Proposed determination of native title—Single Noongar application

Bennell v Western Australia [2006] FCA 1243

Wilcox J, 19 September 2006

Issue

The Federal Court dealt with three preliminary issues in a separate proceeding relating to six claimant applications in the south-west of Western Australia made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA). The separate proceeding included part of the area covered by the claim referred to as the Single Noongar [No. 1] application, also referred to as the Single Noongar Claim (Area 1) in *Bennell v Western Australia* [2004] FCA 228, summarised in *Native Title Hot Spots* Issue 9.

The preliminary issues were, in paraphrase:

- putting extinguishment to one side, whether native title existed in the part of the Single Noongar [No. 1] application to which the separate proceedings related (referred to as Part A, which encompassed the city of Perth and surrounding non-urban areas);
- if so, whether native title was held by 'the Noongar people' as a single, communal title;
- without purporting to make a formal determination of native title, whether the native title rights and interests were rights to occupy, use and enjoy the area in certain specified ways.

All three questions were answered in the affirmative.

Background

The Single Noongar application, filed in September 2003 on 'behalf all Noongar people', has an external boundary that encompasses a large part of the south-west of Western Australia. However, any area where native title has been extinguished is excluded from the area covered by the Single Noongar application. Given the current tenure of the area, as noted in this case, the area that might eventually be subject to a determination recognising the existence of native title is far less than that encompassed by the external boundary. The description of the native title claim group identifies 99 apical ancestors and some 400 family names.

The separate proceedings also dealt with five claimant applications brought by Christopher (Corrie) Bodney seeking a determination of native title in favour of what he identified as two clan groups.

During the 21 days of the hearing, 30 Aboriginal witnesses gave evidence. Expert evidence was given by two historians, a linguist and four anthropologists. Although the separate proceeding dealt with only a small part of the area covered by the Single

Noongar application, the evidence given by the claimants related to the whole of the area encompassed by the external boundary of that application.

Elements of native title

Justice Wilcox set out the definition of native title found in s. 223(1) and noted the findings of the majority of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 442; [2002] HCA 58 (*Yorta Yorta*), summarised in *Native Title Hot Spots* Issue 3, in relation to its interpretation. His Honour then adopted observations made by Single Noongar claimants' counsel about the definition of native title found in s. 223(1), including that:

- as it referred to traditional laws acknowledged *and* traditional customs observed, there is no need to distinguish between the two and no need to draw fine distinctions between legal rules and moral obligations;
- while there must be 'rules' having a normative content derived from a normative system that existed before sovereignty, applying common law or Eurocentric concepts of 'property' or 'normative systems' is likely to mislead—at [58] to [60], referring to *Yorta Yorta* and *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr*), summarised in *Native Title Hot Spots* Issue 16.

Among other things, the main respondents (the State of Western Australia and the Commonwealth) argued that the relevant 'society' at sovereignty was not the single Noongar community but smaller groups, possibly corresponding roughly with the 'tribes' identified on a map of south-western Western Australia produced in 1974 by Professor Norman Tindale. The court noted that native title has been established even in cases where smaller groups were found to have particular rights to particular areas, e.g. a clan estate or linguistic groups—at [61], referring to (among others) *Alyawarr* at [69] to [71].

Meaning of society in an NTA context

In relation to submissions made about the applicable legal principles, it was noted (among other things) that:

- it is difficult to separate questions about the relevant 'society' from questions about laws and customs;
- the state conceded that, if it was established that there was a single Noongar society at sovereignty, then there were persons alive today who are descendants of the members of that society;
- it is sufficient that those claiming native title acknowledge and observe what are essentially the same laws and customs because this is what unites them and makes them a 'society';
- the Single Noongar claimants must establish a connection with Part A but they were not required to demonstrate a connection specific to Part A, divorced from their asserted connection to the whole claim area;
- if they demonstrated the necessary connection between themselves and the whole claim area (or an identified part that included the Part A), then they demonstrated the required connection to Part A because: 'The whole includes its parts'—at [64] to [82].

Later in the reasons for decision, Wilcox J noted that:

- it is no easy matter to identify the relevant Aboriginal 'society', or community, with one 'problem' being that the word 'society' may appropriately be applied 'at various levels of aggregation';
- in the context of s. 223(1), the level of aggregation is 'the communal, group or individual rights and interests of Aboriginal peoples ... in relation to land or waters' at date of sovereignty;
- therefore, the court must determine the community or group (i.e. the 'society') under whose laws and customs those rights and interests were held and observed;
- it does not matter that there may exist a smaller, or larger, group of people which may properly be regarded, for other purposes, as a 'society' or 'community'—at [424] to [425].

Shared laws and customs sufficient to prove society

The state argued that something more than the sharing of law and custom was required to prove a 'society', including:

- a 'necessary ingredient' was that, at date of sovereignty, the individuals throughout the south-west said to constitute the 'Noongar society' were aware of the existence of all the other people in the south-west or acknowledged them as members of a single society;
- for the purposes of the NTA, 'other factors which demonstrate unity and organisation' were required—at [436] to [437].

His Honour referred to *Yorta Yorta* at [49], where it was said that the word 'society' was to be understood 'as a body of persons united in and by its acknowledgement and observance of a body of law and customs' before rejecting the state's submissions, noting that:

- no authority was cited to support these submissions and the 'other factors' were not identified;
- it appeared from *Yorta Yorta* that common acknowledgement and observance of a body of laws and customs was 'a sufficient unifying factor';
- it was not necessary that the 'society' constitute a community, in the sense of all its members knowing each other and living together and, if it was required, it would constitute an 'additional hurdle for native title applicants which would be almost impossible for most of them to surmount';
- the task of showing the existence of a common normative system some 200 years ago was difficult enough and it would be even harder to show the extent of the mutual knowledge and acknowledgment of those who then lived under that normative system, bearing in mind the non-existence of Aboriginal writings at that time—at [437].

Factual issues

The first major factual issue was the identification of the relevant community in 1829 when sovereignty was asserted. The second major factual issue was whether the 'degree of departure' from traditional laws and customs since sovereignty meant that the 'Noongars' no longer acknowledged and observed 'traditional' laws and customs in the sense that word is used in s. 223(1)—at [83].

The court found that:

- the claimants did not have to establish descent from people living in Part A at date of settlement;
- if members of the Single Noongar claimant group had native title rights and interests over Part A, then they were entitled to recognition of that claim regardless of the birthplace and/or residence of the ancestors of the particular people who made the communal native title claim—at [83].

Was there a single Noongar community in 1829?

His Honour noted that:

> The present case [was] unusual in regard to the number of surviving writings in which European visitors and settlers recorded observations, before and soon after the time of settlement, of Aboriginal society and practices within the relevant geographical area. There ... [were] also writings based upon information provided by Aborigines who were alive at, or born shortly after, the time of settlement ... . [T]heir works provide a rich resource in addressing the 1829 situation—at [85].

The evidence also contained extracts from some twentieth-century anthropological writings. The written material was supplemented by evidence given by Aboriginal witnesses as to oral traditions passed to them—at [86] to [87].

His Honour's conclusions about the nature of Aboriginal society in 1829 drew mostly on the work of the early writers and the comments about that work made by the expert witnesses, especially the historian Dr Host, anthropologists Dr Palmer and Dr Brunton, and linguist Dr Thieberger—at [89].

His Honour pointed out that:

> [I]t is necessary to be cautious about accepting the accounts of lay writers—that is, anthropologically untrained writers—of what they had been told by Aboriginal informants. Particularly in the first years of settlement, when Aboriginal people spoke little English, language problems must have imposed significant limitations upon accurate communication of complex information and ideas—at [107].

That said, in his Honour's view, regard should be had to lay-writers' material because:

> Accounts of events which the writers themselves witnessed would seem particularly useful. Also ... [their] ... obvious awareness of the dangers of innocently accepting anything they were told makes it more likely that the information they did record had a reasonable empirical basis ... . Where there is consensus, amongst two or more of the early writers ... this is likely to be the most reliable available evidence—at [110].

