Rubibi appeal — Broome

Western Australia v Sebastian [2008] FCAFC 65

Branson, North and Mansfield JJ, 2 May 2008

Issue

The main issues in these appeal proceedings were:

- whether native title to the Broome area in Western Australia was communal in nature and held by the Yawuru community; and
- whether some of the findings at first instance in relation to extinguishment were correct.

The Full Court of the Federal Court upheld the finding of communal native title but overturned some of the findings in relation to extinguishment.

Background

At first instance, Justice Merkel heard and determined two competing claims under ss. 13 and 61 of the *Native Title Act 1993* (Cwlth) (NTA) for a determination of native title over and around the town of Broome, which were:

- the Yawuru claim, made by 12 people on behalf of the Yawuru community, for communal native title rights and interests;
- the Walman Yawuru claim, made by three people on behalf of the Walman Yawuru clan, for a determination in favour of that clan (rather than the Yawuru community) over parts of the area covered by the Yawuru claim.

The State of Western Australia, the Commonwealth of Australia and the Western Australian Fishing Industry Council Inc (WAFIC) opposed both claims. Submissions on extinguishment were made by the parties. In July 2005, Merkel J published his findings in relation to the competing claims in *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (*Rubibi No 5*, summarised in *Native Title Hot Spots* Issue 16). His Honour concluded that the native title rights and interests possessed in the area covered by the Yawuru application:

- were communal native title rights and interests possessed by members of the Yawuru community;
- were not the group native title rights and interests claimed to be possessed by members of the Walman Yawuru clan.

In February 2006, Merkel J made findings on the following issues:

- the identification of the native title determination area;
- the criteria for membership of the native title holding community; and
- the nature and extent of the native title rights and interests possessed by the native title holding community—see *Rubibi Community v Western Australia (No. 6)* [2006] FCA 82 (*Rubibi No 6*, summarised in *Native Title Hot Spots* Issue 19).

His Honour found that:

- the Yawuru community possessed communal native title rights and interests in the whole of the Yawuru claim area;

- the evidence supported the inference that the Yawuru community was entitled to exclusive possession and occupation of the Yawuru claim area (excluding the intertidal zone) where there has been no extinguishment.

Among others, in *Rubibi No 6*, his Honour also dealt with the issue of whether:
- the Djugan people were a clan of the Yawuru community or a native title holding community in their own right;
- if they were a separate community, whether the northern parts of the Yawuru claim area were in fact part of the country of the Djugan community.

Merkel J found that the Djugan were a subset, or subgroup, of the Yawuru community and, therefore, that the determination of native title should extend over both the northern and southern parts of the Yawuru claim area.

In April 2006, in *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 (*Rubibi No 7*, summarised in *Native Title Hot Spots* Issue 19), Merkel J published reasons for judgment determining the areas within the Yawuru claim area where the native title rights and interests of the Yawuru community had been wholly or partially extinguished and also dealt with certain other issues raised after the publication of *Rubibi No 6*.

Merkel J also found (among other things) that, while the members of the Walman Yawuru clan held special attachments to, and responsibilities for, areas or sites with which the clan was associated, those special attachments and responsibilities did not constitute native rights or interests. Thus, the Walman Yawuru claim failed, although the Walman Yawuru people were found to hold communal native title rights and interests in their capacity as members of the Yawuru community.

His Honour had earlier made a determination in favour of the Yawuru community over a law ground on the outskirts of Broome—see *Rubibi Community v Western Australia* (2001) 112 FCR 409**;** [2001] FCA 607 (*Rubibi No 1*) and *Rubibi Community v Western Australia (No 2)* (2001) 114 FCR 523; [2001] FCA 1553.

Summary of the issues on appeal
The state appealed against:
- the finding that native title exists in the Yawuru claim area, particularly in its northern portion which it said was traditionally owned by a separate society i.e. the Djugan people;
- Merkel J's orders, on the basis that it was not open to his Honour to hold that a change in descent rules from a patrilineal to an ambilineal, or cognatic, system was permitted under the traditional laws and customs of the Yawuru community;
- the findings concerning the validity of certain reserves and the applicability of s. 47B of the NTA to parts of the Broome townsite.

The Yawuru claimants' cross-appeal challenged certain findings in relation to extinguishment of native title. The Walman Yawuru claimants appealed against the dismissal of their application for a determination of group (or clan-based) native title over the Walman Yawuru clan area and the Minyirr clan area.

Broadly speaking, the appeal proceedings concerned:

- the native title rights and interests of the Yawuru community;
- the native title rights and interests of the Walman Yawuru clan;
- certain extinguishment issues, including whether s. 47B applied to areas within the Broome town site so that any extinguishment over those areas had to be disregarded.

