Determination of native title — Broome

Rubibi Community v Western Australia (No7) [2006] FCA 459

Merkel J, 28 April 2006

Issues

This decision, the seventh in the series of Rubibi cases, involves the making of a determination of native title over the town of Broome and its surrounds in the Kimberley region of Western Australia. It also deals with (among other things) the question of the extent to which native title is extinguished.

Background

Justice Merkel had previously decided that, putting questions of extinguishment to one side, the Yawuru community possessed a native title right to exclusive possession of the area subject to their claimant application, other than in relation to inter-tidal areas where native title could only be recognised as 'non-exclusive': see *Rubibi Community v Western Australia* (No 5) [2005] FCA 1025 (*Rubibi 5*) and *Rubibi Community v Western Australia* (No. 6) [2006] FCA 82 (*Rubibi 6*), summarised in *Native Title Hot Spots* Issue 16 and Issue 18 respectively.

While agreement was reached on many of the outstanding issues, several others were left to the court to decide, including:

- the operation of a native title right to exclusive possession over areas in 'common use', such as public beaches;
- whether the native title right to take and use natural resources should expressly be limited to 'non-commercial' purposes;
- whether the 'special attachment' of clan members should be noted in the determination as an 'interest' under s. 225(c) of the *Native Title Act 1993* (Cwlth) (NTA);
- the description of the native title holders and the circumstances in which 'self-identification' was required;
- the validity of certain freehold grants, reserves and a special lease;
- whether a licence to occupy created a legally enforceable right to a grant of freehold;
- the effect on native title of certain 'improvements' to areas subject to non-exclusive pastoral leases and mining leases;
- the application of ss. 47A and 47B.

Operation of native title right to exclusive possession in 'common usage' areas

Merkel J raised with the parties 'how a [native title] right of exclusive possession might operate in a practical way in urban and other areas in common use by the general community'—at [7].

The Yawuru claimants referred the court to s. 212(2) of the NTA, which empowers the states, the territories and the Commonwealth to 'confirm' any existing access to,

and public enjoyment of, waterways, beds and banks or foreshores of waterways, coastal waters, beaches or stock routes and 'areas that were public places at the end of 31 December 1993'. The State of Western Australia had passed legislation to confirm such access: see s. 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (TVA). This 'confirmation' does not extinguish native title rights and interests: s 212(3) of the NTA. The state submitted that the court's concern was 'also' addressed by extinguishment or as a result of the existence of common law rights that could be recorded as 'other interests' in the determination.

While there was no express finding on point, the court appears to have accepted these submissions. Public access to, and enjoyment of, waterways, beds and banks or foreshores of waterways, coastal waters, beaches or stock routes that 'existed' as at the date of the determination, 'so far as' it was confirmed by s. 14 of the TVA, are recognised as 'other interests' in the determination area. Common law public rights to fish and navigate in tidal waters are also are recognised as 'other interests' in the determination area.

The determination also provides that recognition of the existence of native title, whether 'exclusive' or 'non-exclusive' has 'no effect' on these 'other interests' to the extent of any inconsistency and, among other things, the doing of any activity by or under those 'other interests' prevails over the native title but does not extinguish it.

In this context, note Merkel J's views on the effect of 'common usage' on the application of ss. 47A or 47B, summarised below under the heading 'Occupation under ss.47A or 47B and in areas used by the public'. As a result, recognition of 'exclusive' native title over areas in public use was limited in any case.

Exclusive possession and exploitation of natural resources
The question here was whether the determination should limit the native title right to exploit resources to non-commercial exploitation. The Yawuru claimants argued that:

- such a limitation was inconsistent with the native title right to 'exclusive possession', which entitled the native title holders to determine the purposes for which the land and waters subject to that right were to be used;
- commercial exploitation of the resources under a native title right (whether exclusive or not) was the subject of extensive regulation by government;
- paragraph 211(2)(a) of the NTA only exempted native title holders from the restrictions imposed by such regulation if the native title right was exercised for 'non-commercial communal needs'—at [8] to [9].

His Honour found that the right should be limited to non-commercial purposes, preferring the submissions of the state and the Western Australian Fishing Industry Council (WAFIC) that (among other things):

- in relation to a claim for recognition of native title under the NTA, the court is not concerned with the common law rights that might attach to a right of exclusive possession but, rather, with the rights and interests possessed under traditional laws and traditional customs;

- the evidence did not support a finding of a native title right or interest to commercially exploit resources—at [10] to [12].