Journals of pre-settlement explorers

From as early as the seventeenth century, European maritime explorers noted the presence of an Aboriginal population on the south-west coast and referred to aspects of their culture, including tools, fish traps, weapons, huts, burial grounds and use of fire. The court noted that:

- the cumulative effect of the maritime explorers' reports is to establish that Aborigines were present, in significant numbers, along the whole coast from present day Esperance to, and including, the Swan Valley;
- some contacts between them and Aboriginal people entered Aboriginal oral tradition and the detail of that tradition corresponded closely with the explorers' journal accounts;
- the early evidence established that those Aborigines were not a seagoing people, did not make canoes and were timid when they approached the water;
- in 1826, one of them described the local Aborigines as wearing kangaroo skin cloaks—at [121] to [124].

King George's Sound (Albany) writers

The evidence included writings of three people who served between 1826 and 1832, at King George's Sound, the first European settlement in Western Australia (modern Albany). They were: Dr Isaac Nind, Assistant Surgeon; Captain Collet Barker, who commanded the garrison; and Dr Alexander Collie, Government Resident at King George's Sound. All three became friendly with a local Aboriginal man called Mokare, whose family held special rights over the area. Dr Host's summary of the land-holding rules recorded at that time included:

- the family was the landholding group, the head of the family was recognized as the titular custodian and other family members had their plots within the ancestral estate but this was complicated by various connections and associations formed through kinship networks, as well as knowledge of, familiarity with, and access to, extra-territorial sites;
- there was a delicate balance between occupancy and usage rights because seasonal change demanded a degree of reciprocity;
- Aborigines at the time of settlement frequently travelled to other areas for purposes of ceremony, hunting, trade and wife-getting—at [136] to [138] and [145].

The early post-settlement years in the Swan River colony Perth region

In 1832, Lieutenant Governor Stirling estimated the Swan River Aboriginal population at about 11,000. In the following two years a corroboree and a battle took place on what is now St Georges Terrace in Perth which indicated to Dr Host that: 'the local Aborigines ... were sufficiently robust, both culturally and numerically, to do so'. He also noted, among other things, that the Aboriginal people of the south-west had been identified as 'Noongar' (or 'Noongal', 'Nyungar', 'Nyungal', 'Yunger') since at least the 1840s and Aborigines in places as far-apart as York, Perth and Albany were 'Yung-ar'—at [148] and [151].

The evidence also included written material from three people who resided in Perth in the first years of that settlement: Robert Lyon; Francis Armstrong, who was fluent in at least five south-west Aboriginal dialects and conducted a census of Aborigines in 1837; and George Moore, who (among other things) compiled a vocabulary of the language of the people of the south-west—at [100].

Armstrong's writings dealt with a number of aspects of the culture of Swan River Aborigines, including:

- none of the 'tribes' exceeded 40 individuals, there was one tribe to about every ten square miles of country and about 700 individuals regularly visited Perth, Fremantle, Guildford and Kelmscott;
- land was inheritable, being received 'equally by all sons from their fathers' and there was no supreme authority, with the family being the largest association that appeared to be 'actuated by common motives and interests';
- they regularly communicated with at least ten surrounding tribes and got their 'very best' spears from friends south of the Murray River some distance away;
- a whole tribe did not, as a custom, migrate beyond its own district but sometimes paid a visit of a few weeks to a neighbouring tribe when invited;
- few had been further from the Swan River than 80 to 90 miles but they moved about in their own districts according to the seasons and, in winter, lived apart as families in huts, provided food was plentiful, for a month or six weeks;
- they had no knowledge of the use of canoes or any substitute and only one or two weirs were seen but they used nets in the shallower pools of rivers and the spear was their 'great instrument' for fishing;
- they were extremely sociable and, in summer, the tribe 'for sixty miles round' assembled and 'entertained each other with the well known dances and chants ... of the corrobaree';
- in the parts of the colony he had visited (from 100 miles north of Perth to what is now Albany), 'everything leads to the conclusion that the inhabitants are all one race'—at [157] to [168].

George Moore's observations did not contradict Armstrong's in any significant way and noted that the language was 'radically the same, though spoken with a variety of dialects'—see [170] to [173].

Later nineteenth-century writers

Of the writers who arrived in WA soon after settlement, the works of Sir George Grey, Charles Symmons, Rosendo Salvado and Ethyl Hassel were in evidence.

Bishop Salvado ran the Benedictine mission at New Norcia from 1846 until 1900. His memoirs included the following observations:

- the 'natives' of Perth and King George Sound, although about 300 miles apart, speak practically the same language;
- the term 'tribe' was not an accurate term, given that the Aboriginal people 'seemed to govern in the patriarchal fashion', with each family forming a small society 'dependent on its own head alone';
- they possessed general laws, maintained by tradition and handed down from father to son, and any head of a family had the right to punish breaches of these laws severely—at [174].

Ethyl Hassel, who lived north-east of Albany, reported that even Aborigines who had developed long-term relationships with employers would absent themselves to undertake traditional activities—at [175].

Dr Host was of the view that many traditional Aboriginal practices persisted for many years after settlement. In particular, he drew on the writings of Hassell, Eliza Brown and Janet Millett which, in his view:

> [D]emonstrated that Noongar people at the end of the 1860s were alive and well, adapting to the European presence, adopting aspects of European culture but maintaining many aspects of their own ... . Most significantly, Noongar families remained together and on country. When they were employed by Europeans, they remained in the lands that held their significant and sacred sites—at [177].

The court noted these conclusions were not challenged— at [177].

Dr Host continued his survey through the remainder of the nineteenth century, citing accounts of hunting parties, corroborees and reprisal spearings before concluding that 'Noongar people remained robust ... . [E]ven deflated estimates showed a steady increase in the south-western Aboriginal population'—at [179].

Dr Host summarised the position at the end of the nineteenth century:

> Much ... of the south-west remained untouched by formal colonial expansion ... . The kinship system and the principle of mutual obligation from which traditional law and custom arose, persisted, along with the Aboriginal sense of place and various aspects of ceremonial life and material culture—at [180].

It was noted that growth of the non-Indigenous population in Perth was relatively slow (about 6,500 in 1884, rising to 35,767 by 1911) and Noongars had access to the food and water resources of lakes and swamps in the area until after the Second World War—at [181] to [182].

Early twentieth-century writers

His Honour noted this was the latest point of time at which it was possible for any writer to have contact with a person who was alive in 1829 or born shortly thereafter.

Daisy Bates, who was appointed by the Western Australian Government in 1904 to research the Aboriginal tribes, was not a trained anthropologist and her writings had been criticised, e.g. she disregarded 'mixed-blood' Aborigines. His Honour therefore took her comment that 'the once numerous inhabitants had dwindled down to one or two old men' as being 'probably a reference to the number of surviving full-blood members of the tribe'—at [104] and [185].

In a manuscript from about 1910, Bates identified informants who had been alive in the early years of settlement. She used the term 'Bibbulmun' to describe the people called 'Noongar' by others. The court noted, among other things, that the area of the 'Bibbulmun Nation' described by Bates broadly corresponded to the territory claimed in the Single Noongar native title application—at [104] to [105] and [183] to [184].

Bates' conclusions included that:

- people claimed certain portions of territory through their ancestors, they could not be dispossessed of it and on these (or as near as white settlement allowed), they 'lived and died';
- every group had a relationship of some kind with every other group and the 'Bibbulmun Nation' were one people, speaking one language and following the same fundamental laws and customs;
- along its landward boundary (which corresponded roughly with the northern and north-eastern boundary of the Single Noongar claim, according to the court), there were circumcised tribes, i.e. there was a 'line' dividing the 'Bibbulmun Nation', who did not practice circumcision, from its neighbours who did—at [185] to[186].

