Proposed determination of native title — Wanjina–Wunggurr

Neowarra v Western Australia [2003] FCA 1402

Sundberg J, 8 December 2003

Issue

The questions dealt with in the summary of this case are essentially:

- Does native title exist over an area in the north Kimberley region in Western Australia? and, if so;
- Is it held by a regional community (called the Wanjina–Wunggurr community) united by its adherence to a distinctive set of laws and customs, rather than by a language or clan estate based group?

Owing to the length of the decision and both the complexity and novelty of some of the findings in relation to ss. 223(1)(a) and (b), issues in relation to the extinguishment will be summarised in the next issue of *Native Title Hot Spots*.

Background

This decision relates to three claimant applications (the application area) in the Kimberley region of Western Australia. In each, a determination of native title was sought on behalf of 'those persons who hold in common the body of laws and customs derived from beliefs about' Wanjina and Wunggurr (see below). The area covered by the applications was divided into three sub-groups, each representing a different language group or country. Membership of the claim group was said to be by way of 'an inherited link through mother or father to a clan estate country (dambun) within the Wanjina–Wunggurr region'. That region was said to be more extensive than the area covered by the applications considered in this case.

Largely as a result of the impact of colonisation, many of the claimants now live, permanently or seasonally, at Mowanjum, a community near Derby that is some distance from much of the application area. However, there are several permanent and 'dry season' communities on the application area.

Evidence was given by fifty-nine Aboriginal witnesses on various parts of the region, including three from outside the Wanjina–Wunggurr region. Eleven expert witnesses also gave evidence. In all, the trial occupied fifty nine hearing days.

Basis of the claim group

The claimant group was said to be made up of the members of the Wanjina–Wunggurr community, which was a community with a distinctive shared body of beliefs, social and cultural traits and language affinities that bound them together and differentiated them from their neighbours.

Central to this was a body of beliefs about Wanjina and Wunggurr, both being distinctive elements of the native title claim group's traditional laws and customs. Wanjina refers to distinctive figures found in painting galleries located within the Wanjina–Wunggurr region that are associated with certain beliefs acknowledged and practices observed by the claimants. Wunggurr is associated with a set of beliefs in a creative agent sometimes called the 'Rainbow Serpent'. Other salient features of this 'distinctive, shared body of beliefs, social and cultural traits and language affinities' included:

- events of spiritual conception through which a child is associated with a place from which its body was entered in utero by a pre-existing spirit placed there by Wunggurr;
- a division of the entire region into *dambun* (sometimes referred to as estates), which were loosely bounded areas usually associated with one or more Wanjina, often represented as paintings in caves or rock shelters, or Wunggurr;
- *dambun* were classified according to a moiety system and ordered within a system of exchange (called the *wurnan*) in which objects, songs and valued knowledge were circulated through an established order of adjacent *dambun*;
- clan groups, each of which was associated with one of the *dambun*, where membership was determined by that of one's father;
- a kind of 'top-down' division of the world (human and non-human alike) into two complementary categories or moieties, with children being assigned to the opposite one to their mother's (usually the same as their father's);
- a system of kin classification through which clan estates are linked together in specific quasi-genealogical or affinal relationships (brother-brother, mother-child, husband-wife etc.);
- a distinctive form of marriage called patrilateral cross-cousin marriage.

Connection submissions

The laws and customs observed by the claimants were said to establish a number of kinds of connections between them and areas within the Wanjina–Wunggurr region, including language countries, conception sites, and dambun.

The claimants' entitlements under traditional laws and traditional customs were said to exist 'as a complex set of cross-cutting and overlaid individual, groups and community rights and interests of various kinds' that were neither:

- undifferentiated across the Wanjina–Wunggurr region; nor
- held or shared equally by all claimants in relation to the whole of the Wanjina–Wunggurr region for all time and for all purposes.

Rather, they were said to be 'variously possessed' by the claimants i.e. as individual, group and community rights in accordance with the traditional laws and traditional customs of the Wanjina–Wunggurr cultural domain.

The claimants contended that, individually, collectively (in various groupings) and as a community, they had a connection with the claim area by the traditional laws they acknowledged and the traditional customs they observed, which was said to

include historic, ancestral, social, physical, ritual, spiritual, traditional and economic aspects.

Submissions on *dambun*

The applicants submitted that:

- *dambun* were not independent economic, ritual, residential or political units with exclusive rights and responsibilities in an estate's economic and cultural resources;
- *dambun* could undergo 'legitimate' fission and fusion under the traditional laws and customs of the Wanjina–Wunggurr cultural domain;
- there was a long history of co-residency among the claimants, a strong sense of common identity and a social network of multiple 'cross-cutting' ties.

Respondents on claim group

The state and several other respondents admitted that there were Aboriginal people present upon, or occupying, the application area when sovereignty was asserted i.e. in 1829. However, they argued (among other things) that:

- there was no such entity as the Wanjina–Wunggurr community either at sovereignty or at any time thereafter. Rather, if there was any basis for the claim to native title, it should have been based upon patrilineal, patrilocal clan estate groups associated with a language country, with each discrete clan group constituting an organised society; and
- non-Aboriginal settlement, particularly the establishment of mission settlements and pastoral stations, caused disruption of the clan group organisation, relocation of Aboriginal people from their traditional clan lands and a decline in adherence to traditional laws and customs.

Genealogical evidence

Three anthropologists who prepared the genealogical charts and reports gave oral evidence and were cross-examined. Nearly all Aboriginal witnesses gave detailed evidence about their forebears and descendants which, for the most part, was not challenged.

Some of the respondents initially challenged the status of the genealogical evidence as 'expert' evidence. Had the challenges been sustained, the court would have rejected them on the ground that 'genealogies duly prepared by anthropologists employing their specialised skill and understanding of the structure and culture of a society represent an appropriate field of expert evidence'. The evidence given by the three anthropologists about how the genealogies were prepared satisfied his Honour that they had 'specialised knowledge based on their training, study and experience, and that the genealogies and the report accompanying them are substantially based on that knowledge'—at [42].

Justice Sundberg found that the genealogical evidence established who comprised the claimant group and the basis upon which those persons were members of that the group:

> The claimant group is described as the descendants of named people who were previous inhabitants of the claim area. The genealogies ... link the claimants with previous inhabitants ... Insofar as ancestors of the claimants cannot be traced back to sovereignty ..., it is reasonable to infer that there have been no intervening events between 1829 and the time of the birth of the known ancestors of the applicants that stand in the way of a conclusion that the claimants of today are the descendants of the Aboriginal people present on the claim area in 1829—at [48].

The court concluded (among other things) that the genealogical evidence showed that:

- the traditional laws and customs acknowledged and observed by the ancestors of the claimant group did not impose a requirement of strict biological or patrilineal descent as a condition of membership of the group; and
- the members of the claimant group are the descendants of the Aboriginal people present on the area covered by the application at sovereignty (i.e. in 1829)—at [49].

Historical evidence

Having found that all three historians qualified as expert witnesses, Sundberg J found that:

- an inference should be drawn that the level of occupation by Aboriginal people of the application area in 1901 would have been the same in 1829 given the following:
  - Aboriginal people were seen in the Kimberley region before 1829;
  - in 1838, there was an organised Aboriginal society living close to the western boundary of the application area. The members of that society built structures and adorned their environment with paintings, including Wanjina paintings, made artefacts of wood and used stone to crush and grind seeds and to shape into spearheads;
  - in 1901, Aboriginal people were present over the whole of the application area, even though they appeared to be sparsely scattered in some places. Indeed, signs of their presence were 'everywhere';
- in the 1930s, Aboriginal people were present everywhere in the claim area where non-Indigenous people went;
- nothing in the documentary records up to the 1930s suggested any mass movement of Aboriginal people from the area and they continued to conduct ceremonies and to travel long distances across that area;
- many settlers did not want Aboriginal people removed because Aboriginal labour was 'essential to the viability of the pastoral industry in the region from the 1880s to the 1970s';
- the involvement of Aboriginal people in station work meant they could live on or close to their traditional country and have their elderly relatives and children live on the stations. They supplemented their station rations with bush food and hunting and fishing—at [61].