On the question of the native title rights and interests of the Yawuru community, the issues were whether:

- by approving, and adopting, the concept of 'communal native title', Merkel J assumed, rather than found, that native title existed;
- the finding that the whole of the Yawuru claim area was possessed by the one society, both at sovereignty and presently, was open to his Honour despite the fact that there were two legal 'traditions' practised in the Yawuru claim area at sovereignty (northern and southern);
- the finding that rights and interests held by the Djugan people at sovereignty had become those of the Yawuru by a process of succession was open to Merkel J;
- the finding that the change from a patrilineal clan-based community to an ambilineal-based community was not fatal to the claim was open to Merkel J;
- his Honour was correct in determining that a non-Yawuru person could be incorporated into the Yawuru community.

On the question of the native title rights and interests of the Walman Yawuru clan, the issues were whether:

- Merkel J was correct in dismissing the Walman Yawuru claim on the basis that native title in the determination area is communal, rather than clan based;
- the Walman Yawuru claimants held some non-exclusive or exclusive native title rights in their claim area;
- the 'special attachments and responsibilities' of the Walman Yawuru people had been appropriately dealt with by Merkel J;
- the Walman Yawuru people acquired native title rights and interests in an area known as Minyirr by a process of succession.

Nature of native title under the NTA

Justices Branson, North and Mansfield, in joint reasons for judgment, identified the characteristics of native title 'as provided for' in s. 223(1) of the NTA, noting that:

- it is to the terms of the NTA that the court must turn its mind in determining whether native title exists over a particular area, with the key provisions being ss. 223 (which defines 'native title') and 225 (which sets out the requirements of a determination of native title);
- traditional laws acknowledged and traditional customs observed, within the meaning of s. 223(1)(a), are central to the definition of native title;
- the laws and customs of which s. 223(1) speaks must have a normative quality, so that the body of traditional laws and customs may equally be described as a 'body of norms' or a 'normative system';
- to be 'traditional', those laws and customs must be passed from generation to generation, their content must originate in pre-sovereignty rules and they must have had a continuous existence and vitality since sovereignty;
- under s. 223(1)(b), those laws and customs must provide a 'connection' between Aboriginal peoples and the claimed land and waters;

- only traditional laws and customs having those characteristics give rise to native title rights and interests;
- 'inextricably linked' to the concept of traditional laws and customs is the body of Aboriginal peoples which acknowledges and observes them;
- the word 'society' is a descriptor of the Aboriginal peoples who may possess native title rights under traditional laws and traditional customs in accordance with the definition in s. 223(1);
- laws and customs arise out of and, in important respects, go to define a particular society, with 'society' being understood as a body of persons united in, and by, its acknowledgment and observance of a body of laws and customs;
- 'society', rather than 'community', was chosen to emphasise 'this close relationship between' the identification of the group and the identification of the laws and customs of that group;
- under s. 223(1), the native title rights and interests possessed under traditional laws and customs may be communal, group or individual in nature—at [27] to [31], referring in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3), *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*, summarised in *Native Title Hot Spots* Issue 1), *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 (*Yarmirr*).

The court then noted observations made regarding the nature of native title rights and interests under the NTA in later Full Court decisions, including *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCAFC 110 (*De Rose No 2*, summarised in *Native Title Hot Spots* Issue 16) and *Northern Territory v Alyawarr, Kayteye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16).

In this case, both the state and the Commonwealth submitted that the Full Court had, in the *De Rose* and *Alyawarr* decisions, introduced 'analyses and concepts that are not in accordance with the key principles' in *Yorta Yorta.*

The Djugan and the Yawuru

The state challenged Merkel J's findings that:

- the Djugan people were a subset, or subgroup, of the Yawuru community at sovereignty and presently; and
- consequently, the Yawuru community held native title rights and interests over the northern portion of the Yawuru claim area (the portion traditionally associated with the Djugan).

The state argued that:

- by focussing on the Yawuru 'community', and characterising the claim as one for 'communal native title', Merkel J failed to identify the relevant native title holding society at sovereignty;
- as a result of that erroneous approach, Merkel J also erred in not finding that the Djugan and the Yawuru, in fact, formed two discrete societies at sovereignty.

The court canvassed the relevant parts of Merkel J's reasons for judgment and noted his findings that (among other things) the evidence established, notwithstanding cultural differences, there were extensive traditional connections and commonalities between the Djugan and the Yawuru, the common source of which was the *Bugarrigarra*. In reaching that conclusion, Merkel J relied upon the observations made in *Alyawarr* that members of a 'community' may possess 'communal native title rights and interests', notwithstanding that those rights and interests were

'intramurally allocated' to different groups or subsets of the community i.e. his Honour adopted the approach that the state and Commonwealth criticised.

There was a finding of communal native title

On the appeal, it was argued that Merkel J assumed, rather than determined, that native title existed in relation to the Yawuru claim area, with the assumption being that native title was held by the Yawuru community. The court noted that:

- it was necessary 'to analyse the totality' of Merkel J's reasons for judgment;
- Merkel J reviewed the relevant provisions of the NTA and the case law touching on its proper construction;
- importantly, Merkel J acknowledged the requirements of proof to be drawn from earlier authorities and noted that the critical question was whether, under the traditional laws and customs of the Yawuru community, the claimant community, or the claimant group, possessed the native title rights and interests claimed in respect of the respective claim areas—at [71].