Late twentieth century writers

The court noted that the writers on early WA Aboriginal history published during the latter half of the twentieth century did not talk to people with personal knowledge of conditions in the early years of the colony and so they were not of much assistance in determining the situation in 1829—at [114].

Language a significant factor

The court noted that a conclusion as to whether or not there was a common language throughout the area at date of settlement would be a significant factor to be taken into account in identifying the relevant 1829 community—at [274].

Expert linguistic evidence

Dr Thieberger was the only witness who had specialist linguistic qualifications and 'extensive experience' in Aboriginal languages, including a long association with south-west Western Australia. His Honour noted that Dr Theiberger:

- expressed the firm opinion that, in 1829, there existed a common language, although with dialectical differences, throughout the Single Noongar claim area;
- was not challenged by the respondents either as to his methodology or sources or his opinion and was not explicitly contradicted by other evidence;
- was 'an impressive witness: knowledgeable, careful and fair'—at [192] and [277].

Aboriginal evidence on language

In his Honour's view, the Aboriginal witnesses' evidence supported Dr Thieberger's conclusions about a single Noongar language with only dialectical variations. It was noted that:

- the Aboriginal witnesses came from widely scattered parts of the Single Noongar claim area and their dates of birth spanned a period of about 40 years;
- all claimed to speak and understand, to varying degrees, a language they identified as 'Noongar', which most said they learned from their parents, grandparents or other older people and had passed, or were passing, on to their descendants;
- many mentioned regional differences in vocabulary or pronunciation but all insisted that Noongar speakers could understand each other—at [217], [251] and [252].

Conclusions on language

His Honour accepted the respondent's submission that people who all speak a particular language are not necessarily members of the same society or community. However, it was noted that: 'The converse is also true; a single society may transcend language differences'—at [273], referring to *Neowarra v Western Australia* [2003] FCA 1402 (*Neowarra*) at [586], summarised in *Native Title Hot Spots* Issue 9 at [393].

In his Honour's opinion (among other things):

- the overwhelming view of the early writers who touched upon the issue was that, in 1829, the people of south-west WA shared a common language with regional variations and the oral tradition of south-west Aborigines was that there is, and always has been, only one Indigenous language in the south-west;
- Dr Thieberger, whose opinions were to be preferred because of his training (i.e. the only expert with specialist linguistic qualifications) and practical experience, gave 'detailed and persuasive reasons' for concluding that the language spoken inside the Single Noongar claim area was a language different to that spoken immediately outside its boundaries, despite some degree of commonality;
- the evidence of some early writers supported Dr Thieberger's view that regional variations were dialects, rather than different languages, and those variations did not preclude communication between the different 'dialect' groups—at [276] to [279].

Therefore, it was found that the evidence about language in the claim area provided 'significant, although not decisive, support' for the claim that, in 1829, 'there existed a single [Noongar] community throughout the claim area'—at [280].

Laws and customs about land at sovereignty

From the early writings, which provided a lot of information about the 'ownership' and use of land in the south-west at around 1829, his Honour concluded that:

- there was no rule that all members of a large community (whatever it was) had equal rights over all land;
- particular relatively large areas of land were 'owned' by particular small groups of people whose members inherited their right of 'ownership';
- each of those groups was made up of several nuclear family units, with some members of different units being ordinarily related by blood or marriage;
- some of the early writers used the word 'tribes' to refer to these small groups and all agreed that, although the groups were led by a 'titular custodian', that person was not a 'chief', in the sense of having a right of command;
- the land-owning groups enjoyed some exclusive rights over their land but, generally, their rights were not exclusive of all others;
- by virtue of laws or customs acknowledged by them and operating beyond their own ranks, they had to submit to periodic intrusions by particular people or on particular occasions and they also recognised obligations, which were probably reciprocated, to share any abundant produce of their land;
- it is unhelpful to use the word 'ownership' to refer to the land rights held by particular individuals or 'tribes' at date of settlement since this was not 'ownership' in the European sense, i.e. the rights were held in common with other

members of the 'tribe', were subject to obligations towards others outside the 'tribe' and were not transferable by sale or lease;
- a particularly striking feature was 'the consistency of the accounts of land laws and customs written by people who lived as far apart as King George's Sound, Perth and New Norcia'—at [282] to [284].

The contemporary evidence of the Aboriginal witnesses was relevant to the issue of law and custom at sovereignty only in that it was 'consistent throughout the claim area' and tended to suggest there were similar land 'ownership' rules throughout the claim at that time. The relevant evidence was summarised this way:
- although there was some inconsistency as to the details of the descent rules, the pattern was broadly the same, i.e. there was no regional or geographic variation in the evidence;
- all the Aboriginal witnesses claimed special rights over particular areas of country, variously described as their '*boodja* ' or 'run' or 'country', including the right to 'speak for' that country;
- they all expected to have access to other land within the claim area, dependent on some special relationship with that land (e.g. mother's country) or via permission;
- even if access was available, the person would not think it proper to 'speak for' that land—at [285] to [286].

After reviewing the anthropological evidence, his Honour went on to note the parties' submissions on this issue—see [287] to [341].

Conclusions on laws and customs about land at sovereignty
Wilcox J noted that:
- the evidence concerning laws and customs in 1829 relevant to land was of 'cardinal importance' to the question of whether, in 1829, there was in a single normative community or a number of normative communities occupying discrete, smaller territories, perhaps similar to the dialect areas identified by Tindale;
- it was 'significant' that Dr Brunton, who was called by the state, conceded the existence of a 'considerable degree of cultural similarity' throughout the whole claim area in 1829, including in relation to laws, customs and beliefs;
- the only difference he identified was that concerning descent rules claimed by Bates (i.e. that in one area, the people took descent from their mothers and, in the rest, from their fathers) but even Bates wrote that, throughout the whole area, there was only 'one people, speaking one language and following the same fundamental laws and customs'—at [348] to [349].

It was noted there was 'considerable' common ground on the laws and customs relating to land at 1829, including that:
- in dealing with widely-scattered geographical areas, the early writers reported normative rules that differed from each other only to the extent that Bates detected a more rigid system of descent than the other writers and thought it differed between one part of the claim area and the remainder;
- in 1829, the normative system governing rights to land was that of a larger community than either the 'tribes' mentioned by some of the early writers or the

'estate groups' or 'country groups' and that system supplied members of smaller groups rights to occupy and use particular areas and imposed obligations to allow certain others to use that area for certain purposes, e.g. food-gathering and ceremonies;
- the normative system derived its force from the fact that it was part of a mosaic of laws and customs that were generally observed by a community of people larger than the various 'tribes', 'estate' or 'country' groups;
- the notion of a geographical difference in descent rules was rejected and a general rule of patrilineal descent, subject to exceptions, was accepted but there were differences between the expert witnesses, and other anthropologists, as to the nature and extent of those exceptions—at [350].

It was found that the apparent lack of points of distinction between the laws and customs governing land use and occupation in different parts of the claim area at 1829 tended to support the view that the people within that area were a single community at that time—at [351].

Evidence of other laws and customs at 1829

His Honour then went on to note the evidence about laws and customs in relation to:
- the 'circumcision line', identified by Bates and Tindale, which all parties accepted existed in 1829, that divided people who practised circumcision from the people of the south-west, who did not. The line roughly followed the north and north-east boundary of the Single Noongar claim and 'must have been', for pre-settlement societies a 'marker of the existence of different communities;
- the practice of skinning kangaroos and wearing a coat made from the skin which, it seemed from the evidence, was not the practice in any area outside of the Single Noongar claim area;
- spiritual beliefs, many of which did not add weight to a claim to a separate, distinctive community because similar beliefs were widely held outside the claim area. However, the court noted that evidence of present-day adherence to those beliefs was relevant to the question of continuity in adherence to traditional laws and customs of such a community, and saw no reason to read down the reference to laws and customs in s. 223(1) to exclude laws and customs observed in common with other Aboriginal communities;
- marriage, sexual transgressions and 'payback', which did not assist the claim to a single community at 1829 because either those practices were 'once wide-spread in Aboriginal Australia' or the area they applied to could not be geographically defined or there was nothing to suggest the practice was different in the south-west;
- funeral rites and tools, weapons and food-getting, which were of no assistance to the question of the existence of a single community at 1829 as there was no indication that these practices were different elsewhere in Aboriginal Australia;
- social interaction between local groups, which demonstrated interaction between 'tribal' groups (e.g. for trade, feasting, ceremonies, wife-getting and fighting), rules under which particular land 'owners' had to submit to the intrusions of others and a custom of land 'owners' accepting certain intrusions by friendly neighbours—at [352] to [389].