Archaeological evidence

Most of the archaeological evidence related to areas within the Wanjina–Wunggurr region but outside of the boundaries of the application area. In relation to this evidence, the court found (among other things) that:

- there was much more evidence in the surrounding areas suggesting continuity of occupation because more research had been done in the surrounding areas;
- there was widespread evidence for cultural continuity in the surrounding areas from dated sites that show use from well before 1829 well into the late twentieth century;
- the more widespread evidence consistent with the pre- and post-contact use in undated sites in both the application area and the surrounding areas suggested that material evidence from cultural continuity over time was more widespread than the number of dated sites would suggest;
- there was evidence at two rock shelters in the application area of use and occupation 'well into the historic period';
- undated evidence of flaked stone artefacts was consistent with pre-contact use, with the presence of flaked glass artefacts and other European material attesting to post-contact use;
- there was substantial evidence for continuity in the form of flaked stone, flaked glass and ground iron, with the flaked glass and iron suggesting that European materials were used in ways consistent with Aboriginal technological traditions well into the historic period;
- minimum age estimates for a number of Wanjina rock art paintings in the Kimberley range from 600 to 100 years, with the distribution of those sites broadly congruent with the expanse of the claim area and the surrounding areas—at [70].

Anthropological evidence

The main point of disagreement between the anthropological experts was the level at which native title should be recognised in this case. The applicants' three experts were of the view that native title was held by the Wanjina–Wunggurr community through a complex system of cross-cutting ties. The state's expert argued that native title was held by clan estates (dambun) on the basis of 'recognition of the Ngarinyin people as both the owners of the language and the spiritual custodians' of the country in which their language was 'emplaced'—see at [84].

The three experts for the applicants, Dr Alan Rumsey, Dr Anthony Redmond and Professor Valda Blundell, had all carried out extensive fieldwork in the claim region over lengthy periods. The state's expert, Professor Basil Sansom, had not carried out fieldwork in the Kimberley, which was found to give his opinions and conclusions a 'desktop or academic quality which renders them of less weight than those of experts who have immersed themselves in the day to day life of the claimant group'—at [120].

A joint expert report filed by the applicants was prepared Dr Rumsey and Dr Redmond, which, among other things, stated that:

- the earliest ethnographies for the region identified four features as being part of a 'cultural complex' that was distinctly different from that found in neighbouring regions, namely:

    - belief in a class of individually named ancestral creator beings known as Wanjina, who left themselves throughout the region as cave paintings of a distinctive sort, and/or as features of the landscape;
    - a set of beliefs about Wunggurr, the primordial water-serpent, closely associated with Wanjina, rain, and with child-spirit countries from which children acquire a Wunggurr identity through a dream that comes to their father;
    - named clan countries and groups, each associated with one or more named Wanjina creator beings, usually portrayed at rock shelters within the clan country;
    - named exogamous patri-moieties (with cognate or overlapping sets of names);
- the 'ensemble of socio-cultural forms' among the north Kimberley peoples was not totally anomalous but was recognisable as a distinctive regional variant of more general patterns or institutions among Aboriginal people;
- it was 'reasonable' to conclude that:
    - this ensemble evolved through processes of continuous reproduction and transformation within a wider Aboriginal social field;
    - given the continent-wide distribution of some of its basic elements, these processes had been going on for a far longer period than that of European colonisation, since the relevant features (exogamous, patri-filiative local-totemic groups, moieties, ideas about the rainbow serpent, etc) 'could not possibly have swept across Australia during the short interval between the arrival of Captain Cook and the first recorded observations of these features at widely scattered locales';
    - on the basis of the ethnographic evidence alone, the state that the north Kimberley ensemble had reached in 1829 was probably very much like the one reported in the earliest ethnography a hundred years later;
- One unique aspect of the culture was the use of a highly skilled technique of pressure flaking for making spear tips, a technique applied only across the north Kimberley region—at [75].

Linguistic evidence

The evidence given was that:

- the north Kimberley languages were classified together as a distinct family of languages related by common descent from a single ancestral language;
- geographically contiguous languages contrasted sharply with the north Kimberley ones in several respects;
- the shared features of the north Kimberley languages were unlikely to be as a result of borrowing alone because:
    - the resemblances among the languages were of a systematic nature; and
    - they were shared among non-contiguous languages in the group but not with neighbouring languages outside of the group;
- both the overall affinities within the group and the pattern of differentiation among the languages suggested that they have been developing in situ for a very long period of time;

- the boundaries of the north Kimberley language family were fairly closely aligned with those across which all of the other features were distributed i.e. the moieties, the named clan groups each associated with the Wanjina, the set of beliefs about Wunggurr etc., which suggested that there was a relatively distinct regional community of people in interaction with each other and evolving a set of institutions in close interaction with each other, which gave another kind of evidence that could be quantified in a way that the ethnographic evidence could not;
- while some of these languages were mutually unintelligible, one of the characteristics of the Wanjina–Wunggurr community was that many individuals continue to be multilingual-quadrilingual—at [76] to [77], [98] and [111].

Based on this evidence, his Honour found that:
- the evolution of the north Kimberley ensemble of socio-cultural forms took place on a time scale such that the state it had reached in 1829 was much like the one reported in the earliest ethnography 100 or so years later;
- pressure flaking was used across the entire north Kimberley region and was unique to it;
- the north Kimberley languages are a family of languages derived from a single ancestral language, and contrast sharply with geographically contiguous languages;
- the north Kimberley family of languages are different enough to be mutually unintelligible, though so many Aboriginal people are multi-lingual that the differences are of no practical relevance;
- the boundaries of the north Kimberley language family are closely aligned with those across which other elements of the ensemble are distributed (moieties, named clan groups associated with Wanjinas, Wunggurr beliefs)—at [120].

Claim group an anthropological construct

There was no Aboriginal name in evidence for the claim group. The state's expert argued that the Wanjina–Wunggurr 'cultural domain' on which the claim was based was an 'imagined and invented entity' and a 'novel creation that has no customary existence'. If traditional rights and interests in land existed, his view was that they would be held in common by those who can show connection with the estates or *dambun* of a particular language-country, three of which (Ngarinyin, Worrorra and Wunambal) extend into the application area.

His Honour accepted the evidence to the contrary, which was that:
- the secondary sources, the experts' fieldwork and the transcript of the Aboriginal evidence disclosed a set of laws and customs commonly acknowledged and observed by Ngarinyin, Worrorra and Wunambal people;
- although the term 'Wanjina–Wunggurr community' was an anthropological construct, Aboriginal witnesses did describe the inhabitants of the region as 'the three tribes' or 'the Wanjina tribe' and used the composite expression 'Ngarinyin, Worrorra and Wunambal' to describe the members of those tribes or that tribe;

- this anthropological construct was an expression that attempted to represent the emic (insider) view of another culture using an analytical language that others (such as anthropologists) with an etic (outsiders) view would understand;
- a small group of Aboriginal people in the north Kimberley formed around the core of a clan and occupying an estate would be too small a unit to maintain itself as a biological population;
- a shared kinship system, as in this case, is a clear indicator that people share a culture and constitute a people, because kinship is the glue that holds these types of societies together—at [91] to [110], [120] (25) to (28) and [162] to [132].

Findings in relation to anthropological and linguistic evidence

In addition to those noted above, his Honour made the following findings in relation to the anthropological and linguistic evidence:

- the earliest ethnography showed a high degree of consistency regarding key socio-cultural traditions among the Ngarinyin, Worrorra and Wunambal peoples (Wanjina beliefs, Wunggurr beliefs, named clan countries each associated with its own Wanjina rock painting, exogamous patri-moieties);
- these four traditions (and others identified in later ethnography) are part of a cultural complex that is distinctly different from that found in all the neighbouring regions;
- Elkin's 'North Kimberley' was almost identical to the area of the Wanjina–Wunggurr region propounded by the applicants' anthropologists and his 'North Kimberley' map corresponded very closely with what he later mapped as the 'Boundary of Wanjina Cult Paintings';
- what was most distinctive of the north Kimberley region is the way in which moieties, patrifilial local groups and Wunggurr beliefs were intertwined with each other and with a particular kinship and marriage system and clan-based exchange system;
- particular places and regions in general have people related to them in more than one way —someone's Wunggurr place, another's clan country, another's relation's place, another's language country;
- to the extent that these various forms of social identification may be used to specify groups of people, the groups are neither mutually exclusive (since people belong to multiple more or less overlapping ones) nor undifferentiated in their identification with country, since the people in each group have multiple, cross-cutting ties to other country on other bases;
- people's identification with particular places and areas within the Wanjina–Wunggurr region is underwritten by their common adherence to the set of beliefs and practices regarding Wanjina and Wunggurr, beliefs pertaining to the entire region, notwithstanding the fact that they link people in multiple cross-cutting ways to specific places and areas within it;
- because of the high rate of endogamy within the region and the fact that clans are strictly exogamous, most of the people who are linked to specific places and locales in the region have specific links to at least two *dambun* within the region through their father and mother;
- in addition to these links, the great majority of people also have their Wunggurr place within the region and not necessarily within either of their parents' *dambun*;

- rights to specific places within the region are not held in common amongst the entire Wanjina–Wunggurr community but by certain members of it who are linked to a place or locale in specific ways. However, the entire community holds in common the set of culturally recognised forms of linkage in terms of which all such specific links to specific places and locales are established—at [120].

