Proposed determination of native title – Broome

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

Merkel J, 13 February 2006

Issue

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:

- the identification of the native title determination area;
- the criteria for membership of the native title holding community;
- 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*, Justice Merkel found (among other things) that:

- the Yawuru community was a recognisable body of persons who were likely to be the descendents, on an ambilineal or cognatic basis, of the members of the Yawuru community at sovereignty;
- it could be inferred that the Yawuru community had a continuous existence from sovereignty to the present time;
- 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;
- there were two legal traditions practiced in the area covered by the application - the southern and the northern tradition;
- the source of the traditional laws and customs for both traditions was the Bugarrigarra;
- the southern tradition was still acknowledged and accepted by the Yawuru community as governing all aspects of that community's traditional life;
- 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;
- 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;

- the evidence established a linkage between the law, the tribal and the linguistic boundaries created by the Bugarrigarra and spiritual connection to Yawuru country;
- 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:

- the Djugan were devastated by the colonisation of their land and by the early 1900s were struggling to survive as an identifiable group;

- the sudden and early disintegration of the Djugan explained why the subsequent ethnography concerning the Djugan was so problematic;
- 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;
- 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;
- 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:
- 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;
- 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;
- 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 pre-dated 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:

- 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;
- a significant number of the Yawuru men had gone through both northern and southern law;
- Djugan and Yawuru skin section and kinship systems were substantially similar, 'if not identical';
- 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:

- 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;
- 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;

- 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;
- 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;
- 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;
- 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;
- 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;
- 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;
- 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;
- 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;
- 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;
- 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 Jabbir Jabbir (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:

- 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;
- 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;
- 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;
- 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:

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

- 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;
- 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 the right to:

- use and occupy the claim area;

- 'speak for' and 'look after' the claim area;
- hunt and use 'bush foods' and 'bush medicine' throughout the claim area;
- give permission to others to access the claim area; and
- 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 (summarised in *Native Title Hot Spots* Issue 1*)* 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:
- 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;
- 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 town site 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.