His Honour went on to consider both the expert evidence and the submissions of the parties on point—see [391] to [423].

Conclusion on 1829—one society

For the following reasons, it was found that there was a single Noongar community in 1829—at [453].

Wilcox J first commented that all the expert witnesses (consistently with the early writings) agreed that the normative system binding the members of the 'tribes' or 'estate' groups or 'country' groups was that of a larger community. The issue was how much larger—at [426].

It was then noted that, while Dr Brunton thought there were 12 or 13 normative communities roughly corresponding to the dialect groups in the south-west at 1829, he was not able to cite anything in the early writings that supported that conclusion and, when pressed, ultimately advanced two matters:

- the likely limits of travel in pre-settlement times, which would have broken people into a number of discrete communities; and
- Bates' observation about the existence of a patrilineal descent system in one part of the south-west and a matrilineal system in another.

As to the first, Wilcox J found (among other things) that:

- while that there were travel limits in pre-settlement times (probably around 100km in all directions), in the absence of any over-arching government structure that necessitated clearly-defined boundaries, there was no reason to assume such limitations resulted in the creation of a series of discrete communities occupying identifiable territories;
- it was important to note the absence of any correlation between the extent of the Swan Valley tribe's regular contact, as reported by Armstrong, and the area in which a particular dialect was used, i.e. Swan Valley tribes were reported as using an area that would have brought them into frequent contact with people using at least three, and possibly five, other dialects—at [429] to [431].

In relation to the second, while initially this appeared 'potentially persuasive', his Honour found that Dr Brunton:

- was unable to say what significance should be attributed to Bates' observation and conceded it was not factually well-founded;
- eventually conceded that there were significant exceptions to what he assumed to be a universal rule of patrilineal descent;
- started with the assumption of a normative society smaller than the single Noongar community and chose the dialect group for lack of any arguable alternative;
- accorded a great deal of respect to Bates, who was unequivocally of the opinion that, there was 'one people, speaking one language, and following the same fundamental laws and customs', i.e. a single fundamental normative system—[432] to [434].

In relation to the significance of dialectical differences, his Honour found that:

- the evidence clearly established the existence, in 1829, of a number of different dialects in the claim area;
- it would have been 'natural' for those who spoke the same dialect to feel special affinity with others who spoke that dialect and to express that affinity by using a name having regional significance but there was no evidence that any such affinity had 'normative significance';
- in the absence of any over-arching government, such evidence could only be found by identifying substantive differences in the norms (i.e. the laws and customs) operating in different dialect areas;
- there was no such evidence despite 'the number of early writers who took an interest in the normative system governing the lives of the Aborigines with whom they came into contact'—at [435] to [436].

While the court accepted there was no evidence that, in 1829, individuals throughout the south-west were aware of the existence of all the other people in the south-west or acknowledged them as members of a single society, it was found it was not necessary for this to be proven. All that was required was proof of 'a body of persons united in and by its acknowledgement and observance of a body of law and customs'. It was noted that, in *Yorta Yorta*, common acknowledgement and observance of a body of laws and customs was regarded as 'a sufficient unifying factor'—at [437].

Any 'additional' requirements having been rejected, his Honour went on to examine the evidence, especially the early writings, to determine whether a single normative system operated in the south-west at 1829 and whether it was acknowledged and observed by all the people in the claim area in 1829.

Barker, Nind, Collie, Lyon and Armstrong were of little assistance, in his Honour's view, either because they had no knowledge of Aborigines living elsewhere or expressed no opinion about the extent of the Aboriginal community (or society) and said nothing about normative differences.

The following early writer's were noted as providing useful information:

- Moore, who noted that everything 'leads to the conclusion that the inhabitants are all of one race' with 'sharp dialectical boundaries' and have a language that was 'radically the same', which his Honour took as being 'consistent with the notion of over-lapping communities';
- Salvado, who interested himself in the content of the 'general laws', which he said were 'maintained by tradition and handed down from father to son', i.e. it may be significant that he did not mention any regional differences in those laws;
- Bates who, thought they were all 'one people, speaking one language, and following the same fundamental laws and customs'—at [442] to [444].

Aboriginal witnesses on dialects

Wilcox J noted that the contemporary evidence from Aboriginal witnesses:

- saw them claiming association with a group identified by a name that closely corresponded with one of the dialect names mentioned by Dr Thieberger;
- was 'striking', in that none of them treated their local name as a sufficient, or even primary, statement of their identity;
- each of them strongly asserted they were 'Noongar', although a Noongar associated with a particular local group;
- most contrasted Noongars, as a whole, with people, such as Wongais (or 'Wangkayi', who lived out towards Kalgoorlie) and Yamatji (towards Geraldton);
- while not much weight could be put on this evidence in relation to the position in 1829, it was not inconsistent with their case concerning it—at [445] to [451].

The evidence relied upon was:
- the explicit assessments of Moore and Bates and an inference to be drawn from the silence of the other early writers in relation to the question whether or not there was a single community;
- expert evidence as to the use of 'one fundamental language' throughout the claim area, albeit with regional dialectic differences;
- the existence of a circumcision line, sharply separating the area in which circumcision was practised from that in which it was not;
- the difference in practice, in relation to kangaroo skinning, between the people of the south-west and those outside it;
- the evidence of extensive 'tribal' interaction within the claim area, over areas of land greater than particular dialect areas;
- the absence of any suggestion of normative differences, other than the dubious possibility of a distinction between patrilineal and matrilineal descent—at [452].

Continuity of laws and customs from 1829 to now

On the question of continuity of law and custom since sovereignty, the court considered the evidence in the light of two logically distinct questions:
- whether the single Noongar community that existed in 1829 continued to exist over subsequent years, with its members continuing to acknowledge and observe at least some of the traditional laws and customs that were acknowledged and observed in 1829;
- whether that community continues to exist today, with its members, including at least some of the claimants, continuing to acknowledge and observe at least some of those laws and customs—at [457].

Having noted that the evidence of the Aboriginal witnesses 'tended to lock together what the person had learned, or experienced, as a child and the position today', his Honour said that:

> I am conscious of the possibility that a native title claim may fail because of a discontinuity in acknowledgement and observance of traditional laws and customs, even though there has been a recent revival of interest in them and there is current acknowledgement and observance ... . Before upholding a native title claim, the Court must be satisfied, on the balance of probabilities, of continuity of acknowledgment and observance, by the relevant community, from the date of sovereignty until the present

time—at [457], referring to *Yorta Yorta* and *Risk v Northern Territory* [2006] FCA 404 (*Larrakia*), summarised in *Native Title Hot Spots* Issue 19.

His Honour went on to note that:

- there can never be direct evidence covering such a long time but inferences may be drawn, from the evidence, concerning the situation in earlier times;
- the 'usual' course taken is to call middle aged or older people who state that, in their time (usually at least 50 years), the relevant practice had 'always prevailed' and, in the absence of contrary evidence, to show that practice has 'prevailed from all time';
- where there is a 'clear claim' of the continuous existence of a custom or tradition that has existed at least since settlement that is supported by 'creditable evidence' and evidence of a 'general reputation' that it had 'always' been observed, it could be inferred (absent evidence to the contrary) that the tradition or custom had existed at least since the date of settlement—at [457], referring to *Yorta Yorta* at [80] and quoting from *Gumana v Northern Territory* [2005] FCA 50 at [195] to [201]

His Honour went on to set out the evidence given by the Aboriginal witnesses in order to determine whether the single Noongar community that existed in 1829 continued to exist, as such, from that time up to the present. Most of the evidence of the Aboriginal witnesses had been provided in statements in which each witness was then cross-examined. Due to its length, it is not set out in any detail here—see [460] to [595] and [602] to [604].