The court was of the view that the critical question posed by Merkel J was not whether 'assumed native title rights and interests' were possessed by the 'claimant community' on the one hand or the 'claimant group' on the other:

> The question posed is whether, applying the principles earlier identified by his Honour, including the requirement that native title rights and interests are possessed under a normative system that has had a continuous existence and vitality since sovereignty, under the traditional laws and customs of the Yawuru community the community as a whole, or alternatively clans within the community, possess the native title rights and interests in the claim area—at [72].

It was noted that Merkel J was aware that he had to consider whether the Yawuru community was a 'recognisable body of persons united in and by' traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue were claimed. The court was satisfied that the language used by Merkel J suggested he had the majority judgment in *Yorta Yorta* 'at the forefront of his mind'—at [73].

On the issue of continuity, the court noted that Merkel J:

- knew that the continuing acknowledgement and observance of traditional law and custom by the Yawuru community was contested;
- considered the evidence of indicia of continuity of Yawuru traditional law and custom;
- knew that the term 'community' was not the critical issue;
- identified and applied the correct legal test to the facts properly found by him—at [74].

The court concluded that, Merkel J's reasons for judgment, if 'read fairly in their entirety', showed that he was conscious of what was said *Yorta Yorta*, particularly that the rights and interests possessed under an identified body of laws and customs are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs—at [75].

Therefore:

- it was apparent that Merkel J did determine in *Rubibi No 5* that native title rights and interests existed in the Yawuru claim area and his reference in *Rubibi No 6* must be read as a reference to that finding;
- Merkel J was aware that the precise nature and extent of those native title rights and interests remained to be determined;
- this understanding of Merkel J's remarks in *Rubibi No 6* was also consistent with his identification of the issues he proposed to address in that judgment;
- in *Rubibi No 6*, the remaining issues to be addressed were identified by Merkel J with no reference to determining whether the Yawuru claimants had native title rights and interests in the Yawuru claim area but that did not demonstrate that Merkel J did not address that issue at all and simply assumed affirmatively that such rights and interests existed;
- on the contrary, the detailed consideration of that issue in the judgment in *Rubibi No 5* made it clear that the issue had already been addressed and determined by his Honour—at [76].

Both the state and the Commonwealth argued that Merkel J's approach to fact-finding necessarily involved an error because the existence of a society (or community) holding native title rights and interests could not be resolved until the status of the Djugan had been addressed. However, the court noted that:

- Merkel J correctly identified the task he was to undertake as explained in *Yorta Yorta* and did not lose sight of that task;
- the 'sequence of a series of complex factual findings' did not demonstrate to the contrary and may well have been informed by an expectation that the parties may have been able to resolve matters as to the precise extent and geographical scope of the native title by agreement following *Rubibi No 5*—at [77].

It was noted that:

> The consideration then given to the evidence concerning the Djugan, and how their position related to and affected the general findings made in *Rubibi No 5*, indicates that his Honour did carefully consider the evidence to identify, and then made findings about, the society or community which held native title rights and interests over or in relation to the Yawuru claim area. He has ultimately integrated the general findings made in *Rubibi No 5* with those made in the later judgment. In our view, when his Honour's reasons are considered overall, the contention that his Honour erroneously assumed the existence of native title rights and interests in the northern part of the Yawuru claim area should be rejected—at [78].

No error in finding Djugan a subset of Yawuru

The Yawuru were 'typically associated with' the southern part of the claim area and the Djugan with the northern part of the claim area. Merkel J recognised that when determining the existence of the Yawuru's native title rights in *Rubibi No 5*. The state argued that Merkel J was wrong because:

- he focussed on 'communal native title' when he should have more closely addressed the question of who held native title rights in the northern part of the Yawuru claim area;
- he focussed on the term 'community' rather than 'society' in relation to the Yawuru, which was not consistent with *Yorta Yorta*;
- he made no 'proper' finding of a relevant society at the time of sovereignty and so was wrong in finding there was a continuation of such a society to the present time.

The court found that Merkel J did make a finding in *Rubibi No 6* that the Djugan and Yawuru formed one 'native title holding community ... now and at sovereignty' and that the Djugan were a subset of the Yawuru—at [81].

Their Honours went on to note that:

> Partly, the State's contentions involve the proposition that the terms "society" and "community" are not interchangeable in the light of *Yorta Yorta*. We have already considered and rejected that proposition as indicating error on the part of the primary judge in finding that native title rights and interests exist in the claim area—at [82].

