights and interests possessed under those laws and customs are possessed by the Yawuru community or by any of the clans constituting the Yawuru community. Thus, although the particular question for decision at this stage relates to the seemingly discrete issue of whether native title in the respective claim areas is clan or community based, that question cannot be answered without consideration being given to all of the laws and customs relied upon to establish that title—at [30].

**Oral evidence—general**

Merkel J made introductory observations about the reliability of oral histories and the contrasting views of various courts and anthropologists noting (among others) the comment in the joint judgment in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) that it is an 'impermissible premise that written evidence about a subject is inherently more reliable than oral history on the same subject'—at [36] to [39].

**Yawuru evidence**

Evidence was given by several law men and women and others of the Yawuru community and by five law men from surrounding tribes: Karajarri, Mangala, Nyangumarta, Nygina and Bardi—at [47].

His Honour found that the evidence confirmed that:

- both the Yawuru community and the Walman Yawuru clan shared a common element in that the *Bugarrigarra* (or *Buggarri* as called by the Walman Yawuru) is the core of their cultural and spiritual existence and the source of their traditional laws and customs;
- two traditions of law, which were kept separate, were said to apply to Yawuru country:
  - southern law practised by Yawuru, Karajarri, Mangala, Nyangumarta and Nygina peoples referred to as Yawuru law; and
  - northern law practised by the Bardi, Nyul Nyul, Jabirr Jabirr and Nyambal peoples referred to as Bardi law;
- there were common customs and laws but the two mytho-ritual traditions differ in their origins from mythical creatures;
- ultimately, the normative system relied upon by the Yawuru was the southern tradition—at [50] to [52] and [54] to [61].

The evidence allowed Merkel J to find (among other things) that:

- on balance, the evidence supported the southern tradition of law as still acknowledged and observed by the Yawuru community and was accepted as 'governing all aspects of life';
- evidence as to *rai* as a totemic connection between Yawuru persons and their *rai* place could be accepted;
- although there are few speakers of Yawuru language today, it is still acknowledged and respected as an important traditional link with the past and an effort to teach the present generation was evidence of that acknowledgement;
- skin group, kinship, *malinyanu* laws and customs still have an important role in the Yawuru community, although it is significantly diminished, particularly in regard to marriage;
- songs, dances and ceremonies are no longer a significant part of the daily existence of the Yawuru community but a link with tradition is maintained by stories that people believe link the Yawuru community with the *Bugarrigarra* and remain an important element of Yawuru life;
- the spiritual association with hunting and use of bush tucker has been diminished yet there remains a link between those activities and the *Bugarrigarra* ;
- the community was committed to protecting and looking after country and acknowledged the right to speak for country under traditional law and custom;
- the evidence on *nyiyarbi* or increase sites established there was knowledge and recognition of such sites but there was little current practice of rituals related to those sites;
- traditionally, strangers were required to ask permission to access the country and a modern variation remains sourced in that traditional requirement;
- community membership is established by reference to traditional law and custom rather than solely by descent;
- there should be no departure from the findings on genealogies in Rubibi No 1 that the Yawuru claimants are likely to be descendents of Yawuru people at the time sovereignty was asserted and are not a new community—at [77] to [79], [80] to [90], [96] to [109], [122], [136] to [153], [159], [162] to [163], [173], [178], [180] to [181] and see also [282] to [291].

**Walman Yawuru evidence**

The witnesses for the Walman Yawuru clan were all descendants of Ngobing Babere and Chimbere Sitocay. Merkel J noted that:

- Emma Nobing (also called Mimi), a senior law woman who married a non-Aboriginal in 1898, was the primary sources of the Walman Yawuru witnesses' evidence;
- the evidence supported the existence of racist policies in Broome that made it difficult for Mimi and her family to practise Aboriginal law and custom;
- the Walman Yawuru clan witnesses were unable to provide detail of the traditional laws and customs of the clan—at [191], [194], [206], [245] to [246].

By way of contrast, his Honour found:

> While a similar criticism might be made of some of the evidence given by the Yawuru claimants' witnesses, a significant distinction that can be drawn is that the Yawuru claimants' witnesses and, in particular, the senior Yawuru 'law men' explained the detail

> of the important spiritual underpinning of the traditional laws and customs as laid down in the southern tradition. The Yawuru claimants' witnesses also included senior 'law men' who were also able to provide much greater detail of the traditional laws and customs that they were acknowledging and observing—at [183].