Evidence as to Noongar identity

Wilcox J commented that the evidence given by the Aboriginal witnesses as to their identity as a Noongar person was 'critically important' to the issue of continuity of a single Noongar society and then noted (among other things) that:

- while there were some differences in the Aboriginal witnesses' perceptions, there was unanimity about the existence of such a society;
- there was substantial agreement about the location of Noongar land and little variation in the boundary descriptions, which were generally consistent with both the early writings and the anthropological evidence;
- most witnesses gave clear evidence of differences between Noongars, on the one hand, and Yamatjis and Wongais on the other and were of the view that those differences were not like the differences between Noongar 'tribes';
- while it would have been 'relatively easy' for them to 'fabricate' identification evidence, and there were moments of confusion, the manner in which they dealt with the Noongar 'identity' issue was impressive and the witnesses all were genuine and confident in their identification;
- many of them told about first learning they were 'Noongar' when they were children which, given their age, was around the 1940s or earlier, i.e. well before the 'recent resurgence of interest in Aboriginal traditions and culture';
- it was 'important ... that no respondent suggested to any of the witnesses that they were being dishonest, or were mistaken, either in their general evidence about identification or in stating the date when they first learned about their membership of the Noongar community'—at [596] to [599].

Distinguished from *Yorta Yorta*

After noting that, while European settlement had a 'profound effect' on Aboriginal people in the south-west of WA, Wilcox J found that 'the culture of those people persisted', going on to distinguish the facts of this case from those relevant to *Yorta Yorta* :

> Unlike the Yorta Yorta people ... the south-west community did not suffer a cataclysmic event that totally removed them from their traditional country. Families were pushed around, and broken up ... . However, people continued to identify with their Aboriginal heritage—at [599].

His Honour was impressed, for example, by:

- the extent to which witnesses were able to trace their line of descent back for many generations and identify their contemporary relatives, despite the paucity of written records;
- the extent to which they were able to speak about Aboriginal customs, beliefs and codes of conduct—at [599].

A 'Noongar network'

From the evidence given, his Honour concluded that:

- there was 'clearly' a present-day 'Noongar network', linking families throughout the claim area;
- whether this was a 'community' for the purposes of s. 223(1) depended on the extent to which the network's members continued to observe and acknowledge their traditional laws and customs—at [600] to [601].

Spiritual beliefs

Wilcox J noted that each of the Aboriginal witnesses gave 'extensive' evidence about spiritual beliefs which 'overwhelmingly' conveyed that they shared particular beliefs, however unlikely those beliefs might seem to a non-Aboriginal person. These included beliefs about:

- feeling good (or being safe) on *boodja* (country) because of the presence of familiar or friendly spirits and the description of spirits that do good things;
- the adverse effects of unfriendly spirits or those ensuring correct behaviour;
- smoking an area to clear away bad spirits;
- ways of propitiating unfriendly spirits, especially before fishing or hunting;
- places to avoid, regardless of cleansing, because of bad spirits;
- the chitty chitty bird (willy wag-tail) and 'messenger' birds';
- *Wudatji* or *mamari* (little people who cause mischief and take possessions);
- *Marbarn* men, who have special powers;
- Creation stories for particular country;
- spiritual totems—at [602] to [603].

This evidence was found to:

- indicate that some beliefs were held by virtually all the witnesses, despite their variation in ages and the fact that they came from widely-scattered parts of the single Noongar claim area;

- illustrate a 'rich and active' spiritual universe;
- have a high degree of consistency in relation to the most widespread beliefs, which 'says something about both the unity of the people across the claim area and their adherence to traditional ways'—at [604] to [606].

Marriage rules

On the evidence, his Honour concluded that there were, and continued to be, strict rules designed to prevent marriage between close relatives operating throughout the Single Noongar claim area:

> Marriage between first cousins or second cousins was, and is, universally condemned; third cousins may be alright. The kinship rules were traditionally enforced by parental involvement; parents either chose the marriage partner or needed to give their permission [and] ... people in leadership positions throughout the south-west continue, against great difficulties, to enforce at least the substance of the rules, by discouraging marriages between close cousins—at [643] to [644].

Death and funerals

Almost all the Aboriginal witnesses gave evidence about death and funerals, which included:

- when a person dies, his or her spirit goes back to the land so it is best to die in one's own country and a person who dies away from his or her traditional country should be taken back to it for burial;
- Noongars are never cremated because fire would burn the spirit;
- people should not be buried quickly because the spirit needs time to escape and wander;
- burial places should be approached only if the spirit has been put to rest—at [645].

'Importantly', as there was no challenge to, or inconsistency in, the evidence about any of those matters, the court could 'properly' say they represented attitudes widely accepted throughout the Single Noongar claim area—at [647].

It was also noted (among other things) that the evidence about the method of burial contained 'significant discrepancies'—at [649].

Hunting, fishing and other food-gathering

On this issue, his Honour pointed out that:

- all the Aboriginal witnesses gave evidence of learning about food-gathering as a child;
- while the food sources varied from one part of the claim area to another, a common feature was that there were rules attached to taking, preparing and cooking particular food and most witnesses expounded these rules;
- many of the rules apparently stemmed from pragmatic considerations but some had a spiritual rationale;
- the witnesses considered the rules still apply when people seek the particular food;
- the most notable feature was the surprising proportion of the witnesses who claimed they still continued to hunt and/or fish, either for themselves or in order

to teach their children or grandchildren, i.e. 22 of the 29 witnesses were more than 50 years old and 18 of them were more than 60—at [653].

His Honour went on to summarise the extensive evidence given on this topic before concluding that:

> [H]unting, fishing and food-gathering remain important ingredients in the lives of most of the witnesses, and this despite the constraints imposed upon them by *wajala* [whitefella] laws and practices and the fact that these activities are presumably no longer essential to Aboriginal survival ... . [I]n carrying out these activities, the witnesses strive to follow traditional laws and customs and ... many of them ... are actively teaching their skills, and those laws and practices, to younger members of their families—at [684].

Evidence of laws and customs concerning rights to land

Wilcox J was of the view that:

> The continuing importance attached to land will ... be apparent from the identification evidence ... . Each one of the 30 Aboriginal witnesses identified his or her *boodja* , or 'country'. This was an area, special to the witness, in which he or she felt at home and could move about freely without need of anybody's permission. There is a striking resemblance between the situation described by those witnesses and the picture conveyed by early writers ... . I have the impression that the typical contemporary *boodja* is more extensive than in 1829 ... [which was] ... the logical result of the interaction of a rule (or ... a practice) that a man should seek a wife from a tribe far away from his own, with the greater mobility ... forced upon ... the Noongar people by white settlement—at [686].

The evidence as to the rules dictating how a person acquired rights over particular land and waters was, in summary:

- there must be a connection, by birth or family, with the particular area;
- the person must seek to associate himself or herself with that area, by living within, or frequently visiting, that area and learning about it;
- the person must be recognised by other Noongars as being connected with it;
- while a marriage connection will enable a person to live and hunt in particular country, it did not entitle the person to 'speak for' that country;
- it appeared possible for a person to gain rights to particular country through either parent;
- although each Aboriginal witness expressed the matter in their own way, 'overwhelmingly' they claimed the existence of a rule about seeking 'permission' to visit another's *boodja* (country), the importance of that rule and the tradition that, if permission is asked, it is not usually refused;
- the 'permission' rule has had to accommodate the realities of modern life (e.g. a person would not need to seek permission if merely driving through another's country on the way to somewhere else) but the rule is regarded as extant and its breach strongly disapproved—at [685] to [700].