The state and the Commonwealth contended that:

- there was no finding in conformity with *Yorta Yorta* that the society be united by common observance of traditional laws and customs within the same normative system i.e. there was no finding that the Djugan's northern and the Yawuru's southern traditions were part of the same observed normative system;
- the finding of *substantially* similar laws and customs observed by each of those clans was insufficient to found the existence of their unified observance by the Yawuru claimants as required by *Yorta Yorta;*
- Merkel J's 'communal title' approach in *Rubibi (No 6)* reasoned wrongly that, because substantially similar customs were observed between two clans, those clans constituted one group having native title rights over the claim area.

The court held that Merkel J did find that there was a common normative system of the two clans over the claim area:

> Such a finding appears ... in *Rubibi (No 6)*. His Honour there explains the basis upon which he found in *Rubibi (No 5)* as the normative system of the Yawuru as having been "prescribed by the Bugarrigarra", with the southern tradition as part of both the normative system and the traditional customs and laws observed and acknowledged in relation to the claim area. … [H]is Honour concluded, as he did in *Rubibi (No 5)*, that the Bugarrigarra and the many other commonalities in traditions (despite the differences) formed the content of one normative system. There does not appear to be any prescription in *Yorta Yorta* ... that *all the same traditions and customs* of each clan be observed and acknowledged by the two clans for them to operate under the one normative system. *Yorta Yorta* consistently refers to "a body of law and customs" rather than "the identical body and law and customs"... . The body of laws and customs under which native title rights and interests are possessed by a group of persons does not require that each member of the group has precisely the same knowledge of those laws and customs or that each member of the group fully comprehends in precisely the same way as each other member of the group how those laws and customs operate. The existence of native title rights and interests … is a question of fact to be determined upon the evidence in each case. We consider that is what the primary judge did in this case, and that the conclusion he reached was one available to him and which should not be disturbed on appeal—at [84], emphasis in original.

The court also rejected criticism of the general approach to the determination that native title was held by the Yawuru group as a communal or group title because:

- each case must be decided on its own facts and there was nothing in *Yorta Yorta* which 'prescriptively indicates' that the use of the term 'communal rights' to describe the rights held by a particular group of persons was not appropriate;
- the state's submission sought to elevate the language used by Merkel J 'beyond what he clearly meant in an endeavour to show the approach was inconsistent with *Yorta Yorta';*

- properly understood, his Honour's approach accorded with that decision and, indeed, Merkel J showed a careful analysis of it so as to properly follow it—at [86].

The state's argument that Merkel J failed to properly consider certain evidence was rejected, with the court noting (among other things) that: 'Such litigation as the present ... attracts the observations that the ... conclusions in question can be seen as made with the advantage of hearing the evidence in its entirety'—at [87].

It was found that Merkel J:
- was mindful of the nature of the fact finding task and of the material relating to it following his conclusion in *Rubibi No 5*;
- said in *Rubibi No 6* that his task was essentially to determine whether the Djugan fell into the group of persons entitled to native title rights and interests;
- noted in *Rubibi No 6* that he had difficulty in defining the Yawuru community on the early anthropological evidence but attributed particular weight to evidence given by Aboriginal elders prior to the commencement of the present claims;
- at the outset of the judgment in *Rubibi No 6*, said that the genealogy charts in evidence were a basis for an inference of continuity of the Yawuru community from the time of sovereignty through to the present time because they evidenced ambilineal or cognatic descent which was consistent with traditional Yawuru laws and customs, with the court noting that this followed a finding made in *Rubibi (No 5)*—at [88].

Therefore, it was held that:
- the path to the conclusion that the Djugan continued as part of the Yawuru society was the commonalities found between the Djugan and the Yawuru clans;
- the evidence was that there were 'extensive traditional connections and commonalities' between them (including the common source of *Bugarrigarra*) that were in existence at, and since, sovereignty;
- the connections and commonalities of most significance included the substantial similarities between the languages spoken by Djugan and Yawuru, their skin section systems and their kinship, in addition to 'the identical source of law and tradition in the *Bugarrigara*';
- the oral evidence supported those findings;
- the evidence Merkel J relied on pointed firmly against the state's contention that there were separate societies at sovereignty and a lack of continuity —at [89] to [90].

The state's challenge on the alternative basis that there was a contradiction between the finding that the Djugan and Yawuru had cultural differences but their commonalities bound them as one, and the finding of the disintegration of the Djugan, was rejected because the reference to 'disintegration' did not, in context, amount to a finding that the Djugan became extinct—at [92].

Succession of rights

The state took issue with Merkel J's 'alternative finding' that, if the Djugan were not a subset or subgroup of the Yawuru, whatever rights and interests they had in the northern area had passed to the Yawuru community in accordance with its traditional laws and customs.

After noting that the joint judgment in *Yorta Yorta* provided some support for the recognition of native title rights and interests transmitted by a process of succession, the court looked to Merkel J's consideration of the relevant evidence, commenting that (among other things):

- it appeared that none of the anthropologists expressed a view as to whether succession of rights from the Djugan to the Yawuru had been contemplated by their traditional laws and customs or had in fact occurred;
- there was a 1992 ethnographic survey that recorded the views of Yawuru elders that 'succession to the Broome area was secured under general principles of Yawuru land tenure';
- Merkel J concluded that the information provided by those elders was consistent with the anthropological view that principles of succession formed part of the northern and southern traditions practiced in the Yawuru claim area and, therefore, that succession had in fact occurred—at [97].