There were difficulties in the evidence where Walman Yawuru witnesses identified themselves as a Yawuru people living on Yawuru country—at [201] and see also [209], [211], [217], [222] and [244].

On the evidence for the Walman Yawuru clan, Merkel J found:

- site specific evidence justified a finding of a special attachment of the Walman Yawuru witnesses to the *Mangalagun* area;
- most of the Walman Yawuru witnesses knew their skin and had a general understanding of the skin system and the proper way to marry but most did not follow it, apart from not marrying someone who was biologically close. Most had little knowledge of other peoples' skins;
- the Walman Yawuru witnesses recognised the importance of 'looking after country' and of having a general understanding of the spiritual significance to them of country and the need to protect it;
- their evidence about leaving food as an offering was an example of an observable pattern of behaviour that was not a traditional custom of the Yawuru community;
- matrilineal country holding clans, as they asserted, do not exist under the traditional laws and traditional customs of the Yawuru community;
- the evidence that the Walman Yawuru *rai* as not being site specific was a new idea and witnesses knew only that *rai* came from *Bugarri* , that they were born with it and when they died the *rai* goes back to Walman country or in some cases to *Mangalagun*, as their ancestor's place;
- the expulsion of one family from the clan (who supported the Yawuru claim) did not appear to have any proper basis in traditional law and custom;
- the evidence was consistent with the Yawuru claimants' contention that the present community remains a traditional and observant community but the Walman Yawuru witnesses were generally the least observant (which was not surprising given the urbanisation of Mimi's family in Broome)—at [233] to [239], [241] and [292] to [296].

His Honour noted that the Walman Yawuru clan's 'acknowledgement and observance' evidence was relevant to three issues:

- as the Walman Yawuru clan members were a very small part of the Yawuru community, the conclusion that they were among the least observant members of the community and the rejection of certain 'customs', such as matrilineal descent, would not lead to any reformulation of the conclusions on acknowledgement and observance by members of the Yawuru community;
- as those who claimed group, rather than communal, native title must establish they have rights and interests possessed under the traditional laws and customs acknowledged and observed by that group, the 'acknowledgment and observance' evidence was critical to whether the Walman Yawuru claimants could satisfy s. 223(1)(a);

- it was first necessary to be satisfied that clan-based native title rights and interests claimed are possessed under the traditional laws and customs of the Yawuru community;
- the Walman Yawuru witnesses' evidence, standing alone, did not establish clan-based native title—at [242] to [244].

It was noted that, prior to the dispute, the Walman Yawuru regarded themselves as Yawuru people whose country was Yawuru country:

> [A]ny serious pursuit of a claim that those areas are Walman Yawuru country … only arose as a result of that dispute. It was in those circumstances that the Walman Yawuru case evolved as an idealisation of the present to justify the competing Walman Yawuru native title claim of a clan, rather than a communal, title. … As explained above, that evidence was primarily given by persons who, in general, were not well placed or well qualified to give persuasive evidence as to the content of the traditional laws and customs of the Yawuru community—at [244].

His Honour pointed out that evidence given by the Walman Yawuru witnesses was in general terms and 'more as an assertion, rather than as an explanation, of any requirement that, under traditional law and custom, Walman Yawuru country is the country of the Walman Yawuru people or clan'. The main reasons for finding the evidence 'inherently unreliable' were:

- it was based mainly on recollections of what Mimi said more than 50 years ago;
- the written statements made by a number of the Walman Yawuru witnesses prior to the dispute were inconsistent, or difficult to reconcile, with the claim they pursued at trial;
- the finding that these witnesses were among the least observant gave the court little confidence in the reliability of evidence about their knowledge of the 'traditional' laws and customs of that community;
- a number of Walman Yawuru witnesses demonstrated an unwarranted readiness to elevate their assertion of a current practice or belief (for example, leaving food, expelling a family from the clan and matrilineal descent) to traditional law and traditional custom.

On the other hand, the evidence of the Yawuru witnesses as to the content of traditional laws and customs, which was generally preferred to that of the Walman Yawuru was:

- that there was no requirement for permission to enter upon areas to which clan members had an attachment;
- detailed and sourced in the *Bugarrigarra* ;
- also supported by the evidence or previous statements of senior 'law men';
- not beset by the problem of wishful reconstruction, misconception of current practice as tradition or an idealisation of the past—at [246].