Partisanship of experts

The respondents argued that the three experts were too close to the applicants to be accepted as independent experts. Rather, it was said, they were advocates for the claimants.

Dr Rumsey had worked with many of the claimants over a period of a quarter of a century and admitted that:

- in his personal capacity, he supported the native title claim strongly;
- there was a danger that he had become too close to the claimants to offer an objective view in relation to the various aspects of their application (but it was noted that he tried to avoid it by remembering he was a professional anthropologist who had to take those factors into account); and
- consciously or unconsciously, it 'could well be the case' that these matters might affect his selection of material and opinions but noted that he tried to guard against it.

Dr Redmond, who had lived with the claimants for extended periods during his fieldwork, was also cross-examined on 'closeness' and admitted that:

- he had become bound up in the day-to-day lives, expectations and aspirations of the claimants 'to a degree' i.e. as an objective of his research in order to 'try and grasp the meaning, structures, and values that people attributed to their actions'; and
- as a private individual, he would feel some sense of disappointment if the claim failed.

He denied that a statement from his diary stating that Aboriginal people had been 'victims of a war of dispossession' meant that he could not 'dispassionately' express an expert opinion and said he was confident that his closeness to the claimants had not affected his professional work.

Having watched both witnesses giving evidence over a lengthy period of time and having read the transcript of their evidence several times, his Honour found that:

- despite Dr Rumsey's candour in acknowledging the risk inherent in 'closeness', his evidence and opinions were at all times entirely professional. Part of the reason he was 'eminently qualified' to give expert anthropological and linguistic evidence was because of his close involvement with the claimant group;
- Dr Redmond's evidence was dispassionate and professional;
- his closeness to his subjects endowed his evidence with particular value and he had struck the 'tricky balance' between becoming, in a sense, a member of the culture he was studying while maintaining his objectivity—at [112] to [115].

Professor Blundell's impartiality was challenged on the basis that she was defensive and, at times evasive, when being cross-examined and that she also acted as an advocate for the claimants, not as an impartial expert.

Professor Blundell is from Canada. She had worked in the Wanjina–Wunggurr region since 1971, had published a thesis that was 'an important contribution to the literature' and had done further fieldwork in 1976, 1977, 1996, 1998, 1999, 2000 and 2001. From 1978 to 1993, while in Canada, she published three articles on aspects of the region and its indigenous inhabitants.

Having noted that Professor Blundell's expertise could not be seriously challenged and that she was suffering from jet lag when she gave evidence, his Honour rejected the challenge, noting that:

> From time to time she became a little impatient at the lack of precision in counsel's questions, and the repetitive nature of the cross-examination. On a number of occasions she pointed out that a particular topic had been covered more than once, saving the Court from having to make that point. Several times ... when she was complaining of tiredness, she professed to be unable to answer particular questions without being able to reflect on the proper answer. I did not see this as evasion, but as a genuine inability to provide the Court with a useful answer on the spot—at [119].

Claim area and language country areas

His Honour surveyed the evidence on relation to the languages spoken in the Wanjina–Wunggurr region (which included areas outside of the application area) and the 'language countries'. The court noted that the evidence indicated that the eleven languages associated with the region were known as the north Kimberley language family, which could be divided into three branches:

- Ngarinyin and Wurla and Andajin in the east;
- Worrorra, Unggumi, Umide, Unggurranyu, and Yawijibaya in the west; and
- Wunambal, Gambere, Gwiinii in the north—at [121 to [125].

While six of these related to the application area, Ngarinyin language country covered most of it. However, the western and northern parts of the region were subject to two other claimant applications brought by the same claimants as the three considered in this case i.e. the whole Wanjina–Wunggurr region was being claimed by the same group, albeit in separate applications—see [151].

His Honour's conclusion was the evidence showed that the boundaries were 'conservatively' drawn in such a way as to ensure that the application area did not intrude on language countries said to be outside of the Wanjina–Wunggurr region (such as Bunuba, Gija and Nykina)—at [158] to [161].

'Traditional' laws and customs

His Honour noted that, for the purposes of s. 223(1)(a), the claimants must possess the claimed rights and interests under 'traditional laws acknowledged and traditional customs observed' by them, with 'traditional' having three elements:

- the laws and customs must have been passed down from generation to generation;

- they must have existed before the assertion of sovereignty and the claimants must establish that their laws and customs are the normative rules of a society that existed before sovereignty in 1829; and
- they must have had a continuous existence since sovereignty—at[162], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3) at [46] to [47].

Normative element

In relation to the requirement for a 'normative' element, his Honour noted that:

- a normative system containing a particular custom does not cease to embody that custom simply because some members of the society flout the rule;
- many people drive their cars in excess of the speed limit but do not thereby cease to be part of a society that requires compliance with speed limits;
- the dictionary definitions of 'normative' were as 'establishing a norm or standard' and 'concerning a norm, especially an assumed norm regarded as the standard of correctness in speech and writing' and of 'norm' as 'a rule or authoritative standard' and 'a standard, model, or pattern';
- a practice had a normative content if it 'lays down a standard of behaviour, and it was observed by the claimants';
- occasional breaches, when accompanied by strong indignation on the part of others, may go to demonstrate the continuing viability of the rule—at [222], [257], [271] and [310].

'Washed away' v changed and adapted?

His Honour rejected a submission by one respondent group that what the witnesses in this case described was often a 'pure' form of the laws and customs that had been so diluted that the *traditional* law and custom had been 'washed away', noting that:

> [I]t is important to bear in mind that if what is asserted is a change or adaptation of traditional law or custom, the question is whether that change is of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws and customs of the Aboriginal people at sovereignty. If what is asserted is that there has been an interruption in the acknowledgment and observance of the law or custom, the question is whether that interruption is "substantial" or whether the acknowledgment and observance has continued "substantially uninterrupted"—at [163], citing *Yorta Yorta* at [87] and [89].

Uniformity of evidence not required

His Honour rejected a submission that there had to be a 'uniformity of practice in respect of the law or custom on the part of the Aboriginal people' in order for something to qualify as a law or custom:

> Rather than presenting a "melange of confusion", the evidence shows that witnesses used their own language to describe different aspects of [their laws and customs in relation to] Wanjina history, tradition and meaning. That the witnesses do not all say exactly the same thing is not a matter for surprise in a society in which different levels of knowledge about laws and customs exist in different parts of it, and different people are ... custodians of special items of knowledge—at [177].

On the contrary, if witnesses from different parts of such a large territory had given evidence in identical terms, Sundberg J would have found it 'suspicious'. In this case, the Aboriginal evidence was 'spontaneous', with 'each witness giving his or her account in the witness's own fashion with differing degrees of proficiency in English. At the end of the evidence the mosaic is there to be assessed as a piece'—at [177].

Distinctiveness of law or custom not required

Similarly, his Honour was of the view that there was no requirement in s. 223(1) that a law or custom of the claimant group must be distinctive, in the sense that no other Aboriginal group had that law or custom. For example, while beliefs about conception occurring from spirit-substances in the vicinity of major water-holes are 'widespread' throughout Aboriginal culture, this was no bar to that belief being a law or custom of the claimant group in this case—at [182].

Identification of laws acknowledged and customs observed

His Honour considered at length and in turn each of the laws and customs asserted. What follows is a brief summary of the major points in relation to each.

Belief in Wanjina

According to his Honour, the 'mosaic' of evidence presented in this case disclosed a belief that Wanjina created the land and waters and what lives on or in them and laid down laws and customs around which the claimants constructed their lives. The evidence of the continued prominence of Wanjina beliefs uniquely held by the claimants included:

- those who first heard Wanjina stories from their elders said they now pass those stories on to their own children and other young people;
- beliefs about Wanjina—his travels, the placing of Wanjina images in the landscape, the rules laid down by Wanjina, the consequences of breaking the rules and the transmission of those rules from one generation to the next—were confirmed by many witnesses from across the 'three tribes', i.e. Ngarinyin, Worrorra and Wunambal;
- *dambun* (clan estates) were often associated with one or more Wanjina painting sites in the area—at [177] to [184].

In relation to the appropriateness of the communal nature of the claim group, it was noted that:

- there was evidence that neither Wanjinas or Wanjina-derived laws existed outside of the Wanjina–Wunggurr region;
- there was evidence that the rules governing the region that were laid down by Wanjina applied to all three tribes and transcended language boundaries—at [177] to [184].

One respondent group submitted that traditional practices to do with Wanjina and *dambun* had ceased in contemporary times on the basis that:

- the failure of claimants to visit or tend to Wanjina paintings on *dambun* rendered the location of the painting 'simply coincidental and a matter of historical curiosity'; and

- in accordance with the practice in 'classical' times, the Wanjina paintings should be repainted or touched up annually.