Therefore, the native title right to take and use resources was determined to be for 'personal, domestic or non-commercial communal purposes' only—at [12].

Clan's 'special attachment' is not 'other interest' under s. 225(c)

In *Rubibi 5* at [223] and [375], the court recognised that clan members had 'special attachments to specific areas' but concluded that any such attachment did not give rise to a native title right or interest. One of the Yawuru clans, the Walman Yawuru, sought to have that 'special attachment' recognised in the determination of native title as an 'other interest' for the purposes of s. 225(c). Merkel J refused to do so:

> The only 'rights' or 'interests' the Walman Yawuru clan members may have in relation to the Yawuru claim area are those held in any capacity they may have as members of the Yawuru community. Those rights and interests are the native title rights and interests ... set out in the determination pursuant to s 225(b) and ... not 'other interests' ... pursuant to s 225(c)—at [13].

Criteria for membership of native title holding community

In relation to the description of the native title holders, his Honour was satisfied that (among other things):

- where a person, descended from an apical ancestor, had two Yawuru parents, the criteria of self-identification or general community acceptance was not required to show membership of the native title holding community;
- where only one parent of a descendant was Yawuru, the criterion of self-identification must be satisfied; and
- people who were not descendants of an apical ancestor may also be members of the native title holding community (e.g. via adoption or having a long term physical association with and cultural responsibilities for it) provided that the criteria of self-identification and general community acceptance were satisfied—at [16].

The Walman Yawuru submitted that the criterion of general community acceptance should also apply where only one parent was Yawuru. While Merkel J admitted to being 'troubled' by whether that criterion should apply in those circumstances, it was decided that it should not because 'general community acceptance' was not required by the Yawuru community's traditional law and custom. On what it means to 'self identify', his Honour emphasised that: 'The genuineness of self-identification is to be determined by reference to all relevant facts, which can include past conduct in relation to self-identification'—at [17].

The Walman Yawuru also claimed the evidence did not justify incorporation of a person having high cultural knowledge and responsibilities. The court was satisfied that it was justified on the evidence while acknowledging that it would only be activated 'rarely' because the person in question must:

- be closely associated with the area;
- have the requisite knowledge and responsibilities;

- self-identify as a member of the Yawuru community;
- be generally accepted by other members of that community as a Yawuru person—at [18].

Validity of freehold grants

A question of the validity of grants of freehold title to 140 lots at Cable Beach in Broome arose because the grants were made after 1 January 1994 (when the NTA commenced) without the future act processes applicable under the NTA at the time being followed. It appeared that houses had been built on the blocks concerned. None of those who held the freehold had been informed of the likelihood that their rights were subject to the rights and interests of the native title holders.

His Honour noted that this 'extraordinary situation' apparently came about because the legislation the state relied on at the time to ensure the validity of the grants, the *Land (Titles and Traditional Usage) Act 1993*(WA), was later held to be invalid: see *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373; [1995] HCA 47.

The reason given by the Commonwealth for the failure to notify was that the area subject to these freehold grants was excluded from the area covered by the Yawuru claimants' application. Therefore, the court could not make a determination of native title in relation to that area and so there was no need to notify those holding the freehold title. In the event, the court found that this was correct i.e. on a proper construction of their application, the Yawuru claimants did not claim the 'relevant freehold lots' and the 'standard' form of excluding only 'valid' freehold did not have the consequence of 'some kind of implicit inclusion ... of invalid freehold grants that do not extinguish native title'. Therefore, it was found that the 140 lots could not be the subject of the native title determination 'in the present matter'—at [27] and [29].

However, it was noted that that this would not 'make the problem disappear' because, even if the area affected by the freehold grants was not 'technically' covered by the application, it was not 'relevantly distinguishable' from the areas that surrounded it, where native title was recognised—at [23].

As Merkel J noted:

> Plainly, the situation is one that will have to be resolved between owners of the freeholds, the State and the native title holders. One likely method of resolution is an indigenous land use agreement under which the native title holders may relinquish their native title rights and interests on appropriate terms—at [22].

Since the area concerned was not included in the application, it is not subject to the determination. However, his Honour considered the question of validity in any case.

The parties accepted that, if the grants were invalid to some extent, they had not been validated by subsequent amendments to the NTA. Therefore, the question of validity turned on the relevant future act provisions of the old Act i.e. the NTA as it stood before the commencement of the *Native Title Amendment Act 1998* (Cwlth).