Merkel J's findings were qualified as, at this point, they did not take into account the anthropological dispute as to clan-based title. The court noted that, if the evidence had supported a clan-based title, this alone would not necessarily resolve the claims

of the Walman Yawuru. For that reason, the findings to this point of the decision are based solely 'on the evidence given by the Walman Yawuru witnesses'—at [248].

**Anthropological evidence**

A number of anthropologists gave expert evidence, earlier anthropological works were referred to and the Yawuru claimants also relied upon anthropological evidence given in Rubibi . This summary discusses only the findings on the anthropological evidence in regard to clan estates, a discrete issue at this stage of the proceedings—see [27].

Merkel J regarded the anthropological evidence as important in three ways:

- as a conceptual framework for considering the indigenous evidence of traditional laws and customs:
- for discussions of earlier anthropological works;
- as a source of expert opinions on issues, including whether the Yawuru claimants' native title claim was a clan or communal title—at [252].

The anthropological evidence included reference to:

- Professor W.E.H. Stanner's work on the nature of clan-based estate proprietary rights of the Yirrkala society;
- reports by the experts for each claim group and the state;
- 1930s works by Father Worms as interpreted by Dr Van Gent.

**Clan estates**

Merkel J referred to his observations in *Rubibi* at [129] to [142], where the issue of clan- or group-based native title was also strongly contested, on continuity and community evolution—at [282].

The longstanding anthropological disagreement over the patriclan estate issue and concepts which underlie it were identified by Merkel J. Principles of Aboriginal landholding identified by Professor Stanner in 'The Yirrkala Case: Some General Principles of Aboriginal Land-Holding' were accepted by other anthropologists but dispute arose about whether or not:

- those principles applied generally throughout Australia and, in particular, whether they applied to the Walman Yawuru and Yawuru claim areas;
- Professor Stanner's dichotomy between primary and secondary rights applied to the Yawuru community because it was an ambilineal or cognatic community with rights in land devolving primarily by descent from either parent—at [306] to [315].

Merkel J summarised his findings on the 'problem' of clan-based claims:

> [T]he traditional anthropological distinction between the 'primary rights' of patriclan members and the 'secondary rights' of non-members at sovereignty is based on a view of an overarching title or ownership in respect of clan country that confers exclusive possession on clan members. However, that approach admits to numerous exceptions, which include spouses, children, band or horde members and 'law business'. …[T]hose exceptions may fall within the definition of native title rights and interests under ss 223(1) and 253 … . Thus, the nature and extent of the acknowledged 'secondary rights'

> undermines the premise of clan exclusivity or, put another way, of a rule of trespass in respect of clan country—at [354].

His Honour did not accept that, at sovereignty, Yawuru society followed the patriclan estate model or a model with a rule of exclusive possession—at [353] to [355], [357].

Merkel J went on:

> Turning to the society in question in the present case, the 'oral history' evidence and the anthropological evidence ... accepted … is unequivocally against the existence of patriclan estates under the traditional laws and customs *now* acknowledged and observed by the Yawuru community. … I accept that those laws and customs might have evolved from traditional laws and customs that provided for landholding to be akin to that of a patriclan estate model at or prior to sovereignty … [but t]he more likely hypothesis is that at sovereignty clan members had special attachments to, and responsibilities for, the areas with which the clan members were traditionally associated. … I regard it as unlikely that there was a clear rule of trespass or a requirement for permission in respect of Yawuru persons who are not clan members. Plainly, the numerous exceptions referred to above are against such a rule—at [356], emphasis in original.

For these reasons (among others), his Honour did *not* accept that:

- the exclusive native title rights and interests claimed by the Walman Yawuru claimants were held by clan members either at sovereignty or presently;
- the evidence established that such rights and interests are possessed under any subsequent evolution of those traditional laws and customs—at [357].

It was pointed out that these conclusions were limited to any rights and interests claimed by the Walman Yawuru clan members as such and were not concerned with any native title they may possess as members of the Yawuru community.

**Evolution of traditional law and traditional custom—patrifileal to ambilineal**

His Honour then turned to the anthropological evidence concerning evolution of law and custom since sovereignty. Having considered the expert evidence on point, his Honour accepted that:

> [I]t is likely that the Yawuru clan members had particular attachments to … areas with which the clan was traditionally or historically associated. However, the attachments and responsibilities, under the traditional laws and customs of the Yawuru people, did not amount to exclusive possession—at [362].