The court noted that:

- Merkel J's alternative finding must have been based on the premise that the Djugan people held native title rights and interests in the northern area under a separate normative system;
- there was an issue as to whether his Honour should have made specific findings about whether the traditional laws and customs of the Yawuru community included principles of succession
- recent Full Court cases indicated that the comments in *Yorta Yorta* on transmission of native title were 'probably directed to intergenerational transmission of rights and interests under traditional laws within the society possessing rights and interests in the land under traditional laws and customs at the time of sovereignty';
- in circumstances where the finding of the primary judge was that succession to rights and interests did not arise because there was always only one society, it was 'perhaps unsurprising that there appears to be little evidence on the point and the primary judge's reasoning is brief';
- on the 'fairly scanty' evidence available, the question remained whether Merkel J's finding should be sustained but, because the attack on Merkel J's primary finding failed, it was not necessary to answer that question;
- had it been necessary to do so, the court was inclined to think Merkel J could draw the conclusion that succession in accordance with the traditional laws and customs of the two clans had occurred on the available evidence—at [98] to [104], referring to *Dale v Moses* [2007] FCAFC 82, summarised in *Native Title Hot Spots* Issue 25.

Descent system of the Yawuru community

The state argued (amongst other things) that Merkel J:

- was wrong to find that, at sovereignty, a principle of choice existed that allowed the evolution of traditional laws and customs to take account of cognatic or ambilineal descent;
- *Yorta Yorta* required a determination of the content of the laws and customs relating to the descent system followed by the Yawuru 'society' at sovereignty and the relevant descent system in this case was a patrilineal clan-based system;
- there was no basis for finding that a change to an ambilineal based community was contemplated under the 'contingency provisions' of the traditional laws and customs;
- the 'contingency' of ambilineal descent was available 'under a traditional patriclan society only in order to cope with a small percentage of the population' and the application of such a

contingency provision to the whole of the Yawuru society created a new and different society in which the contingency had become the norm.

The court found no error in his Honour's approach because:

- it could be seen from the reasons in *Rubibi No 5* and *Rubibi No 6* that Merkel J carefully considered whether the existence of an ambilineal or a cognatic descent system reflected an unacceptable change from the traditional laws and customs at sovereignty such that the rights and interests now asserted are no longer possessed under the traditional laws acknowledged and the traditional customs observed by the Yawuru group that existed at sovereignty;
- his Honour decided it did not reflect such a change, made findings that the rights and interests now claimed through an ambilineal descent system are possessed by the Yawuru people under traditional laws and customs and identified evidence which 'amply supported' his findings—at [121] to [122].

Adoption/incorporation into the Yawuru community

The Walman Yawuru argued that there was no, or insufficient, evidence to support the finding that, under the traditional laws acknowledged and traditional customs observed by members of the Yawuru community, there was a principle of incorporation into the Yawuru community of adult non-Yawuru persons having high cultural knowledge and responsibilities. The court rejected this argument, noting that:

- Merkel J carefully analysed the evidence and, having reviewed the evidence Walman Yawuru referred to, it was not inconsistent with Merkel J's conclusion;
- there was evidence upon which the challenged finding could be made;
- the relative infrequency of activation of membership of the Yawuru did not tend to indicate that membership in that way is not according to traditional laws and customs;
- the suggestion by Walman Yawuru that the determination more clearly defined the actual persons who may become members of the Yawuru by incorporation by reason of their high cultural knowledge and responsibilities was wrong because that degree of precision was not imposed by s. 225;
- the determination made accurately reflected the findings based on the evidence and satisfied the requirements of s. 225—at [135] to [141].

Native title rights of the Walman Yawuru clan

The Walman Yawuru challenged Merkel J's finding that the Walman Yawuru clan was a subgroup of the Yawuru community and that the members of that clan did not hold any native title rights and interests in their capacity as clan members, arguing that:

- their 'special attachments to and responsibilities for clan country' constituted native title rights and interests and a 'connection' to that country;
- their clan had a normative system of beliefs and rules which ascribed their relationship to, and connected them to, clan country;
- Merkel J misunderstood the nature of their claim to native title in the Walman Yawuru claim area which, in their submissions on the cross appeal, was described as a 'competing communal native title claim' and not a group claim;
- their native title rights and interests area were communally held and there was no 'umbrella communal system' that gave other clans rights or interests in each other's lands.

It was noted that, although at first instance the Walman Yawuru claimed to hold exclusive native title in the Walman Yawuru claim area, the focus of their argument had shifted i.e. on appeal, they primarily claimed that their special attachments to, and responsibilities for, their clan country should be recognised as constituting *non-exclusive* rights in that area.