Under the old Act:

- section 22 provided that an 'impermissible future act' was invalid to the extent that it affected native title;
- section 227 provided that an act affected native title if it extinguished native title rights and interests or was otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

As the freehold grants were future acts that were not validated by any provision of the NTA, they were impermissible future acts under the old Act and appeared to be invalid to the extent that they affected native title—at [20], referring to *Neowarra v Western Australia* [2003] FCA 1402 (*Neowarra*) at [586], summarised in *Native Title Hot Spots* Issue 9.

Due to earlier acts (mostly, the creation of reserves) that extinguished 'exclusive' native title, only 'non-exclusive' native title rights and interests existed when the freehold was granted. Therefore, the grants were valid insofar as they did not affect native title. But 'they cannot have any extinguishing effect or confer rights that are inconsistent with the native title rights and interests' found to exist. Accordingly, his Honour found that any rights and interests of the freehold owners—that were not inconsistent with the non-exclusive native title rights and interests—could co-exist with the native title rights and interests—at [21].

It was found that, in principle, s. 47B might apply to the area affected by the grants. However, since those grants had no extinguishing effect on the surviving native title rights and interests, his Honour was of the view that the section would not apply because:

- there was no extinguishment to be 'disregarded' for the purposes of s. 47B; and
- in any event, the requirement in s. 47B(1)(c) for occupation by one or more members of the native title claim group when the application was made was not met—at [22].

Crown grants done after NTA commenced in exercise of a legally enforceable right are past acts

Prior to 1 January 1994, the state granted several licences to occupy under the *Land Act 1933* (WA) (Land Act) after the relevant Minister had invited applications for the purchase of the areas concerned. Each purchaser was granted a licence to occupy on payment of the first instalment of the purchase price. At some time after 1 January 1994, Crown grants were made to each licence holder. Under the licence and the relevant provisions of the Land Act, the licence holders were entitled to a Crown grant upon payment of the purchase price. The question was whether the Crown grants were past acts as defined in s 228(3)(b)(i) of the NTA, which provides that an act that takes place after 1 January 1994 is a past act if (among other things) it takes place 'in exercise of a legally enforceable right created by ... [an] act done before 1 January 1994'.

It was found that:

- the licence to occupy was not distinguishable from a terms contract under which a purchaser is entitled to possession prior to payment of the purchase price;
- the licence was expressed to be subject to the terms specified in it and also to the terms and conditions of the Land Act, which included a requirement to pay the balance of the purchase price;
- the Land Act provided for a Crown grant to be made to the purchaser when the purchase price was paid and any other conditions were satisfied;
- if, as is apparent from s. 229(2)(iii) of the NTA, the legislature intended an option to purchase created prior to 1 January 1994 to be a legally enforceable right to acquire land, it must follow that a contract to purchase was also intended to constitute a legally enforceable right to acquire land;
- the licences created a legally enforceable right, albeit in equity, to the freehold grant i.e. the act that created the legally enforceable right to the freehold grant was the purchase made prior to 1 January 1994 (evidenced by the licence to occupy among other things), rather than the payment of the purchase price after 1 January 1994;
- the payment of the price and the satisfaction of any other relevant conditions merely resulted in the prior legally enforceable right crystallising into a presently enforceable right;
- accordingly, the licences were 'past acts' pursuant to s. 228(3)(b)(i) of the NTA, as were the freehold grants made after 1 January 1994 pursuant to those licences and, therefore, those Crown grants were valid—at [33] to [35].

Validity of creation of reserves

There was a dispute about whether certain reserves were valid. Reserve 631, which was the largest and earliest of them, covered most of the town of Broome. The parties accepted that resolving the issue in relation to that reserve would also resolve the issue in relation to the later reserves.

Reserve 631 was subject to a notice in the Government Gazette dated 27 November 1883 which stated it was set aside for 'public purposes—adjoining Broome, Roebuck Bay'. As there was no evidence of the creation of the reserve apart from the gazette notice, this was accepted as a 'full and complete description' of the purpose of the reserve. The Yawuru claimants argued that the reserve was not validly created because 'public purposes' was not a purpose specified in land regulations in force at the time of *Land Regulations 1882* (WA) (the land regulations).

The land regulations provided (among other things) that land could be reserved for the 'objects and purposes' in those regulations, including 'any purpose of safety, public utility, convenience, or enjoyment, or for otherwise facilitating the improvement and settlement' of the colony.