Subject to that qualification, the court accepted the evidence supported an 'evolutionary model' based on contingency provisions that existed under law and custom at sovereignty. This 'significant' conclusion confirmed the court's views that:

- the present cognatic or ambilineal structure and definition of the Yawuru community is in accordance with the traditional laws and customs acknowledged and observed by the Yawuru community;
- a change from a community similar to a patrifileal clan-based community to a cognatic or ambilineal based community is a change of a kind that was

contemplated under the 'contingency provisions' of those traditional laws and traditional customs—at [362] and [363].

His Honour then turned to answering three questions identified at [30], noting that it did not determine any of the issues although the questions were based on the findings already made—at [365].

**Question 1 – what is the relevant society?**
Merkel J found that the Yawuru community is a recognisable body of persons united in and by traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue are being claimed.

This finding was made on the basis that:

- the present community is a recognisable body of persons likely to be descendants of members of that community at the time of sovereignty;
- the source of the community's traditional laws and customs is the southern tradition and the holding, passing on and receiving of the community's traditional knowledge and law is laid down in that tradition, which formed part of the traditional laws and customs of the community at sovereignty and is still acknowledged and accepted as governing all aspects of the traditional life of the community;
- the findings on *rai*, Yawuru language, skin system, kinship and *malinyanu* laws and customs, traditional stories, name traditions, hunting and bush foods, looking after and speaking for country, increase sites and permission requirements demonstrate that the present Yawuru community acknowledges and observes the traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue are being claimed;
- while the form and practice of traditional laws and customs had changed in significant respects since sovereignty, those changes fall within traditional 'contingency provisions' premised on the fact that laws and customs evolve in response to new or changing exigencies to which all societies adapt;
- the changes or adaptations in this case were not such that it could be said that the native title rights and interests asserted are not possessed under the traditional laws and customs acknowledged and observed by the Yawuru community—at [367] to [369].

**Question 2 – are rights possessed, and is connection established, under traditional law and custom?**
His Honour found that, under the traditional laws and customs acknowledged and observed by the Yawuru community, native title rights and interests in relation to the respective claim areas are possessed by the Yawuru community and that community, by those laws and customs, has a connection with the claim area. It was found (among other things) that:

- under the traditional laws and customs acknowledged and observed by the Yawuru community, native title in the respective claim areas is possessed only by

and on behalf of members of the Yawuru community and not any of the clans constituting that community;
- the evidence supported the anthropological view of the 'necessary' relation between 'language and territory' and the linking of the law, tribal boundaries and spiritual connection to country, which is recognised and respected by the senior law men of the southern tradition;
- the co-incident linguistic, law and tribal boundary sourced in southern tradition forms part of the traditional laws and customs acknowledged and observed by the Yawuru community at and since sovereignty;
- the evolution of a cognatic and ambilineal system of descent necessarily brought to an end any patrilineal or similar system and resulted in any traditional laws and customs that once *might* have been possessed by clan members ceasing to form part of the traditional laws and customs presently acknowledged and observed by the Yawuru community;
- insofar as clan members have any special attachment to a specific area that is acknowledged by the Yawuru, it is not such as to constitute or give rise to a native title right or interest, as defined in ss. 223(1) and 253—at [370] to [375].

As to s. 223(1)(b) and 'connection', it was found that:
- while there is no simple dichotomy between traditional laws and customs that are connected with land and waters and those that are not, by almost all of the laws and customs acknowledged and observed by the members of the Yawuru community, the members of that community have the requisite spiritual, cultural and social connection to land and waters in the Yawuru claim area;
- therefore, the Yawuru community, by those laws and customs, has the connection required by s. 223(1)(b) to the area covered by the Yawuru claim;
- by those traditional laws and customs, members of the Walman Yawuru clan do not have such a connection with the Walman Yawuru claim area in their capacity as members of the clan—at [376].

**Question 3 – communal or group-based native title?**
Based on the conclusions noted above, and without considering the other questions such as extinguishment, his Honour found on an 'interim' basis that the native title rights and interests possessed in the Yawuru claim area are:
- communal native title rights and interests possessed by members of the Yawuru community; and
- not the group native title rights and interests claimed to be possessed by members of the Walman Yawuru clan members.