Sundberg J, after noting that the secondary sources conflicted on this point, rejected this submission, preferring the Aboriginal evidence that obligation to visit and repaint arose when the paint was deteriorating—at [209].

Belief in Wunggurr

His Honour found that there was a great deal of evidence of beliefs about Wunggurr places, how they were acquired and that they gave claimants a link to country that may or may not also be their *dambun*, including:

- the fact that nearly every witness identified their Wunggurr place or that of their children or close relative; and
- knowledge of Wunggurr was passed on to children and grandchildren—at [178] to [184].

The failure of some witnesses to mention their Wunggurr places or those of their children and the fact that some witness were unclear about their or someone else's Wunggurr place, did not, 'when the evidence is viewed as a whole, demonstrate loss of the conception dreaming place law or custom'—at [184].

In relation to the appropriateness of the communal nature of the claim group, it was noted that:

- Wunggurr conception places are a custom of Ngarinyin, Worrorra and Wunambal;
- a person can have rights both in their own *dambun* and in another *dambun* if that person's Wunggurr place is located in the other *dambun*—at [180] to [181].

Belief in Wanalirri

The Wanalirri story, which was (essentially) that Wanjinas emanated from a site on Ngarinyin country identified as Wanalirri and dispersed to various places across the Wanjina–Wunggurr region, was mentioned by at least twenty witnesses. His Honour found that:

- this story was 'clearly central' to the culture of the Wanjina–Wunggurr region and all three 'tribes', as was the Wanalirri site itself; and
- it was known by both the older and younger generation—at [185] to [190].

Language knowledge and use

On this issue, his Honour found that:

- there was 'much' evidence establishing the Wanjina–Wunggurr peoples' knowledge and use of their group of languages;
- the relationship of language to country is another aspect of the peoples' language culture, noting that country is not 'Ngarinyin', for example, because that is where people speak that language. Rather, 'it is the land to which the language belongs';
- traditionally, language affiliation is inherited from a parent whether or not the inheritor speaks that language;

- there was evidence that language speakers moved from one language into another when they reached particular places, which were the 'hand-over points or take-over places where one language yields to another'—at [192] to [198].

Moieties/skin system

His Honour noted that the division of society, people, animals and vegetation into one or other of the moieties Jun.gun and Wodoy was a 'constant feature of the evidence', which included that:

- one of the rules of the claimants was that a Jun.gun person could marry a Wodoy person but not another Jun.gun person;
- the moiety system and its application to marriage rules came from Wanjina;
- the moiety system and those marriage rules apply across the Ngarinyin, Worrorra and Wunambal 'tribes';
- while all Aboriginal groups in the north-west of Western Australia have some type of skin system, the claimants' system was distinctive relative to the surrounding groups—at [199] to [200].

Clans and dambun

The evidence was that the claimants' society was divided into clans through a patrifilial connection with a particular tract of country known as *dambun* (translated variously as 'own place', 'own block', 'camp', 'home', 'our country'), the characteristics of which included:

- membership determined by patrifiliation;
- often associated with one or more Wanjina painting sites in the area;
- often had a totem such as a kangaroo, small duck, wattle tree;
- membership carried rights in relation to the estate, expressed with different degrees of emphasis and exclusivity;
- classified according to the moiety system i.e. either Jun.gun or Wodoy, with same moiety *dambuns*, especially proximate ones, seen as closely related;
- related according to the marriage rules in the same way as individuals are related;
- ranked within the *wurnan* system—at [204].

His Honour accepted the evidence of those able to speak of their parents and grandparents times that, in the past, families travelled over extended areas in search of sustenance, and found that, while it was true that a group living on its dambun was likely to support itself by resort to local fauna and produce, there was no evidence that one's father's dambun was, as a matter of traditional law or custom, the area in which a person sought primary sustenance. The existence of clan clusters, the *wurnan*, and kinship relationships, involved entry, often as of right, to other dambun.

A submission that under traditional law and custom (as existed in 'classical' times), attachment or affiliation to dambun involved living on or near the area concerned was rejected as being too 'categorical and inflexible to form a secure base' for that conclusion:

> The respondents' approach ignores peoples' connection [as evidenced in some of the early ethnography as well as in contemporary times] with land other than their paternal

> or maternal dambun-a neighbouring same moiety dambun, a neighbouring other moiety dambun standing in a husband or wife relationship, a neighbouring dambun on the wurnan line, and the dambun of one's Wunggurr place—at [210].

Kinship, marriage and clans

It was submitted by one respondent group that the evidence disclosed that the moiety system no longer existed 'as a law or as a custom observed in respect of procreative partner selection' (i.e. that most marriages were 'wrong way'). On the evidence as a whole, his Honour found that:

- while there may be some departure from the marriage rule among younger members of the claimant group, this is severely frowned on by the more senior members of the community;
- the rule is still recognised by the older and middle-aged members of the group, though even among them, there have been some 'wrong way' marriages;
- breach of the rule does not show that there is no longer a rule. Occasional breaches, when accompanied by strong indignation on the part of others, demonstrates the continuing viability of the rule;
- despite departures from the rule, it has not ceased to be a core element of the society's culture—at [222].

His Honour went on to note that the marriage rule had not been 'washed away', as was alleged:

> We have not got so far down the track that it can now be said that there has been an interruption in its observance... [T]he rule has continued substantially uninterrupted from sovereignty to the present—at [222].

His Honour noted that the Aboriginal evidence provided 'many examples of clans joining or clustering together as a result of kinship/marriage ties', including evidence of clan fusion i.e. one clan having been reduced to a single member fusing with the adjacent same moiety clan to become a single clan group—at [223] to [226].

Ceremony and ritual

While there was evidence that initiation or 'man making' ceremonies were held from time to time, it was not clear how frequently they were held. His Honour noted that the issue was not whether they took place 'regularly' but whether 'the traditional custom is still enacted whenever the occasion arises to do so' and found that the evidence established that it was—at [228].

In response to a submission that initiation ceremonies were not 'in relation to land or waters', his Honour said that: 'As I read s. 223(1), it is not the laws and customs that must be in relation to land or waters, but the rights and interests in land or waters that are possessed under the laws and customs'—at [229].

When evidence was taken at several Wanjina sites, senior claimants called out to alert the Wanjina to peoples' approach before they entered the sites. Visitors were also 'smoked' at various sites, which involved walking through the smoke of a small fire. Evidence was given to explain the 'rule' behind these rituals. Evidence was also

given about the origin, composition, performance and inter-generational transmission of *junba* (i.e. songs for public performance), with the court attending a *junba* performance in which old people, middle-aged people and young children participated—at [230] to [236].

Widow law and mourning rules (*baran*)
The evidence was found to establish the existence of rules (called *baran*) in relation to what a person must do on the death of their spouse, with his Honour noting that the kinship system of the Wanjina–Wunggurr community was such that the death of a classificatory husband (e.g. a brother in law) activated the 'widow' rule for women—at [237] to [243].

Traditional burial
The evidence indicated that neither of the two types of traditional burial had, with one recent exception, been employed since the late 1940s or early 1950s because the claimants and their predecessors 'was bossed by the white people'. The exception was a burial in the late 1990s, conducted after permission to use the traditional method was obtained from the relevant authorities. His Honour found that the custom of traditional burial had not died out, pointing to the recent employment of that custom, and noting that the resistance of 'churchmen' and 'the state' was the cause of any hiatus—at [244] to [249].

Avoidance relationships (*rambarr*)
The court found that the claimants shared a '*rambarr* rule' that precluded a person from speaking to or looking at a person who falls within the concept of *rambarr* (mother-in-law, father-in-law, son-in-law). During the trial, avoidance was facilitated by erecting partitions—at [250] to [251].

Wudu
There was evidence that Ngarinyin, Wunambal and Worrorra people had a distinctive practice called *wudu*, where female relatives warmed various parts of the bodies of young children while reciting rules and prohibitions (e.g. no swearing, no looking at young girls), with there being a relationship between the parts of the child's body warmed and the particular prohibitions or rules—at [253] to [254].

Avoiding names of deceased people— normative?
The claimants declined to utter the name of a person who had recently died when giving evidence. One respondent group argued (among other things) that this was not a law or custom because it did not derive from any mandatory obligation but was rather a practice, like not swearing. In effect, the submission was that this was not a rule 'having a normative content'—see *Yorta Yorta* at [42].

His Honour, having noted the dictionary definitions of 'normative' and 'norm', found that the witnesses who declined to mention the name of a person who had recently died did so because of the existence of a rule that said they must not say the name.