Merkel J considered the relevant authorities before finding that:

- the land regulation in question was in the 'broadest of terms' and extended to any purpose of public 'utility' or of 'otherwise facilitating the improvement and settlement' of the colony;

- 'public purposes—adjoining Broome, Roebuck Bay' was 'plainly' capable of being considered reasonably proportionate to the pursuit of the enabling purpose and therefore fell within the relevant regulation;
- it was a purpose that was implicitly associated with the development of the Broome township and, as such, was both directly and substantially connected to being a purpose of public 'utility' and was also capable of being characterised as a purpose facilitating the improvement and settlement of Broome in the Colony of Western Australia;
- the phrase 'public purposes' has a broad meaning;
- reserve 631 was created for one of the purposes specified in the land regulations and was validly created—at [41] to [46].

Validity of special lease

A special lease purportedly granted under s. 153 of the Land Act 1898 (WA) for a term of five years commencing on 1 April 1930 was found to be invalid because:

- the area leased was reserved land at the time;
- the structure of Land Act 1898 suggested that the legislature intended that Pt III constitute a code in respect of transactions, such as leases, in respect of reserved land;
- section 153 only empowered the Governor to lease town, suburban or village lands that were not reserved lands under Pt III;
- accordingly, the Governor did not have the power under s. 153 to grant the special lease in question and so it was invalid—at [52] to [53].

Reserves where part used for public works—was native title extinguished over remainder?

The state argued that the construction of a jail and a police station on parts of the parcels of land reserved for those purposes extinguished native title in relation to the whole of the respective reserves because the state had asserted rights over the whole of the reserved area that were inconsistent with native title. It was common ground that native title was extinguished over the areas where the jail and the police station were built because these were public works.

His Honour noted what was said in *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 at [214] to [234], summarised in *Native Title Hot Spots* Issue 1 on the question of extinguishment via the creation of reserve lands, including that:

- looking to the use actually made of a reserve distracts attention from the central inquiry, which is about rights created in others or asserted by the executive, not the way in which they may have been exercised;
- use of the area may suggest or demonstrate that such rights have been created or asserted but the basic inquiry is about inconsistency of rights, not inconsistency of use;
- designating land as a reserve for a public purpose was inconsistent with any native title right to decide how the land could be used but was not necessarily inconsistent with other native title rights;

- whether a native title right to use the land continued unextinguished depends on other considerations, particularly what, if any, rights in others were created by the reservation or later asserted by the executive – at [56].

These findings were said to provide the answer to the state's submission because:
- by creating the reserves in question, the executive did not create rights in others;
- the executive did assert its right to say how the reserved land could be used, which extinguished any native title right to control access to, and use of, the reserved area;
- however, that was not necessarily inconsistent with the native title holders continuing to use the land in whatever way they had, according to traditional laws and customs, been entitled to use it before its reservation;
- the exercise of the right to construct a jail or police station on part only of the reserved land was not necessarily inconsistent with native title rights and interests in the remaining part, if that part was not reasonably necessary for, or incidental to, the operation or enjoyment of the jail or police station—at [57] and see below on s. 251D.

Therefore, it was found that native title was not necessarily extinguished over the remaining areas of the respective reserves—at [59].

Use of cemetery reserves extinguished native title over area used
Note that, in accordance with the principles noted above, it was found that the exercise of rights to use a reserve as a cemetery under, for example, the *Cemeteries Act 1897* (WA), was the taking of steps authorised by the Crown that:
- created in others, or asserted, rights in relation to the land that were inconsistent with native title; and
- extinguished native title but only in respect of the areas where the rights were exercised e.g. to the extent the area was used for the conduct of burials, the digging of graves and the laying of tombstones—at [137].

Fencing a reserve for a main roads depot extinguished native title
The Main Roads Department erected a security fence around the perimeter of a reserve for the purpose of 'Depot, Main Roads Department'. After inspecting the site, his Honour concluded, in accordance with the principles noted above, that the state had asserted rights in relation to the whole of the reserve that were inconsistent with native title:

> In particular, the perimeter security fence is an assertion ... , in pursuance of the reserved purpose, of ... [the state's] right to exclude others from the depot. It follows that native title has been extinguished in relation to the whole of the reserve—at [150].

Vesting under *Cemeteries Act* extinguished native title to whole reserve
Trustees had been appointed under s. 10 of the *Cemeteries Act 1897* (WA) for one of the cemetery reserves considered. That section provided (among other things) that:
- not only could trustees be appointed but, by deed of grant, the lands could be vested in the trustees of a public cemetery;

- serving the Government Gazette notice of the appointment of trustees on the Registrar of Titles resulted in the legal estate in the trust premises vesting in the trustees—at [138].