Continuity of acknowledgement and observance of laws and customs

His Honour rehearsed the parties' submissions at [701] to [749] and, before setting out his conclusions, dealt with some 'peripheral' matters.

Peripheral matters

It was noted that, while the finding that there is a present-day Noongar network was based on the evidence of only 30 Aboriginal witnesses, it provided an 'insight into the way of life of a much greater number of Aboriginal residents of the south-west ... and the family and social relationships between those people'. Further, it was not the number of witnesses that was important but the nature and quality of their evidence—at [750].

His Honour went on to, among other things, express his disagreement with several submissions made by counsel for the Commonwealth, including that evidence of different practices and rituals used to manage spirits was an indication of disunity, rather than unity, of society:

> I accept there were differences in their manner of expressing those beliefs ... . However, some Christians pray standing, some seated and some kneeling. Some use rosary beads, or other aids; some do not. Those differences in behaviour do not destroy the peoples' essential unity as Christians—at [753].

It was also noted that, while there were some differences in the evidence about creation snake stories, that did not establish societal fragmentation, e.g. some Christians 'accept the virgin birth, some do not'—at [750] to [755].

Wilcox J then said these were sufficient examples to demonstrate that the Commonwealth's submission (among other things):

- sought to impose on the Noongar community a degree of conformity in belief that did not apply to the non-Aboriginal community;
- trivialised the Aboriginal evidence on marriage because there was 'obviously' a Noongar rule forbidding marriage between second cousins, a strongly held Noongar belief that infractions should be sanctioned by social ostracism and the fact that it persists was a 'powerful indication of both the unity of the south-western community and its continuity from 1829 to the present day';
- understated the evidence about death and funerals because, while non-Aboriginal notions had impacted heavily, the evidence showed the persistence of some traditional beliefs about death and funerals that were different to non-Aboriginal beliefs, e.g. the relationship between liberation of the deceased's spirit and the timing of the funeral, that cremation is unacceptable because it may burn the spirit and the importance of being buried in one's own country (*boodja*)—at [758].

The Commonwealth's submission in relation to hunting, fishing and food-gathering, included a statement that:

> [I]n an urban environment, which is patently inconsistent with a "hunting and gathering" lifestyle ... the evidence must show that ... hunting, fishing and gathering are not random or coincidental in the sense that other members of the broader urban community also undertake those activities.

Wilcox J found this submission 'puzzling' since the Aboriginal witnesses' evidence was that:

- they were not free to hunt, fish and gather food wherever they wished, as a non-Aboriginal person would do, but rather only within their own *boodja* or elsewhere by permission of the local senior elders;
- the animals they hunted and the foods they gathered extended far beyond those that would ordinarily be taken by a non-Aboriginal person;
- they employed traditional Aboriginal techniques, skills and weapons in carrying out these activities and abided by restrictions that they perceived to be imposed upon them by Noongar laws and customs; and
- they saw their activities as having both a spiritual dimension, requiring them to observe some rules that would not be known to, or observed by, a non-Aboriginal person, and a cultural dimension, requiring them to pass on their knowledge to younger people—at [760] and see [650] to [684].

It was found that:

> In the light of this evidence...the activities described by the witnesses must be regarded as being different in kind to whatever fishing, hunting and food-gathering activities are carried out by non-Aboriginal people in the claim area—at [761].

Conclusion on existence of normative system

Wilcox J then turned to the 'critical' question which was:

> [W]hether the state and the Commonwealth were correct in arguing there was no longer a normative system for allocating rights and interests in land, within the Noongar community, or, if there is, that system is not a continuation of the normative system that existed at date of sovereignty—at [762].

His Honour summarised the respondents' submissions put to support that proposition:

- Dr Palmer, who was called by the Single Noongar claimants, postulated a normative system whereby a person obtained rights as a 'matter of negotiation and assertion' based upon one or more of three factors, namely descent (either matrilineal or patrilineal), place of birth or affinal relationships;
- a 'rule' that makes rights and interests dependent upon choice, and/or negotiation and assertion, is no rule at all;
- the evidence of the Aboriginal witnesses did not demonstrate the existence of a consistent rule as to how a person obtains rights in country through descent;
- the evidence was inconsistent in relation to the importance of birthplace;
- whatever the balance of evidence, the Aboriginal witnesses did not evince or articulate a common understanding of the rules;
- the evidence did not disclose any mechanism for resolving disputes over access to land and many Aboriginal people have come to live in Perth without opposition or criticism;
- the system of local organisation at settlement involved 'bounded estate (or country) group areas and bands (or residence groups)' and that system no longer exists in Area A;
- there is no longer a distinction between 'home area' and 'run' (i.e. core and contingent rights) and the witnesses simply made claims to large areas of country;

- by virtue of six propositions set out below, there was no normative system of law and custom in relation to permission or, if there is, it is not traditional—at [763].

His Honour dealt with each in turn.

Rights were a matter of negotiation and assertion

It was held that, while Dr Palmer did refer to the exercise of rights to country being 'a matter of negotiation and assertion', in the light of the evidence:

- it was erroneous to see a 'normative problem' in the reference to negotiation;
- Dr Palmer was 'really' talking about recognition of an asserted right, being a right allegedly conferred on the asserter by other rules, such as the rules about descent, and was not saying that a person with no asserted right could obtain rights through a bargaining process;
- the range of choice was limited by other normative elements, such as the requirement to live in, and learn about, particular country and the Aboriginal evidence that being a Noongar involved three things, namely being born to a Noongar father or mother, living in Noongar country, and having learned Noongar ways, was consistent with Dr Palmer's views about entitlement to country;
- the starting point was birth (patrilineal or matrilineal) and then there must be a choice, to live in particular country and to a learning and commitment process—at [764] to [772].

Rules regarding birthplace and descent

In relation to this submission, his Honour noted that:

- in 1829, land entitlements were acquired by a general rule of patrilineal descent, subject to exceptions, which implied that people would ordinarily succeed to their father's country with succession to mother's country being exceptional;
- while it was undeniable that claims to matrilineal descent were now commonly recognised, the 'critical point' was the recognition in *Yorta Yorta* that European settlement has had the most profound effects on Aboriginal societies and that it was inevitable that the structures and practices of those societies, and their members, would have undergone great change since settlement;
- the Aboriginal people in south-west WA had been personally affected, in a profound way, by European actions;
- every one of the 30 Aboriginal witnesses had at least one white male ancestor;
- if a rule of patrilineal descent had been strictly applied, all these witnesses would have lost their entitlements to country;
- in such a situation, it is only to be expected that members of the community would have widened the application of the exception, so as to allow a claim to country to be made through the mother, equally with the father, and even, skipping a generation, through a grandparent;
- for the normative system to have survived, it was obviously necessary to allow a degree of choice of country exceeding what would have been necessary in more ordered, pre-settlement times—at [773] to [775].

How much change in birthplace and descent rules was tolerable?

In assessing how much change to the 'descent rules' was tolerable before it must be said the pre-settlement normative system no longer existed, his Honour was of the view that:

> [O]ne should look for evidence of the continuity of the society, rather than require unchanged laws and customs. No doubt changes in laws and customs can be an indication of lack of continuity in the society; they may show that the current normative system is 'rooted in some other, different, society'. Whether or not that conclusion should be drawn must depend upon all the circumstances of the case, including the importance of the relevant laws and customs and whether the changes seem to be the outcome of factors forced upon the community from outside its ranks—at [776], referring to *Yorta Yorta* at [89].

In this case:

- the descent rules are undoubtedly of great importance but changes to them must have been inevitable if the Noongar community was to survive European colonisation;
- the move away from a relatively strict patrilineal system to a mixed patrilineal/matrilineal or cognative system should not be regarded as inconsistent with the maintenance of the pre-settlement community and the continued acknowledgement and observance of its laws and customs;
- it would have been natural for the community to respond by regarding birth upon country as not essential to recognition of the person's entitlement to rights over that country, provided the person was prepared to commit to an association with that country by living upon it, at least for substantial periods of time, and learning about it;
- a principle in those terms emerges clearly from the evidence of the Aboriginal witnesses—at [777] to [778].