The court noted that it was difficult to identify the particular errors said to have been made by the primary judge in relation to the Walman Yawuru claim, with the main contentions apparently being that Merkel J:

- made 'a mistake of fact arising in unfairness' in finding that the Walman Yawuru were a sub-group of the Yawuru community;
- failed to appreciate the 'marked differences' between the evidence of the Yawuru witnesses and the Walman Yawuru witnesses regarding laws and customs relating to land; and
- failed to properly assess the evidence of the Walman Yawuru witnesses, particularly regarding the existence of a rule of trespass in the Walman Yawuru claim area.

After considering the evidence and Merkel J's reasons, the court dismissed the cross appeal, finding (among other things) that:

- Merkel J did not misunderstand the nature of the native title rights and interests claimed by the Walman Yawuru people but, rather, well understood their case and addressed it;
- in oral submissions, senior counsel for the Walman Yawuru claimants acknowledged that his Honour's reasons did not contain any words in which the error which the argument contended that he committed could be seen;
- there were inconsistencies apparent on the face of the rights claimed by the Walman Yawuru and the added difficulty of reconciling the claim on the cross-appeal with Merkel J's reasoning because, although they did not seek to overturn the whole of the decision at first instance, they maintained on appeal that their claimed native title rights were possessed under an independent normative system i.e. independent from the Yawuru community's normative system—at [156] and [164].

As was noted, this could not be anything other than a fundamental attack on Merkel J's conclusion that native title rights and interests are communally held throughout the Yawuru claim area:

> [U]nder a body of traditional laws and customs comprising an ambilineal or cognatic system of social organisation which is *not* concerned with defining the membership of any clan of that community and which does *not* give rise to rights and interests held by members of the community in their capacity as clan members...That is not to say that there could never be two complimentary normative systems within the one claim area. But that possibility was rejected by the primary judge, as reflected in the *determination*. The Walman Yawuru claimants have not shown that the findings made inconsistent with their contention were erroneous—at [164], emphasis in original.

More fundamentally, the Walman Yawuru failed to demonstrate that the primary judge was wrong—at [165] to [169].

The second ground of the Walman Yawuru cross appeal was that:

- there should have been a determination that there was a rule of 'trespass and permission underpinning the requirement of courtesy and respect from Yawuru non-clan members in

acknowledgment of the special attachments and responsibilities held by clan members towards clan country'; and
- this 'rule' gave rise to a native title right and interest held by the Walman Yawuru clan in respect of their traditional land and waters.

It was explained to the court that the Walman Yawuru's claim to exclusive native title rights and interests was an alternative claim that was pressed in case the Yawuru claimants were held on appeal not to have native title rights or interests over Walman Yawuru traditional lands and waters.

The 'short answer' to the Walman Yawuru's alternative contentions was that:

> [T]heir claims were understood by the primary judge, and rejected by him. They were rejected because, on the findings of fact made by his Honour in the light of the evidence, the necessary factual foundation for … them was not made out. That, in turn, depended upon his Honour's assessment of the reliability of competing witnesses for the Yawuru and the Walman Yawuru. There is no reason to disturb those findings. ...
>
> It is difficult to identify precisely what the primary judge is said by the Walman Yawuru claimants to have done wrong; or why the Full Court is being asked to review so many pages of transcript from the hearing at first instance. Nevertheless, after consideration of the material referred to, we have the view that the conclusions of the primary judge were readily available to him, and his reasons for preferring certain evidence over other evidence is cogent and persuasive—at [174] and [176].

The court also upheld Merkel J's finding that:
- the only rights and interests that the Walman Yawuru possess in relation to the claim area are interests or rights held in any capacity they may have as members of the Yawuru community;
- the special attachments and responsibilities they had as clan members did not fall under the s. 253 definition of 'interest' and were accordingly not included in the determination under s 225(c) of the NTA—at [178] to [186].

It was noted that:

> There is much to be said for the view that s 225(c) does not refer to particular intra-mural "interests" of members of the native title claim group, but to third party interests which must be accommodated in parallel with the native title rights and interests—at [186].

It was not necessary to come to any conclusion on the submission that Merkel J should have determined that the Walman Yawuru clan succeeded to the traditional lands of the Minyirr clan because the court had rejected the premise upon which Walman Yawuru's claim was based—at [191].

The Walman Yawuru's submission that there was an implicit finding in *Rubibi No 5* that they held some non-exclusive native title rights and interests in their clan areas in their capacity as clan members was rejected because his Honour 'made no such finding'—at [153].

Conclusion on native title rights and interests

For the reasons summarised above, the appeals of the State and the Walman Yawuru were dismissed 'so far as they concern native title' (i.e. and not extinguishment) issues—at [191].