Although no deed of grant to the trustees was in evidence, Merkel J took the view that it was:

> [P]robable that such a deed did exist, and that the legal estate in the reserved land ultimately vested in the Shire [as trustee]. The reason for that conclusion is that it is implicit in the functions of trustees under the ... [*Cemeteries Act*] that the legal estate in the cemetery vests in them upon their appointment. Also, it is difficult to think of a reason why the Governor would appoint trustees but not vest the legal estate in them—at [139].

Therefore it was found that, when 'the totality of the statutory scheme' was considered, the 'inevitable' conclusion was that the vesting of cemetery reserve was inconsistent with native title and, therefore, it was extinguished over the whole of the reserve—at [140].

Right to live on certain leased areas and extinguishment via 'improvements'

It was accepted that the court was bound by the decision of the Full Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr*) at [130] to [132] (summarised in *Native Title Hot Spots* Issue 16) to find that the native title right to live on a non-exclusive pastoral lease was not inconsistent with the rights of the lessee under the lease—at [61].

However, the state argued that there should be a different outcome for areas covered by mining leases issued under the *Mining Act 1978* (WA), relying (among other things) on the extensive rights conferred on the lessee to use, occupy and enjoy the leased land. This included the right to do all things necessary to carry out 'mining operations', a phrase given a wide definition by the legislation. The Yawuru claimants disagreed but accepted that the exercise of some of the lessee's rights would extinguish any inconsistent native title rights.

Merkel J was of the view that the reasoning in *Alyawarr* at [131] and *De Rose v South Australia* (No 2) 145 FCR 290; [2005] FCFCA 110 (*De Rose 2*) at [157] (summarised in *Native Title Hot Spots* Issue 15) applied equally to mining leases, namely.

- a native title right to live on the land leased was not necessarily inconsistent with any of the rights conferred under a mining lease and did not necessarily involve permanent settlement at a particular place;
- even if a permanent structure was erected in exercise of the native title right to live on the land, that did not preclude a mining lessee's right to require its removal in the event that it conflicted with a proposed exercise of a right under the mining lease;
- in the event there was a 'necessary' inconsistency, the lessee's rights would prevail;
- if the right under the lease was, for example, to erect improvements necessary for mining operations, the exercise of that right would extinguish any inconsistent

native title rights in respect of the area on which the improvements were constructed and any adjacent area necessary for their enjoyment;
- the native title right to live on the leased land was 'qualitatively different' from a native title right to live on land where there was a native title right of exclusive possession because, in the latter case, the right of the native title holder is not subject to the risk of subsequent extinguishment—at [65] to [66].

In relation to the last point, with respect, even where 'exclusive' native title is recognised, it is 'subject to the risk of subsequent extinguishment' e.g. by operation of certain of the future act provisions of the NTA.

Native title and pearling

In order to preserve the point for any appeal, WAFIC submitted, 'as a matter of formality', that native title rights to take and use a particular species of pearl oyster were extinguished by the enactment of the various pearling Acts. It was accepted that Justice French had rejected the same submission in *Sampi v Western Australia* [2005] FCA 777 (summarised in *Native Title Hot Spots* Issue 15) at [1146] to [1147] and that French J's decision would be followed unless shown to be 'clearly wrong', something WAFIC did not contend. Accordingly, Merkel J rejected WAFIC's submission for the reasons given by French J in *Sampi*, with which his Honour agreed—at [15].

Relevant area for purposes of ss. 47A and 47B

In relation to s. 47A, his Honour found that:
- 'textual, contextual and purposive considerations' pointed to 'the area' referred to in s. 47A(1)(c) as being the particular area the subject of the freehold estate, the lease, the vesting or the land expressly held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders as defined in that paragraph;
- the occupation that must be established was occupation in respect of the whole, rather than merely a part, of the particular area the subject of the freehold estate, lease, vesting etc—at [69] to [70], referring to *Neowarra* at [686] and [721] and the Explanatory Memorandum for the Native Title Amendment Bill 1997 (EM) at [5.45] to [5.49].

In relation to s. 47B, it was found that:
- the relevant area is the particular area in relation to which it has been concluded that, but for the section, native title rights would be extinguished;
- 'occupation' must be shown in respect of the whole, rather than merely a part, of the particular area where, but for s. 47B, native title would be extinguished—at [71] to [72], referring to *Neowarra* at [721] and [758] to [760] and the EM at [5.56].