Lack of articulation of the rules

As to the submission that the lack of articulation of the rules about country led to an inference that there was no normative system, his Honour was of the view that, while some witnesses were unwilling to speak generally, some did and:

> All the witnesses ... identified their own country and explained the basis of their claim to it. I see no error in Dr Palmer using these items of individual evidence to discern and describe the set of rules that appears to be in operation ... [and his] ... opinions about land rights and interests ... seem to be soundly based on the early writings and the evidence in these cases—at [780].

No mechanism for resolving disputes

As to the submission that there was no mechanism for resolving disputes over access to land (e.g. no action has been taken to resist, or protest against, entry to Perth by Aborigines from other areas), Wilcox J noted (among other things) that:

- it was not necessary to identify a claimed right or interest as one which carries with it, or is supported by, some enforceable means of excluding from its enjoyment those who are not its holders;
- some regard must be paid to the realities of post-settlement life, i.e. in pre-settlement times, intruders may have been sanctioned by being speared but that

practice became illegal and so the most effective method of enforcement disappeared;
- the only remaining method was disapproval, perhaps involving social ostracism, and the evidence suggested this still occurred;
- 'home areas' had effectively disappeared and so today's *boodjas* are similar in concept to – although probably larger in area than – the 'runs' of pre-settlement times which, while a significant change, was readily understandable in that it was forced on Aboriginal people by white settlement;
- surprisingly, the social links between families seemed to have survived but the related families ceased to be residence groups and the ability to maintain the 'home area' element of the pre-settlement normative system was lost—at [784] to [786].

Permission rule

Among other things, in relation to the rule requiring permission, the state submitted that the evidence 'clearly' supported six propositions:

- there was no law or custom requiring 'permission' to simply go to an area but, rather, the concept only arose in respect of conducting certain activities on the land (which his Honour accepted was 'substantially' correct since it could hardly be otherwise in the age of the motor car and urbanisation);
- the rationale for the concept was that there might be dangerous places and spirits in other country, which was found to be 'partly' true but Wilcox J noted there was also a recognition of the duty to acknowledge the local group's right to control access to their land;
- in most cases, no form of permission was sought at all, which his Honour found was correct in relation to non-Aboriginal visitors and some Aboriginal people but there was not much that the local group can do about it now;
- to the extent any form of 'permission' was sought, it was a matter of courtesy, was never refused and there is no consistent understanding as to how it should be sought or from whom. (As to this, among other things, his Honour noted that the evidence clearly indicated permission should be sought from a senior member of the local group in the territory which is to be visited);
- the witnesses' concept of 'permission' was not specific to Noongar country but was a general principle that applied everywhere, which his Honour agreed was correct—see [724] to [730].

However, his Honour found the permission rule survived:

> Certainly, today, there are more convenient ways of seeking permission than there were in 1829. But it is still the rule that permission must be obtained. Not everybody obeys the rule. However, a law is not abrogated by the disregard of some. Of course, remedies for breach of the rule are today extremely limited. But that does not mean the community has discarded the rule—at [787].

Dr Palmer's view preferred

Where there were points of disagreement between Dr Palmer and Dr Brunton, Wilcox J preferred Dr Palmer's views. Therefore, his Honour accepted Dr Palmer's

opinion that there was a Noongar normative system relating to land—at [788] to [790].

Conclusion—1829 normative system survives

His Honour then concluded that, while the changes noted above raised important issues and many traditional laws and customs had not been maintained, when he came back:

> [T]o the test stated in *Yorta Yorta* , and ask myself whether the normative system revealed by the evidence is 'the normative system of the society which came under a new sovereign order' in 1829, or 'a normative system rooted in some other, different society', there can only be one answer. The current normative system is that of the Noongar society that existed in 1829, and which continues to be a body united ... by its acknowledgement and observance of some of its traditional laws and customs ... . It is a normative system much affected by European settlement; but it is not a normative system of a new, different society—at [792].

Connection to Part A

It was found (among other things) that:

- the Single Noongar claimants succeeded in demonstrating the necessary connection between themselves and the whole claim area (excluding the off-shore islands and any other area below low-water mark from the mainland);
- therefore, they had established a connection with Part A, which is part of the Single Noongar claim area;
- it was sufficient that they were members of a community of Aboriginal people who continued to acknowledge and observe the traditional laws and customs possessed by them at sovereignty, under which particular rights and interests in that area are enjoyed by some or all members of the community;
- there is no doubt that Aborigines inhabited Part A at date of settlement;
- they were members of the single Noongar community which acknowledged and observed the traditional laws and customs discussed above;
- accordingly, it was open to present day members of that community to obtain recognition of the community's rights in relation to Part A, whether or not there are, today, members of the community who can trace their ancestry to people living in Part A at sovereignty;
- actual use of particular land by particular members of the Noongar community is an intracommunal matter to be regulated by that community;
- the single Noongar community established 'on the probabilities' that some members of the present day Noongar community are descended from one or more Noongars who lived in Part A at sovereignty;
- while the evidence did not permit a positive finding in relation to any particular witness, it was highly unlikely that all their claims to be descended from an ancestor living in the Part A were wrong since thousands of Aborigines lived in that area at date of sovereignty;
- even allowing for a high rate of infant mortality and the effect of European settlement, it seemed most unlikely that today's wider Noongar community contains no descendant of any of them—at [792] to [799].

Mr Bodney's applications

Mr Bodney's applications were all dismissed because:

- the court was not convinced that the 'Ballarruk and Didjarrak people' through who he claimed, were land-holding groups and seemed instead to be names of moiety (skin) groups;
- there was no evidence that the members of Mr Bodney's claim group were descended from anybody who was a Ballarruk or Didjarruk person alive at or about the date of settlement or that they have continued to acknowledge and observe whatever were the Ballarruk and/or Didjarruk rules about landholding at that time;
- his claims were inconsistent with the finding that the relevant community in 1829 was the Single Noongar community—see [842] to [876].

No native title below low-water mark

Low-water mark was found to constitute the seaward limit of any area subject to native title, in this case, because:

- as there was no evidence or oral tradition that, in 1829, the Aboriginal inhabitants of the south-west had means of accessing islands or used any island, the normative system relating to land and waters in 1829 did not extend to the off-shore islands;
- in relation to land and water below low-water mark, the only evidence was that, at date of settlement, the south-west Aborigines did not use any kind of boat and must have been restricted to places they could reach from dry land or by wading—at [802] to [805].

Surviving native title rights and interests

His Honour noted that:

- many laws and customs of the 1829 Noongar community have not survived;
- the 'bundle of rights' metaphor used to describe the nature of native title implies one or more rights may survive, even though others have disappeared;
- the rights and interests that make up that bundle are possessed under the laws and customs as presently acknowledged and observed;
- the term 'extinguishment' is usually used to refer to a loss of rights though acts attributable to the legislative or executive branches of government and it is confusing, and potentially misleading, to use the same term to refer to a loss from a quite dissimilar cause;
- there is no difficulty in saying that a particular right has been lost through a failure of the relevant community to continue to acknowledge and observe it—at [806] to [807]

It was emphasised that the findings on surviving rights and interests did not purport to specify the precise wording of any determination that may ultimately be made and the parties should have a further opportunity of discussing the form it should take—at [809].

The evidence was found to indicate that:

- Noongar people have, since sovereignty, continued to occupy, use and enjoy those parts of the lands and waters of the claim area to which they have had legal access;
- it was appropriate to make a determination of a non-exclusive right (at least) to occupy, use and enjoy the area concerned;
- the specific rights attached to that general right ought to be exhaustively stated—at[829].