Extinguishment — police station and gaol reserves

In relation to two unvested reserves, one for the purpose of a gaol and the other for a police station, Merkel J determined that native title was only wholly extinguished in the areas on which the gaol and the police station had been built. Over the remainder of each reserve, his Honour found that non-exclusive native title survived. (His Honour had visited both reserves before making his decision). After reviewing the evidence, the court agreed with this finding (albeit on slightly different grounds), holding that:

> [H]is Honour's conclusions are to be understood as conclusions that the Crown has not, by the mere construction and use of the gaol and police station, asserted rights over that vacant land that are inconsistent with all native title rights and interests. … So understood we agree with his Honour's conclusions. In our view, native title has been [wholly] extinguished in respect of the land on which the gaol and the police station have respectively been constructed, the immediate curtilage of the works constituting the gaol and the police station, and areas adjacent thereto enclosed by walls or fencing. Otherwise ... native title in respect of the reserves has not been [wholly] extinguished—at [208].

Application of s. 47B to the town site

The state argued that:

- section 47B did not apply to any area within the town site because it was subject to a proclamation originally made pursuant to Land Regulations 1882 (WA) in November 1883 'under which the whole or a part of the land or waters in the area is to be used for public purposes, or for a particular purpose' within the meaning of s. 47B(1)(b)(ii);
- the court should not follow *Alyawarr* as to the construction of s. 47B(1)(b)(ii).

It was held that this ground failed because (among other things):

- the construction of s. 47B adopted in *Alyawarr* should be accepted as correct unless and until a judgment of the High Court establishes that it is erroneous;
- the classification of Crown lands as town and suburban lands to form the township of Broome under the Land Regulations 1882 (and subsequently under the Land Act 1898) embraced a variety of potential subsequent uses, none of which was defined at the point of proclamation;
- any intention to use the land for requisite purpose or purposes was to be gleaned from the terms of the proclamation and its constating legislation as an intention to be fixed for the duration of the proclamation, and not as a matter of fact at the time of the application for a native title determination;
- given that the critical time to determining the requisite purpose was to be gleaned from the terms of the relevant instrument and its constating legislation, no relevance attaches to the time, if any, at which the township of Broome was established—at [220], [222] and [226], referring *Moses* and *Griffiths v Northern Territory* (2007) ALR 72, summarised in *Native Title Hot Spots* Issue 27.

Occupation for the purpose of ss. 47A or 47B

The Yawuru said Merkel J was wrong in his approach to the issue of whether or not the requirement in ss. 47A(1)(c) or 47B(1)(c) for occupation was met. They contended Merkel J made three errors:

- in finding that the use of the area had to be a traditional use;
- in considering that general public use of the area was a relevant, if not determinative, factor;
- in incorrectly finding, as a matter of fact, that the requisite occupation was not established.

As to the first, the court said that:

- Merkel J did not impose such a requirement but, rather, correctly held that there was no proper basis for reading a requirement of traditional occupation into the sections;
- by 'traditional use', the Merkel J clearly meant 'use in accordance with the way of life, habits, customs and usages of the group' and, so understood, 'this was a helpful elaboration of the concept';
- the extent to which an area must be inhabited or used by one or more claimants in order to satisfy that requirement is not easily described and cannot be reduced to a simple formula - it is 'a matter of fact and degree'—at [286] to [289], referring to *Moses* and *Hayes v Northern Territory* (1999) 97 FCR 32.

As to the second, it was found that:

- Merkel J's approach had to be seen in context i.e. he was dealing with an argument that use by the Yawuru claimants which was indistinguishable from use by the public did not amount to occupation;
- his Honour rejected that 'extreme position' but held that public use may be a relevant factor and, importantly, went on to say that the question was, ultimately, whether occupation by a claim group member at the relevant time had been established;
- the suggestion that public use might be determinative was 'perhaps overstating the position' but it was clear from his reasons that Merkel J did not treat this as determinative but, rather, took it into account with a variety of factors and had regard to all the circumstances of the case;
- while general public use was 'a weak signifier against occupation', there was no reason to think that Merkel J placed 'more than appropriate reliance on it'—at [290] to [291].

As to the third challenge, the court noted that the difficulty faced by a party alleging such an error was formidable:

> [T]he primary judge not only visited the areas in question and observed the terrain…, he also had the benefit of many days of hearing evidence from a large number of members of the native title claim group and had the opportunity to assess their activities on the land. All of these advantages are unavailable to the appeal court, and are likely to have helped the primary judge assess the evidence in relation to occupation. This Court is confined to the bare words on the pages of transcript—at [293] to [294], referring to *Moses*.

That said, in relation to areas at a place called Kennedy Hill in the Broome town site, the court overturned Merkel J, finding that the evidence established that the Yawuru claimants did occupy those areas within the meaning of s. 47B(1)(c)—at [305].