Proving 'occupation' under ss. 47A or 47B

His Honour noted that the Yawuru claimants:
- relied on 'extensive' evidence of connection with visits to, and use of, numerous urban and bush areas within the Yawuru claim area;

- contended that the traditional connection with, and use of, the areas in question over a period of time by certain members of the claimant group constituted occupation of those areas at the relevant date;
- 'even' argued that they did not have to establish use because the native title right of exclusive possession recognised in these proceedings (subject to findings on extinguishment) was sufficient to constitute occupation, which was found to be 'erroneous' because it failed to distinguish between the criteria under s 223(1) for recognition of a native title right to exclusive occupation and 'the discrete requirement' in ss. 47A or 47B for occupation 'as a matter of fact'—at [74].

After noting that whether or not there was 'occupation' for the purposes of ss. 47A or 47B involved matters of 'fact and degree', Merkel J went on to extract some 'general principles' from earlier cases which included, in summary:

- while a broad and beneficial construction of the word 'occupy' was preferred, generally it required something more than a traditional connection with, or mere use of or visits to, the area;
- occupancy may be established, notwithstanding that members of the claimant group are rarely present on the area, so long as at least one claimant makes use of the area as and when they wish to do so;
- although it was not necessary to establish frequent use, it could be a relevant factor;
- the requirement for occupation should be understood in the sense that the Indigenous people traditionally occupied the land, rather than according to common law principles;
- use of the area by members of the claimant group that is not random or co-incidental but accords with the way of life, habits, customs and usages of that group is sufficient;
- while evidence in relation to traditional connection can be relevant, it was erroneous to equate connection with occupation;
- while 'random or co-incidental use' was unlikely to constitute occupation, and traditional use may be more likely to constitute occupation, there was no proper basis for reading a requirement of traditional use into these sections;
- where the use was not traditional, the question was whether the evidence about connection, use, habitation or visitation is sufficient to warrant a conclusion, as a matter of fact, that the requisite occupation was established;
- it was not necessary for occupation to be confined to members of the claimant group —it could be shared with others; and
- occupation by non-claimants did not preclude the claimants from 'occupying' the area in the sense required—at [76] to [85].

Over areas where there was a dispute as to whether or not ss. 47A or 47B applied, his Honour considered each in turn in the light of principles set out above. Not all of Merkel J's findings are noted below, only those that raised an additional issue.

On the application of ss. 47A or 47B, see also *Risk v Northern Territory* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19) at [879] to [903].

Occupation under ss. 47A or 47B and in areas used by the public

His Honour was of the view that:

- general public use of the area is a relevant, if not a determinative, factor;
- traditional connection cannot be assumed in respect of use of public areas where the use of those areas by claim group members is 'not a use for a traditional activity and is not distinguishable from use of the areas by other members of the public';
- the court should take account of the fact that, generally, visits to and use of areas in Broome, by the public, were largely indistinguishable from visits to, and use of those areas, by members of the claim group;
- that said, the case put in respect of each area must be considered in its own context and on its own facts having regard to all of the circumstances—at [85] to [87].

Section 47A and areas held by Aboriginal corporations

The issue was whether s. 47A applied to parcels of land held by several corporations (the corporations), all of which were incorporated under the *Aboriginal Councils and Associations Act 1976* (Cwlth). The objects of each of the corporations were, generally, to promote the economic and social development of their members. The rules for each provided for the property and funds of the corporation to be available at the discretion of the governing committee for the purpose of carrying out the objects of the corporation. His Honour found that:

- the property of each association was held expressly for the benefit of Aboriginal people;
- a combination of activities could amount to occupation by claim group members, notwithstanding that the area was also occupied by the corporation—at [95] to [87], referring to *Neowarra* at [697] to [698], [706] and [708].

However, it was found that s. 47A did not apply to areas held by:

- Mamabulanjin Aboriginal Corporation, because the 'activity' relied on was residence in one of the two houses on the area by a claim group member and this was occupation of 'merely' part of the area;
- Bidyadanga Aboriginal Community La Grange Inc, where a sobering up centre was in operation, because 'the involvement of some Yawuru persons, as well as others, in co-ordinating and using the centre is not sufficient to constitute occupation of the centre';
- Nirrumbuk Aboriginal Corporation, because the evidence did not establish the requisite occupation;
- Broome Aboriginal Media Association, because 'the involvement of Yawuru persons, together with others, in the association (whether as members or employees) and participation in some of its activities' was not sufficient to constitute occupation—at [98] to [101].