The court noted that when there was the occasional lapse, it was greeted by a 'murmur of disapproval'. This was sufficient to give the 'practice' of avoidance a normative content, in that it 'lays down a standard of behaviour, and it was observed by the witnesses'. If it were necessary to do so, his Honour would, in any case, have characterised the practice as having a mandatory or obligatory quality—at [256] to [257].

Use of 'bush' names

The evidence indicated that children were given bush names, with their Wunggurr place often being one of them but that not all of the witnesses used such names. Nevertheless, his Honour was of the view that the custom of having and using such a name continued, even though not everyone practised it—at [260].

***Wurnan*—sharing and trading resources**

According to the evidence, there was a complex system of exchange and reciprocity in the region, called the *wurnan*. Detailed claimant evidence was given about the *wurnan*, including that:

- the things traded on the *wurnan* included spear points, boomerangs (*marndi*), bamboo (*milinggin*) and hair belts (*naga*);
- a lot of 'good rules, pretty strong rules too' applied to the *wurnan*;
- there were four *wurnan* lines, with one running into the Northern Territory;
- the *wurnan* functions throughout and outside the Wanjina–Wunggurr region;
- things are sent rather than 'ordered' on the *wurnan* e.g. receipt of red ochre from outside of the region had to be responded to by sending something back, e.g. a kangaroo;
- *wurnan* had its origins in a story about sharing resources and operated over both long distances and at the local level, e.g. the *wurnan* was 'followed' locally when distributing parts of a kangaroo;
- that *wurnan* pathways are reflected in the layout of contemporary Aboriginal communities, such as Mowanjum near Derby, where many of the claimants now live—at [261] to [269].

In relation to the sharing of food, his Honour found that there was ample evidence of this practice and that it was 'clearly' traditional. Further, contrary to submissions made:

> There is no requirement that it be an invariable, mandatory or obligatory practice, so long as it is normative—rule based ... There is evidence that not to share is severely frowned on. I find that the sharing practice has the required normative character—at [269].

It was also submitted that the use of the *wurnan* to transmit ceremonial objects was not a law or custom because it was not considered mandatory or obligatory. After referring to his earlier finding that a practice had a normative content if it 'lays down a standard of behaviour, and it was observed by the witnesses' and to evidence, including that there were 'pretty strong rules', Sundberg J found that the transmission of ceremonial objects via the *wurnan* had a normative character—at [271].

Transmission of cultural knowledge
Many witnesses gave evidence about transmitting knowledge, custom and rules to the younger generation—at [272] to [273].

Being from or belonging to country
There was evidence as to whether someone 'came from' or 'belonged to' certain places, e.g. Wunggurr and *dambun* are Paddy Neowarra and Tiger Moore. Sometimes 'belong to' was used or explained 'so as to convey ownership'. Others used the word 'own'—at [274].

Speaking for country
A right to speak for, speak about, talk for or talk about country was often used by witnesses 'without any indication of what this amounted to in practical terms'. Sometimes the context indicated its meaning, which included:

- the right to permit a mining or tourist company to use the land, amounting to ownership of the country;
- the right to make decisions about the country and to stay there;
- the responsibility to look after the country—at [275].

Painting country
The laws and customs relating to repainting Wanjinas overlapped with 'being from', 'speaking for' or 'owning' country, with laws and customs about repainting being described as a process of renewal of a fading Wanjina.

Wanjinas are now reproduced on canvas. The evidence was that:

- the laws and customs that applied in relation to reproductions on canvas had their origin in the laws and customs relating to renewing Wanjinas;
- only those people with appropriate connection to the area of the Wanjina can renew it or authorise others to renew it;
- retouching or repainting the Wanjina paintings ensured that rain would fall and animals and plants would be replenished. There were often thirty to fifty layers of paint as a result of this practice;
- there was concern about unauthorised and unsupervised persons, such as tourist operators, damaging Wanjina or Wunggurr places—visitors had to ask permission to visit sites so that those looking after the sites could be there to show them around and ensure the safety of the sites—at [277] to [283].

His Honour found that if (as had been submitted), in 'classical' times, Wanjina were touched up annually but retouching later came to be carried out when needed, then this would be a modification or an adaptation of a traditional practice and not a 'discontinuance' of that practice—at [283].

Looking after country and places—not site specific
The evidence was that the general obligation to look after country primarily rested on those with a close connection to it (e.g. their *dambun* or Wunggurr) and those who could 'speak for' country or were accepted as having the right to make decisions about it. The obligation was not usually limited to specific sites but related to

'country'.

The state submitted (among other things) that lack of evidence about visitations to a site was fatal to recognition. This was rejected because it failed to acknowledge the 'central role' played by Wanjina and Wunggurr places in the applicants' culture and society. Both Wanjina and Wunggurr give rights and impose obligations in respect of the country in which they are located, not just in the 'bounded area of that specific place'—at [289].

The state also submitted that visitations for the purpose of the native title claim should be disregarded. His Honour found that:

> It is not easy to quarantine these visits [for the claim] from the laws and customs that govern Aboriginal behaviour. For example, while the applicants visited Wanjina sites in preparation for giving evidence about them and in some cases in preparation for the Court visiting the sites, the purpose motivating the visits could not be achieved without observing traditional laws and customs about warning the Wanjina of the approach of strangers, and carrying out the smoking ritual—at [299].

His Honour also found that the fact that the claimants lived outside the application area did not show that they no longer looked after country. While some lived permanently away from the area, others moved back and forth to various communities, many of which were on the application area—at [301].

Permission to access

Almost all witnesses spoke about a requirement that they be asked and give permission to those who want to come onto country, with the only general rule being that a 'stranger' must always seek permission, i.e. anyone not under the 'umbrella' that extended beyond those who 'belong' to the country to cover family members from another tribe. Indigenous people who are not under that umbrella are 'strangers'. The need for permission was found to relate to country generally and not to particular sites—at [302].

The evidence was that, while the witnesses expected non-Indigenous visitors (e.g. tourist companies) to seek permission, they rarely did. The respondents submitted that:

- the evidence indicated that there was no practice of seeking permission and no expectation on the part of members of the claimant group that permission would be sought for access to the claim area;
- there was never a traditional law or custom pursuant to which access could be denied to others or, if there was, it is no longer observed or acknowledged by the claimant group or anyone else;
- to the extent that members of the claimant group have an expectation that they will be spoken to by anyone—especially non-Indigenous people—prior to entry, that expectation is so as to ensure that such people do not inadvertently desecrate or disturb a painting site;
- the belief that permission should be sought cannot be a law or custom because there is no mandatory requirement to seek permission;

- if it existed, then the right to be asked for permission for access to country had been 'significantly diminished', was not in place in all parts of the claim area, was largely unenforced and in many cases was not practicably enforceable because those entitled to enforce it no longer lived on or near their country—at [307] to [309].

His Honour found that:

- the 'permission rule' had a normative quality and, at sovereignty, applied to Aboriginal persons who were 'strangers' to a *dambun*;
- it was clear that relatives did not need to ask permission for access and that 'relationship' is a broad concept;
- the general tenor of the evidence was that Aboriginal strangers usually did seek permission and non-Aboriginal strangers usually did not;
- apart from non-Aboriginal strangers, the system appears to operate in accordance with the normative rules of the society;
- non-Aboriginal strangers may or may not know of the requirement under traditional law to seek permission before going on a person's land and, even if they did, compliance with it may be difficult;
- it would be extraordinary if non-Aboriginal intrusion onto land, without permission, should cause this Aboriginal law or custom to be lost—at [309].

His Honour went on to say that, in determining whether the custom of being asked for permission to enter a stranger's land has been modified or terminated, it was appropriate to take into account all the circumstances in which claimants are placed, including:

- dispersion of the claimants from their traditional locations consequent upon European settlement;
- their migration to church and government settlements;
- the lack of significant employment opportunities outside the pastoral industry;
- the trend towards living in Aboriginal communities; and
- the nature and extent of the claim area.

In all these circumstances:

> [I]t would be unworkable and unreasonable to expect the observance of a custom such as being asked for permission to enter land, which was established when Aboriginal people lived next to other Aboriginal people in the adjacent dambuns, all of whom acknowledged the relevant custom, to continue unaltered in the changed situation of uneven Aboriginal distribution across the Kimberley and the intrusion of white people who are strangers to the society. A normative system containing such a custom does not cease to embody that custom simply because some members of the society flout the rule. Most Aboriginal people respect it, though the dispersal of the community resulting from the changed face of the Kimberley means that there are often practical difficulties in the way of observing it ... The permission for access custom is still observed for the purposes of s. 223(1)(a). It would be wrong to approach the analysis on the basis of whether or not non-Aboriginal people respect the custom. Certainly, many Aboriginal witnesses complained, with different degrees of heat, about the non-observance of the custom by

> white people, thereby asserting the existence of the custom and deploring its non-observance by white intruders—at [310].