Vesting of inter-tidal zone wholly extinguished native title

The court upheld Merkel J's finding that any native title rights or interests in so much of the intertidal zone of the determination area that was vested in the Minister for Transport pursuant to s. 9 of the *Marine and Harbours Act 1981* (WA) (MHA) were extinguished when the seabed in that area was vested in the minister. This was because, (among other things):

- the MHA created a body corporate with perpetual succession under the name 'The Minister for Transport', s. 9 of the MHA authorised the Governor by proclamation to vest in that minister any real or personal property of any kind or interest in any such property and, in

February 1982, the Governor vested in the minister the area of seabed identified in the proclamation as the Broome port area;
- section 12 of the MHA revealed a legislative intention that the proclamation vested a legal estate in fee simple in the seabed and the space above the seabed in the minister;
- there was no necessary inconsistency between the vesting of fee simple in the intertidal zone and the continuation, until abrogated, of the public right of fishing and navigation;
- on its face, the MHA did not single out native title rights and interests for different treatment (questions of compensation to one side) and, therefore, the vesting was valid but s. 10(1) of the *Racial Discrimination Act* 1975 (Cwlth) would supply to native title holders a right of compensation for their loss;
- because the vesting was not invalid, it was not a 'past act' within the meaning of Div 2 Part 2 of the NTA;
- the effect of Division 2B of Part 2 of the NTA (the confirmation of extinguishment provisions), when read together with s. 12I of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (TVA) was that native title was taken to have been wholly extinguished in the Broome port area upon the publication of the proclamation vesting the area in the minister—at [228] to [241], referring to *Ward*, *Yarmirr* and *Gumana v Northern Territory* (2007) 158 FCR 349, summarised in *Native Title Hot Spots* Issue 24.

McMahon Oval Reserve

Merkel J's findings that earthworks undertaken by the local authority in 1989 for the construction of the McMahon Oval had the effect of extinguishing native title were upheld. About 40% of the reserve in question was an uncompleted sports oval. There was uncontested evidence that the local shire carried out earthworks and installed drainage ditches and paths and that the whole of the reserve was traversed and disturbed by heavy earthmoving equipment in the course of creating the oval. Merkel J visited the reserve before making the finding that 'the oval was a major earthwork the construction of which involved usage of the whole of the reserve'. The court noted that:

- the public work relied upon by the shire was not the uncompleted oval but the completed 'major earthworks';
- therefore, as the completed earthworks were 'major earthworks' as defined in s. 253 of the NTA, they result in extinguishment under the provisions of the TVA analogous to ss. 15(1)(b)(i) and 23C(2) of the NTA, notwithstanding that not all of the works planned for the area were complete;
- 'major earthworks' do not need to constitute part of a completed project in order to fall within the definition of a 'public work'—at [270] to [279].

Reserve not validly created under state legislation

The court overturned Merkel J's finding that Reserve 631 was validly created pursuant to reg. 29 of the Land Regulations 1882 because:

- on the proper construction of reg. 29, it did not authorise the Governor to reserve lands for a purpose as general as 'public purposes, adjoining Broome, Roebuck Bay';
- the Governor was required to identify the object or purpose of every reserve created under the regulations;
- the notice by which Reserve 631 was purportedly created did not comply with the requirements of reg. 29 of the Land Regulations 1882—at [242] to [253].

Broome cemetery reserve did not wholly extinguish as no evidence of vesting
The court overturned Merkel J's finding that:

- the legal estate in Broome cemetery reserve was vested in trustees;
- the rights flowing from the vesting were inconsistent with any native title rights and so native title was wholly extinguished over the whole area of the reserve.

Their Honours were of the view (among other things) that:

- had there been evidence of the appointment of trustees, together with the vesting of the cemetery land in the trustees under the *Cemeteries Act 1897*(WA) (Cemeteries Act), that 'may well have extinguished native title';
- however, the evidence did not show that there was any such vesting despite the fact that the investigation of land tenure and the materials produced were extremely extensive and detailed in this case;
- therefore, the state, as the party asserting extinguishment, had not discharged the evidentiary onus of proving the nature and content of the act said to extinguish native title;
- Merkel J was wrong in his view that the trustees had rights to use the cemetery for burials, digging graves and laying tombstones under the Cemeteries Act because the state had not established, on the evidence, that the trustees had those rights i.e. those rights and powers depended on their being a vesting in the trustees;
- neither the mere passing of the legislation nor the appointment of trustees extinguished native title;
- the reserve was not vested in the trustees under s. 212 of the *Municipal Corporations Act 1906* (WA) either because that section only applies where property is 'granted or held on trust', which the reserve was not—at [257] to [258] and [265] to [269].

Conclusions on extinguishment issues
The court concluded that Merkel J erred in concluding that:

- Reserve 631 was validly created;
- native title was wholly extinguished over the Broome Cemetery reserve;
- the Yawuru claimants did not occupy the areas at Kennedy Hill at the time their claimant application was made.

All the other challenges to his Honour's findings on the extinguishment issues failed—at [306].

Decision
It was decided that the parties should have the opportunity to consider the appropriate orders to be made in the light of the reasons for judgment. They were ordered to provide an agreed minute of orders (or, if there is not agreement, a minute of the orders each party sought and a brief outline of submissions in support of those orders) by 20 May 2008.