Pastoral lease held by ILC and s. 47A

It was found that:

- Roebuck Plains pastoral lease, held by the Indigenous Land Corporation, was held 'expressly' for the benefit of Aboriginal people; and

- at the relevant time and thereafter, the area was used by members of the Yawuru claim group to pursue traditional activities as and when they chose to do so;
- therefore, the requisite occupation was established and s. 47A applied—at [102].

Section 47B — areas outside town boundary
Although the evidence in relation to these areas of unallocated Crown land (UCL) was sometimes 'sparse', his Honour accepted that the requisite degree of 'occupation' was established in relation to all areas outside of the town boundary where the application of s. 47B was in dispute on this ground, largely on the basis of continuing traditional use of the general area by Yawuru claim group members, or connection with the area and traditional activities undertaken in the area by Yawuru claim group members, as and when they choose to do so—at [104] to [114].

Section 47B — areas within the town boundary
Section 47B was found to apply areas of UCL within the town boundary only where there was evidence that claim group members:
- visited and used the areas to obtain bush tucker, bush medicines and, in some instances, different kinds of wood for traditional and ceremonial purposes;
- hunted possums, kangaroo and goanna;
- in the coastal areas, fished, crabbed and cockled, as well obtained bush medicine and bush tucker.

The state mostly accepted this evidence was sufficient for proof of 'occupation' under s. 47B but argued it was evidence of contemporary usage rather than usage at the relevant dates i.e. in 1994 or 1995 when the application was made.

While Merkel J was prepared to find that s. 47B did apply, based on an inference that the same, or a substantially similar, usage by claim group members occurred at the relevant dates as did the 'contemporary usage', it was noted that it was 'preferable' for direct evidence to be given of occupation at the relevant date—at [121].

In relation to all other areas of UCL within the town boundary, which ranged from bushland to walkways and drains, it was held that:
- the 'sparse evidence' of usage was not sufficient; and
- in some cases, it was not evidence of a traditional usage; and
- 'more importantly', the usage was not distinguishable from 'a likely similar usage by the public'—at [115] to [117] and [120].

Inter-tidal areas and ss. 47A or 47B
It was held that:
- exclusive native title was not 'recognised' in the inter-tidal zone under s 223(1)(c);
- therefore, ss 47A and 47B could not be relied on to claim exclusive possession because those sections are concerned with disregarding past extinguishment rather than 'non-recognition'—at [123], referring to *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50 at [263], summarised in *Native Title Hot Spots* Issue 14.

Extinguishment via improvements disregarded where ss. 47A or 47B applied
His Honour rejected the state's argument that past extinguishment brought about by exercise of the right to 'improve' leasehold land is not disregarded even where either ss. 47A or 47B applies:

> [P]ast extinguishment only occurred by the grant of the lease or prior interest which conferred the right to construct the improvement ... . [T]he extinguishment arises from the grant of the lease and operates when the improvement is constructed. It follows that, if the grant of the lease or other prior interest is to be disregarded under s 47A or s 47B, there can be no extinguishing effect by the exercise of the right to construct the improvement—at [124], referring to *De Rose 2* at [157].

Public works
Among others, the following (which otherwise fell within the definition found in s. 253) were found to be 'public works':

- an open, unsealed shallow storm water drain because it was a 'major earthwork' as defined in s. 253;
- an uncompleted sports oval on a reserve because the whole of the area had been 'traversed and disturbed' by heavy earthmoving equipment and so it was a 'major earthwork' notwithstanding that not all the works planned for the oval were completed—at [129] to [133].

It was found that graves and tombstones in cemetery reserves were not 'public works' because they were not 'constructed or established' by or, on behalf of, the Crown or a local government body or other statutory authority of the Crown in any of its capacities—at [136].

Future 'hypothetical' use not relevant to s. 251D
Unallocated Crown land outside the perimeter of the Broome jail was found to be outside the extended definition of 'public work' in s. 251D. It was not 'necessary for, or incidental to, the construction, establishment, or operation of the work' because it was not, as the state contended, required for 'privacy and recreational purposes' and on the evidence, the question of 'future expansion' was:

> [N]o more than a mere possibility and can be put to one side as it is hypothetical. If the expansion occurs, any extinguishing effect of the expansion will need to be considered by reference to the *NTA* as at that date—at [144].