Inheritance of country/succession

The evidence disclosed that a process of succession existed to deal with the case where a clan ceased to exist. For a clan to take in this way, it must have the same skin as the people who previously held ownership—at [312] to [314].

Living on, using and enjoying country

The evidence that the claimants lived on, used and enjoyed many parts of the claim region included:

- that 73 of the 134 Aboriginal sites in the Wanjina–Wunggurr region (most of which were on the application area) had been visited for painting, hunting, fishing or some other use;
- Aboriginal occupation, use and enjoyment of the areas around station homesteads;
- Aboriginal occupation, use and enjoyment of the various Aboriginal communities and surrounding areas;
- occupation, use and enjoyment of at least 130 other places spread across the Wanjina–Wunggurr region, most in the application area, visited either while footwalking, hunting, fishing or mustering.

The evidence of use and enjoyment of country was found to 'substantially' cover the application area, with the pattern of use making it 'easy' for the court to infer use and enjoyment over parts of the application area that, 'geographically, lent themselves to such activity'—at [320].

It was submitted that use and enjoyment of Aboriginal communities established under the laws of Western Australia after a process of negotiation with non-Aboriginal people could not be relied upon to support a traditional right to live on, use and enjoy country. This was rejected because it failed to distinguish between non-indigenous property rights and native title:

> The applicants claim native title over the whole of the claim area, including the communities. They rely on what they do at the communities to establish use and enjoyment of the claim area. The fact that, unless they obtain a favourable determination of native title, they must deal with pastoral lessees and the State in order to establish their communities, says nothing about their claim to native title based on the existence of those communities. To put the matter another way, it does not follow from the fact that the communities are situated on land having a particular status for non-indigenous purposes, that members of the communities cannot have a right arising from traditional law and custom to live in the claim area—at [322].

Laws and customs passed down

For law and custom to be 'traditional', they must have been passed down from generation to generation. His Honour found that this requirement was satisfied because nearly all the claimants who gave evidence said they had received instruction about the laws and customs from their parents and grandparents. Given that the age of the most senior witnesses was between 70 and 80, this would have

happened circa 1875. Given the evidence that the current laws and traditions were the same as those that existed before 1829, the court inferred that the grandparents of the senior witnesses received their instruction in the same way as had the witnesses—at [336].

Normative rules of a society that existed before sovereignty

His Honour found that the laws and customs relied on by the claimants originated in the normative rules of the societies that existed in the application area before 1829 for the following reasons:

- the principal Aboriginal witnesses were in their 70s and 80s, which meant they were told things by their parents and grandparents in about 1930. As those parents and grandparents were passing on practices and customs learned from their old people, it could be inferred they received comparable instructions circa 1875 to 1900;
- the early ethnographers (Elkin in western Ngarinyin country from 1927–28, Love in Worrorra country, mainly 1927 to 1940, Hernandez and Lommel in Wunambal country in 1934 and 1938–39 respectively) all recorded many of the customs and practices of which the witnesses spoke, including *dambun* with patrilocal membership, intermarrying moieties, totems, the rules for granting access, the existence of Wanjina, Wunggurr and the *wurnan*;
- the observations in the earliest ethnography accorded with the evidence of the senior claimants as to the customs and practices that came from their parents;
- such a complicated system of beliefs could only have grown up over an extended period of time;
- the archaeological evidence established that the minimum age of the Wanjina predated sovereignty 'by a long stretch'. As many of the laws and customs described were 'Wanjina-derived', it was reasonable to infer that the practices laid down by the Wanjina are at least as old as the images themselves;
- the early ethnography showed a high degree of consistency regarding the four key socio-cultural traditions among the peoples they describe;
- the evidence showed both that Wanjina–Wunggurr cultural complex developed over a long period of time out of a combination of things that were already in place and that each of those things must have been there for longer than 200 years because they are attested so widely around the continent;
- the state's expert anthropologist was also of the view that the 'whole of the claim area was subject to a form of traditional title prior to 1829'—at [323] to [335].

Continuous existence since sovereignty

His Honour found that:

- the applicants' laws and customs, 'while modified and to some extent diluted by the changed circumstances of the older applicants and their forebears, have had a continuous existence since sovereignty'; and
- any changes and adaptations were not of such a kind that it could no longer be said that the rights and interests the applicants assert are possessed under the traditional laws and customs that existed in 1829—at [337] and [364].

Adaptation and change—movement off country

The adaptations involved in 'relocation' to Mowanjum, a community outside of the application area, did not involve a change of such a kind that the rights and interests in land asserted by the applicants were no longer possessed under the traditional laws and customs, for the following reasons:

- Mowanjum was not always a place of permanent residence—people moved around, some to communities on the application area, while retaining a family base at Mowanjum and there were other permanent settlements on the application area used by the claimants, as well as several others used during the dry season;
- the people who moved into earlier missions and who now formed the Mowanjum community were basically the claimants or their ancestors—the Ngarinyin, Wunambal and Worrorra;
- the distribution of housing at Mowanjum reflected the location of Ngarinyin, Wunambal and Worrorra territories;
- there was 'much traffic' from Mowanjum into the application area along the Gibb River and Kalumburu Roads. Traditional life was not a sedentary *dambun*–based existence. It often involved lengthy travels in search of sustenance, to visit relatives, and to accommodate the wet and dry seasons. Movement between settlements and country is the 'modern day' equivalent of the earlier excursions on foot—at [338] to [339].

Selling paintings—traditional?

The evidence was that:

- at sovereignty, the claimants' ancestors painted on rock surfaces and renovated the paintings either annually or as required;
- while some renovation was still carried out, the remoteness of many Aboriginal people from their Wanjina sites prompted some claimants to start painting on canvas;
- this involved change in the law to enable artists to paint at Mowanjum rather than on their various 'countries', which was done for educational reasons, i.e. so that children would see what their ancestors did and carry on the tradition;
- only an authorised person could paint for particular places;
- despite a change in where the painting was done and the medium employed, this aspect of the law as at sovereignty was unchanged; and
- some of the artworks produced were sold commercially.

The state submitted that painting artworks was not 'traditional' because they were sold. His Honour found that:

- the sale of the artworks was 'an incidental spin off';
- the educational rationale for painting on canvas at Mowanjum meant that the practice was 'traditional' as required by s. 223(1); and
- it did not lose that character because it had an incidental economic advantage—at [341].

Connection via succession is traditional

A submission that one claimant's connection with a particular area was not traditional but based solely on long-term residence was rejected. (This was based on

the fact that the people for that language country (the Ungummi) were all 'finished up'). His Honour found that:

> It is a custom of the Wanjina–Wunggurr community that the country of people who are finished can be taken over by those in a neighbouring territory, and that one of the group that has taken over country ... can become recognised as entitled himself to pass it on—at [343].

Young don't know law and custom

One respondent group submitted either that only the 'elderly' people acknowledged and observed traditional law and custom or that there were no traditional laws and customs acknowledged and observed by the claimants, relying upon evidence from some of the claimants that young people:

- don't listen to the old people;
- eat food that under traditional law should not be eaten by young people;
- go to 'danger places' where they should not go; or
- don't want to go into the bush and learn about country.

His Honour rejected the submission for, among other things, the following reasons:

- as the older members of this Aboriginal society are the main holders of stories, laws and customs, it was 'natural' that they should give evidence of those matters;
- in this culture, comparatively few people were fully informed about all the laws and customs and different people were familiar with different aspects of the cultural heritage;
- there was ample evidence that there remains 'a vital society and lifestyle in which significant social pressures of various forms still exist that encourage and support normative behaviour', including evidence of:
  - the initiation of boys;
  - the practice of *wudu* ritual;
  - young people's participation in *junba*;
  - senior people complain about non-compliant behaviour, provide role models and impart knowledge of traditional rules and customs—at [345].

Sundberg J noted that:

> Witnesses who spoke of the indolence of youth did so in a condemnatory manner. There is no reason to think that young Kimberley Aboriginal people are any different from young non-Aboriginal people in a tendency to rebel against authority and question the settled practices of their elders—at [345].

Connection with land or waters— s. 223(1)(b)

Paragraph 223(1)(b) requires that the Aboriginal peoples making an application for a determination of native title must, by the traditional laws acknowledged and the traditional customs observed by them, have a connection with land or waters.

It was noted that whether there is a relevant connection depends upon the content of traditional law and custom and upon what is meant by connection 'by those laws and customs'—at [353], referring to *Western Australia v Ward* [2002] HCA 28 (*Ward HC*, summarised in *Native Title Hot Spots* Issue 1) at [64]. See also *De Rose v South*

Australia [2003] FCAFC 286 at [169] to [171], summarised in *Native Title Hot Spots* Issue 8.