His Honour held that, subject to formulation of the precise wording of the determination and the application of the principle of extinguishment, what survives as native title is the right of the Noongar people to occupy, use and enjoy lands and waters for the following purposes:

- to live on and access the area;
- to use and conserve the natural resources of the area for the benefit of the native title holders;
- to maintain and protect sites within the area that are significant to the native title holders and other Aboriginal people;
- to carry out economic activities on the area, such as hunting, fishing and food-gathering;
- to conserve, use and enjoy the natural resources of the area for social, cultural, religious, spiritual, customary and traditional purposes;
- to control access to, and use of, the area by those Aboriginal people who seek access or use in accordance with traditional law and custom;
- to use the area for the purpose of teaching, and passing on knowledge, about the area and the traditional laws and customs pertaining to it;
- to use the area for the purpose of learning about it and the traditional laws and customs pertaining to it—at [841].

Wilcox J rejected:

- rights to inherit, dispose of or give native title rights and interests, to determine and regulate membership of, and recruitment to, the native title holding group and to regulate and resolve disputes between the native title holders because they were not 'rights and interests ... in relation to lands and waters', as required by s. 223(1);
- the right to conduct social, religious, cultural and economic activities on the area because initiation and corroborees are not part of the contemporary system of law and custom and it was not clear what other activities this right might contemplate but the applicants have the opportunity to revisit this before the form of the determination is finally settled;
- the right to control access to and use of the area by all Aboriginal people, not only Noongars, but such a right concerning Aboriginal people who seek access to, or use of, the claim area in accordance with traditional law and custom was accepted—at [832] to [837].

'Exclusive' native title

It was noted that:

- there were 'obvious practical difficulties' in the way of the Noongar people exercising a right of exclusive possession, occupation, use and enjoyment in an urban and or a semi-urban environment;
- this did not preclude the court from recognising the existence of that right because the definition in s. 223(1) is directed to the possession of the rights or interests, not their exercise;
- the difficulty in practical enforcement of a native title right is not a proper ground for denying its existence—at [816].

The case law was considered, including *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28, summarised in *Native Title Hot Spots* Issue 1, where it was said at [88] to [89] that:

> It is the rights under traditional law and custom to be asked permission and to "speak for country" that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.

Wilcox J rejected the state's submission that the Aboriginal witnesses' claimed rights to speak for land ought not be construed as a claim of ownership. That said, the court left the question in relation to 'exclusive possession' open because:

- 'no attention was paid' to, and no evidence led in relation to, this claim;
- while absence of previous extinguishment is an obvious prerequisite to recognition of native title, it is not 'self-evidently sufficient' to justify a determination of a right of exclusive possession;
- the question was a complex one that could only be addressed in a case-by-case basis over each tenure parcel and, in this case, only in relation to the six specified types of area where it was claimed—at [825], [838] and [840].

Comment

With respect, the issue of whether or not a native title right to exclusive possession, occupation, use and enjoyment can be recognised (putting extinguishment to one side) turns on whether or not the Noongar people have proven that, under the normative system in operation today, they have:

- the right to speak for country, which his Honour apparently found they did; and
- the right to be asked permission to access or use the area concerned, and on this point, the finding appears to be that they do but only in relation to those bound by their law and custom—see [285], [700], [727] to [730], [781] to [782] and [787] for example.

Further, in the statement made to summarise the decision, Wilcox J said:

> In particular, contemporary Noongars continue to observe a system under which individuals obtain special rights over particular country—their *boodjas*—through their father or mother, or occasionally a grandparent. Those rights are generally recognised by other Noongars, who must obtain permission to access another person's *boodja* for any traditional purpose. Present day Noongars also maintain the traditional rules as to who may 'speak for' particular country.

The correct approach seems to be taken by Justice Sundberg in *Neowarra* at [368] to [383], i.e. if there is both a right to speak and a right to be asked permission then, *prima facie*, the right to exclusive possession is established as a matter of fact but subject to consideration of extinguishment. It is unfortunate that such an important issue was apparently left unresolved by the trial judge, particularly since Wilcox J retired soon after delivering this decision.

Postscript: the state's notice of motion

On 25 August 2006, the state filed a notice of motion seeking:

- rescission of the orders made for the hearing of a separate question in a separate proceeding;
- an order for a new trial of the separate proceeding before a different judge;
- an order pursuant to s. 84C that Part A of the Single Noongar application be struck out; and
- orders concerning discovery and interrogatories relevant to the identity of the native title claim group and authorisation.

Reaction to the motion

Wilcox J:

- thought the state's legal advisers had been discourteous to the court by filing the notice of motion in circumstances where there had been a lengthy hearing into the separate question, the parties were advised that work had commenced on the judgment, that judgment was expected to be delivered soon and no notice was given of the state's intended action;
- was surprised by the complete U-turn by the state, i.e. it was the state that had urged the court to pursue the separate question yet it was now seeking, nearly three years later and after expenditure of taxpayers' dollars, to rescind the orders—at [892] to [893].

Validity of the order for the separate question

Wilcox J agreed that while a decision to order determination of a separate question under Order 29 rule 2 of the Federal Court Rules is one to be made carefully after consideration of the views of the parties, there was no limit on the court's discretion to take that course. His Honour was of the view that the order was valid.

Is it open to the state to complain about the order for a separate question?

Wilcox J agreed with the principle stated by the House of Lords in *Marsh v Marsh* (1945) AC 271 at 285: 'If a litigant has himself induced, acquiesced in or waived the irregularity, he cannot afterwards complain of it'—at [931].

His Honour noted that:

- the state had clearly made a considered decision to proceed to trial on the separate question without filing a prior strike-out motion in relation to authorisation within time;
- both the state and the Commonwealth appreciated that authorisation was not before the court but that the court was agreeable to widening the hearing if all the

parties agreed but they took no action to obtain the agreement of the other parties to do so;
- the court then embarked upon a long and expensive hearing and now, in the absence of any new factors, the state was seeking to throw away all the work that had been done;
- the word 'unconscionable' sprang to mind and 'whatever happened to the longstanding principle that the Crown sets an example to others by behaving as a model litigant?'—at [932].

Conduct of the strike-out motion

Wilcox J viewed the state's apparent belief that the effect of the filing of the strike-out motion was to prevent anybody taking any further action in relation to the proceedings as 'breathtaking', amounting in effect to taking out an injunction against a judicial officer—at [940].

It was held that the state's strike-out application failed to satisfy the condition precedent specified by s. 84C which, in this case, related to evidence about lack of authorisation. According to the court:

> [I]t is inimical to the purpose of s 84C(2) to allow a party to ignore a direction about filing a strike out motion by a particular date, engage in a lengthy hearing and then raise an issue of authorisation without supporting evidence—at [943].

This did not mean that a judge could not give leave to file a strike-out motion after a specified date, as s. 84C(1) refers to the words 'at any time'.

Disposal of the 'postscript' motion

His Honour dismissed the motion because:
- the state required leave to file a strike-out motion out of time and had not sought or obtained it;
- the motion was not supported by evidence of an arguable case of non-compliance in the terms of s. 84C—at [945].

Costs of the late motion

Wilcox J was of the view that the state had acted unreasonably and put another party to avoidable expense. Therefore, the usual rule in s. 85A(1) was departed from and the applicant's costs of the motion were awarded against the state. The costs position of the other parties was reserved and further carriage of the matter remitted to Justice French—at [950].

Final comment - reconciliation

Among other things, Wilcox J urged the parties to 'consider their desirable future action':

> [T]his litigation is not a private squabble about money. It is litigation that deals with matters of great importance to ... all Western Australians ... [and] has significant implications for ... 'reconciliation' ... . It ought not be conducted like a game ... . [I]t would seem ... desirable for the parties to engage in some serious thought and discussion before any of them spends more money on legal action—at [952].

Appeal

The state and the Commonwealth have announced they intend to appeal against certain aspects of this decision. As Wilcox J noted, the orders in this case are not final and so leave to appeal will be required—at [880].