Conclusion
His Honour noted that the determination of native title made in this case brought to an end 'an epic struggle by the Yawuru people to achieve recognition under Australian law of their traditional connection to, and ownership of, their country'—at [159].

The Yawuru claimants were largely successful because:

- the claim succeeded, in whole or in part, over approximately 4900 square kilometres of their traditional country in and around Broome;
- they established a communal native title entitlement to exclusive possession of their traditional country.

However, the court pointed out that, as a result of 'the criteria laid down under Australian law' for recognition of native title, the native title rights and interests in respect of most of those areas were found to be 'non-exclusive'—at [162].

Determination of native title effective only in part at present

A determination of native title was made in accordance with the reasons for decision given in this and *Rubibi 5* and *Rubibi 6*. The part of the determination recognising the existence of native title will not take effect until the native title holders have a prescribed body corporate registered on the National Native Title Register: see ss. 55 to 57 of the NTA. The determination that native title is wholly extinguished over some areas took effect immediately upon the making of the orders.

Comments on the claim process

Merkel J set out the history of the proceedings, noting (among other things) that resolving the claim took more than 12 years, involved 71 hearing days, several attempts at a mediated outcome and the hearing of 'voluminous' evidence, for two reasons.

The first was to explain why native title claims 'are not only complex' but impose 'unprecedented' demands on the parties and the court. His Honour noted that:

- unlike most adversarial proceedings, which must be commenced within 3 to 6 years of a cause of action accruing, proceedings involving a claimant application 'require evidence to be given concerning ... connection ... and ... observance and acknowledgment of traditional laws and customs since sovereignty, which in Western Australia was 1829'; and
- while it is 'obviously' unsatisfactory for resolution of 'any litigious dispute to take over ten years', there were 'special circumstances' surrounding resolution of 'native title disputes that make the delay in achieving resolution understandable, even if not acceptable'—at [163].

The second 'and far more important reason' was that his Honour thought it would be 'remiss' of the court to:

> [D]epart from the present matter without observing that there may be a better, more efficient, more effective and fairer way of resolving native title disputes ... . [T]here are presently 608 applications in relation to native title awaiting resolution... . Most ... have been before the Court a considerable time...603 of the 608 applications ... have no final hearing date fixed in the reasonably foreseeable future. In these circumstances, it is fair to describe native title in Australia as being in a state of gridlock—at [164].

Merkel J did not put the lack of progress to final hearing down to the court's inability to provide hearing dates or a lack of resources available to the court to conduct final hearings but, rather, identified (among others) ongoing mediation, lack of financial resources for claimants, unresolved intra-communal disputes and logistical difficulties confronting parties to a final hearing—at [165].

His Honour also identified the requirement under s. 87 that any agreement to resolve a native title claim must involve all the parties to the proceeding, irrespective of whether their interest may be affected by the terms of the agreement, as a 'significant brake' on the resolution of native title disputes because it usually required the agreement of numerous parties and some, including those who were publicly funded, 'may have little incentive to resolve the claim'. It was noted that obtaining a determination recognising the existence of native title could lead to 'the enhancement of self respect, identity and pride for indigenous communities' and be a 'stepping stone' to more effectively securing their involvement 'the economic, social and educational benefits that are available in contemporary Australia'. However, it was also important that those indigenous communities: '[A]ppreciate the risk, which recent experience reveals is far from hypothetical, of failure in a native title claim. Where that occurs, it can have devastating consequences for the claimant community'—at [165] to [167].

Merkel J made some suggestions for resolving the 'present native title gridlock' by mediation, including:

- amending s. 87 of the NTA so that it only relates to the parties whose interests are affected by the relevant agreement;
- providing for formal, confidential offers of settlement to be made, in the course of mediation, that may be presented at trial for consideration in relation to awarding costs against parties for whom the final outcome was not greater than the settlement offered;
- greater emphasis being placed in mediation on narrowing contested issues to reduce costs and enhance the efficiency of the trial process;
- adopting a practice in mediation, and in the court, of determining issues not resolved by mediation at an early hearing and requiring the parties to then finally decide to either settle or contest the claim—at [169].

His Honour hoped that adopting these suggested changes might:

> [D]iminish the risk of, and the harm that can flow from, a final finding at an adversarial hearing that the 'tide of history' has washed away recognition of a community's native title under Australian law. It might also greatly advance the reconciliation between Australia's past and present—at [170].