According to Sundberg J, it is not necessary:

- that there be any acknowledgment or acceptance by others of that connection; or
- to show continued use of land or waters to establish a connection therewith—at [347], referring to *Commonwealth v Yarmirr* (2000) 101 FCR 171 at [307], *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [307] and *Ward HC* at [64].

His Honour found that the evidence in this case was much like that noted by the Full Court in *Western Australia v Ward* (2000) 99 FCR 316 (*Ward FC*) at [241], i.e. that European settlement brought major changes in that:

- the Indigenous population was substantially reduced in numbers;
- land uses introduced by the settlers killed or frightened off much of the resources the Indigenous inhabitants depended on for sustenance; and
- in some areas of concentrated settler activity, it could be inferred that Aboriginal presence became impracticable, other than as labour on pastoral enterprises;
- in this case, Aboriginal people came out of the bush to live in missions and government settlements and the impracticability of some of them visiting their country was due to its distance from the community in which they now lived—at [348].

However, as the relationship between Aboriginal people and their country was 'primarily' a spiritual affair:

- connection could be maintained by continued acknowledgment of traditional laws and continued observance of traditional customs, evidenced by the fact that traditional practices and ceremonies were maintained, so far as possible, off the area and that the ritual knowledge underlying traditional law and custom continued to be maintained and passed down from generation to generation;
- evidence of current knowledge of the boundaries to traditional lands provides evidence of continuing connection through adherence to their traditional laws and customs;
- whether or not connection has been maintained in the absence of physical presence is a question of fact to be assessed in the circumstances of each case;
- the fact that some claimants live out of the application area did not necessarily mean that their connection with it has been broken. This is relevant to the sizable population living at Mowanjum and those who live in Derby—at [348] and [351].

Little required to show connection

His Honour was of the view that, given what was accepted both at first instance and by the Full Court in *Ward* as being sufficient, 'little is required to constitute a continuing connection' (although a great deal of evidence was required to show the existence of traditional law and custom for the purposes of s. 223(1)(a)—see summary above)—at [350].

The matters noted from *Ward FC* included:

- evidence identifying the boundaries of traditional country and that present members of the community had maintained connection with the country through adherence to their traditional laws and customs;
- in relation to an area where it was impracticable to engage in physical activities, evidence that a spiritual relationship was maintained by continuing to acknowledge and observe traditional laws and customs involving ritual knowledge, ceremony and customary practices;
- in relation to islands, some of which had not been visited by claimants, a claimant's continued assertion of a relationship with the islands was sufficient;
- where evidence of physical presence was minimal, the fact that none of the Aboriginal witnesses said their connection with the area had been lost was sufficient to support a finding that connection had been substantially maintained so far as it was practicable to do so—at [350].

Connection at a 'general' level

Sundberg J found that many of the traditional laws and customs shown to exist were connected with land or waters. His Honour was of the view that observance of those laws and customs by the claimants gave them a connection with land or waters. Therefore, the court concluded that there was 'ample' evidence that the claimants were connected to the land or waters in the application area 'by' their laws and customs—at [353].

This conclusion was based firstly on the evidence that:

- Wanjina are physically present on land throughout the claim area;
- Wunggurr places are identifiable locations;
- the languages of the area are related to the land—they are language countries, not merely languages spoken by people who live on the country;
- clans have clan estates i.e. areas of land;
- moieties have their own countries i.e. Jun.gun and Wodoy;
- claimants travel over the country and practise their laws and customs there;
- the *wurnan* is directly connected to land i.e. there is *wurnan* rank and *wurnan* location or direction;
- rituals, such as initiations and *junbas*, are carried out at special sites;
- *baran* (the widow law) has a physical relationship to land in that the widow must leave her camp and live elsewhere for a time.

Secondly, connection on the basis of each of these laws and customs was 'deepened' by the fact that there was a network of connections:

> On the one hand are places (e.g. Wunggurr) and areas of country (e.g. *dambun*) and related groups of areas of country (e.g. families of clan countries, *wurnan* neighbours) and areas having various forms of common or overarching identity (eg moiety, language, Wanjina). On the other are individual members of the claimant group and various groupings of individuals (eg families, close kin, *wurnan* partners, communities, moieties, language groups). The strands of this network are multiple and cross-cutting—at [352].

Thirdly, connection 'was amply' demonstrated by the evidence used to prove s. 223(1)(a) (i.e. continued acknowledgment of traditional laws and observance of traditional customs) in that:

- traditional ceremonies are enacted at Mowanjum and other settlements;
- ritual knowledge is passed on from generation to generation;
- children are taught the laws and customs by their parents and grandparents;
- stories from history are passed on and widely known;
- many senior claimants were able to give detailed descriptions of the boundaries of their ancestral countries and language areas; and
- there was evidence of the *wurnan* routes—at [353].

Connection maintained when living off country

Where physical connection had not been maintained with country, Sundberg J was satisfied that this was mainly due to practicalities, such as distance, the location of many claimants far from their country, the age of some claimants and the difficulty of accessing rough terrain—at [353].

In relation to claimants living permanently in Mowanjum, a community outside of their country, the court was satisfied they had maintained the requisite connection because they:

- practised their laws and customs at Mowanjum; and
- asserted claims to country inherited from their forebears and had that assertion respected by their peers (based on a finding that it was a characteristic of the claimants' laws and customs that a connection with country can be maintained by way of that assertion and acceptance)—at [353].

Connection at *dambun* level

While satisfied that the evidence demonstrated a general connection between the claimants and the application area, his Honour went on to find that the evidence also established a connection by traditional law and custom at *dambun* level. (Since the level of recognition was the major objection put by the state, this was presumably to assist any appellate court, should the matter go on appeal on this point). There is an extensive survey of each *dambun*, which is not summarised here. However, some of the matters going to show connection in this regard were knowledge of *dambun*, Wanjina and/or *wurnan* locations, one *dambun*'s relationship to its neighbours, who had rights of entry, who had entitlements to *dambun* and the source of those entitlements—at [354] to [355].

Conclusion on connection

On the basis of the foregoing, Sundberg J was satisfied that, by their laws and customs, the claimants had a connection with the land or waters of the claim area, whether viewed in a general way or on a *dambun*-by-*dambun* basis—at [356].

Distinguished from *De Rose*

One respondent group submitted that it would be difficult to establish connection where absence from land is extensive, referring to *De Rose* at first instance (the Full Court's judgement in the appeal had not been delivered at the time of this decision).

His Honour distinguished that decision on the facts:

> The *De Rose* Aboriginals entirely left the claim area. They were "scattered to the four winds". They did not stay together as a group. Many of the claimants in the present case have established communities in various parts of the claim area. It is true that [many] are mainly based at Mowanjum. But they are there as a community, ... Some ... have bases in the claim area as well. Some resort to Mowanjum [only] during the wet season ... . Many ... visit other settlements [that are on their country]. The communities at Mowanjum and other places in the claim area are cohesive societies or groups. They hold ceremonies—initiations and *junba*—and some sites are looked after. In these important respects *De Rose* and the present case are distinctly unalike—at [362].

Native title rights and interests

Paragraph 223(1)(a) requires that the rights and interests claimed are possessed under the traditional laws acknowledged and the traditional customs observed by the claimants, which gives rise to three issues:

- the way in which 'rights and interests' are to be viewed;
- that the rights and interests must be rights and interests in relation to land or waters; and
- that those rights and interests must be 'possessed under' the relevant traditional laws and customs.

Must be viewed from claimants' perspective

His Honour was of the view that the rights and interests claimed must be looked at from the perspective of the claimants or, as the anthropologists put it, from an emic as opposed to an etic perspective. This is because they must be possessed under their traditional laws and customs—at [364].

Support for this view was found in s. 223(1)(c), in that the 'rights and interests' referred to in s. 223(1)(a) that are viewed emically must pass the test posed by s. 223(1)(c) i.e. the Aboriginally-viewed rights or interests must be capable of being recognised by the common law of Australia. His Honour noted that these 'Aboriginally-viewed' rights and interests did not require recognition by someone other than the person who asserts them in order to retain their 'vitality'. Nor was a system of enforcement necessary—at [364] to [365].

Meaning of 'possessed under'

The requirement that the rights and interests be 'possessed under the traditional laws ... and customs' means no more than that the rights and interests arise or exist under the traditional laws and customs i.e. those laws and customs must be the source of the rights and interests—at [365].

Possession, occupation, use and enjoyment as against the whole world

The rights and interests claimed included rights to:

- possession, occupation, use and enjoyment of the application area as against the whole world;
- make decisions about the use and enjoyment of the application area;
- control the access of others to the application area (essentially through the 'permission system').

The evidence established, amongst other things, that:

- the words 'belong to' a *dambun* or place were generally used to convey ownership;
- the assertion of the right to 'speak for' country usually meant:
  - the right to permit or not permit someone to enter land;
  - that the land belonged to the speaker or the speaker's people (in the sense of ownership);
  - the right to make decisions about the country;
- other terms subsequently reduced to the English word 'own' carried with them an obligation to look after country;
- 'ownership' (however expressed) extended to country as a whole, i.e. was not limited to particular places on country such as Wanjina sites or Wunggurr places;
- country has to be looked after and its special sites protected from intruders so it can be passed on to the next generation unspoilt;
- the passing on of country to the next generation in Aboriginal custom is the same thing as the white man's custom of choosing where his property is to go on his death— 'he pick the right son to take this progression';
- strangers (i.e. non-Indigenous people and unrelated Aboriginal people) had to ask permission to come onto the country and Aboriginal people who required permission usually sought it;
- someone entering without permission could be expelled;
- some witnesses assimilated unauthorised entry with the non-Indigenous concept of trespass—at [367].

Extinguishment not relevant at this stage

The state submitted (among other things) that it was not possible to assert a native title right equivalent to ownership when the area in question is subject to other interests, such as a pastoral lease or Crown reserve, that would extinguish any such right. This was rejected:

> [T]he first task for a court hearing a native title case is to determine the native title rights and interests that exist under traditional law and custom. Only then can issues of extinguishment be addressed. Only then does one have a right or interest that can be compared with the competing right or interest that is said to extinguish it—at [368].

Permission rule not universal

The state also submitted that there was no evidence demonstrating that the permission obligations applied as between the Wanjina–Wunggurr community and people who are not members of that community. His Honour noted that:

> [T]he applicants do not assert that the permission rule applies as between the Wanjina–Wunggurr community in a monolithic sense and non-members of it ... . Rather they claim that the rule applies as between *members* of the Wanjina–Wunggurr community and those who are not members, as well as within the community itself. The applicants have at all times stressed that their entitlements are ... variously possessed by the claimants for their respective individual, group and community rights according to their traditional laws and customs. ... [T]he underlying tenor of the permission evidence is that a "stranger" is ... anyone who is not related to those to whom a particular *dambun* belongs, Aboriginal or non-Aboriginal. It would be surprising if "stranger" encompassed an unrelated member of the community but not some unrelated person from outside the claim region, from

> another language system, who for those reasons is much more "strange" than an unrelated community member—at [372], emphasis in original.

Rule of general application

As to the state submission that the permission system was significantly diminished and not in place in all parts of the application area, his Honour found that:

> A large and persuasive body of evidence attests to the existence of a society with common traditions and customs, founded in the travels of Wanjina, that exists over the whole of the claim region. It is appropriate in those circumstances to infer that the permission rule is of general application within that society—at [374].

Interruption in exercise of right

His Honour noted the comment in *Yorta Yorta* at [84] to [85] that evidence of some interruption in the exercise of a particular right did not 'inevitably' answer the statutory questions, as these were directed at the present possession of rights and interests under traditional law and customs, not the exercise of them. In this case, as he was satisfied of both the existence of the right and its content, Sundberg J found that the right to be asked permission was still possessed under the traditional law acknowledged and traditional customs observed by the claimants, notwithstanding that changed circumstances had diminished the practical operation of the permission system—at [374].

Enforceability not required

The fact that the permission system was unenforced or practically unenforceable was not relevant: 'A right or interest does not require for its recognition some enforceable means of excluding from its enjoyment those who are not its holders'—at [375].

Exclusive possession

His Honour noted 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;
- the expression of these rights and interests in these terms reflects not only the content of a right to be asked permission...but also the common law's concern to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing—at [376], citing *Ward HC* at [88].

Claim to common law equivalent

The applicants were 'acquitted' of the charge made by one respondent that they had extrapolated native title rights from 'a finding of the existence of a common law equivalent title'. Rather, Sundberg J noted that, in their evidence, they identified a collection of individual rights and then asked the court to see in them a native title equivalent to ownership and: 'Nothing said [by the High Court] in *Ward* is inconsistent with that approach'—at [377].

Rather, it was said that where the native title rights and interests:

> [D]o not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms. ... Rather ... it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters—*Ward HC* at [51] to [52].

If, at this stage of the inquiry, i.e. prior to any consideration of extinguishment and for the purposes of s. 225(b), the applicants successfully established rights and interests amounting to 'exclusive possession', there would be no need to list the activities they may conduct as of right on the land. In a case where the evidence establishes a 'more modest collection of rights and interests, it will be necessary to employ a form of words that may amount to a list of the rights and interests or a list of activities'—at [378] and [380].

Did 'own' mean exclusive possession?

One respondent group submitted that it would be 'ridiculous' to treat the use of the word 'own' by an Aboriginal witness as an assertion of non-Indigenous 'ownership', having regard to the limited grasp of English that many of the witnesses had. While some witnesses spoke better English than others, his Honour had:

> [N]o doubt that those who used 'own' in relation to country thereby asserted that the country belonged to the witness or the person in question; that he or she was the "boss for it". Some witnesses had no difficulty in providing credible similes for words such as "own" in relation to interests in land. ... I reject the submission that those examples are not supportive of the applicants' exclusive possession case. Similarly I reject the submission that "speaking for country" does not support that case—at [378], citing *Ward High Court* at [88] (i.e. 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).

The fact that the witnesses did not say that a pastoral leaseholder was a 'trespasser' was not surprising 'given the pastoralists' lawful occupation of their land and Aboriginal familiarity with and acquiescence in that occupation'—at [378].

Conclusion on exclusive possession

His Honour found that the rights and entitlements of which the Aboriginal witnesses gave evidence amounted to the common law expression 'possess, occupy, use and enjoy the land to the exclusion of all others', i.e. exclusive possession. In this context, it is noteworthy that Sundberg J was of the view that the absence of competing claims by other Aboriginal people strengthened the conclusion that the claimants in this case had rights and interests that were exclusive of those of any other Aboriginal people—at [379] to [380].

His Honour noted that the determination of a right to 'possess, occupy, use and enjoy the determination area' was set aside by the High Court in *Ward*:

> [O]nly because of extinguishment considerations. There was no suggestion that, absent any co-existing non-native title rights and interests, the Full Court's order was inappropriate—at [380].

His Honour concluded that:

- the source of the claimants' right to possession, occupation, use and enjoyment of the claim area as against the whole world is their laws and customs;
- the right was therefore 'possessed' under those laws and customs for the purposes of s. 223(1)(a);
- it was a right in relation to land and waters.

It was noted that, in the course of considering matters of extinguishment, it may be necessary to: 'unbundle this comprehensive right into the component parts asserted by the applicants, and to consider whether these components are in relation to land and waters'—at [382].

In relation to the requirement under s. 223(1)(c) that the rights and interests of Aboriginal peoples in land and waters must be 'recognised by the common law of Australia' in order to qualify as a native title right, his Honour noted that:

- paragraph (c) was not concerned with continuity of acknowledgment and observance of traditional law and custom;
- a right to possession, occupation, use and enjoyment of land to the exclusion of all others is a right that could be enforced and protected by the common law—at [383].

Notion of society

Sundberg J considered the comment by the High Court in *Yorta Yorta* that (among other things) in a native title context, 'society' is to be understood 'as a body of persons united in and by its acknowledgment and observance of a body of law and customs', noting that their Honours chose the word 'society' rather than 'community' to emphasise the close relationship between the identification of the group and the identification of the laws and customs of that group.

In this case, his Honour was satisfied that:

- the evidence identified the relevant society as the Ngarinyin, Wunambal and Worrorra people who acknowledge and observe the laws and customs there described;
- they are the people who are 'united' by that acknowledgment and observance;
- there was no want of the anthropological evidence identifying a 'society' or 'community';
- the state's submission that no witness identified his or her country as extending 'beyond the local' failed to accommodate the evidence, including evidence about 'clan clusters' and 'families of clans', which were recognised by the state's own expert;
- in any case, the kinship evidence was 'fatal' to the *dambun*-based submission because of the evidence of Professor Blundell that:
    - kinship is the glue that holds these types of societies together;
    - a shared kinship system was a very clear indicator that people share, constitute, a culture, a people—at [394] to [396].

***Hayes*, *Yarmirr* and *De Rose* distinguished**

Both *Hayes v Northern Territory* (1999) 97 FCR 32 and *Yarmirr v Northern Territory* (1998) 156 ALR 370 were distinguished on the basis that the issue that arose in this case (i.e. the appropriate level for recognition) did not arise in either *Hayes* or *Yarmirr*—at [397].

De Rose at first instance was distinguished on the basis that the notion of a community of Yankunytjara, Pitjantjatara and Antikurinjawa speaking peoples (the YPA community) within the wider Western Desert cultural block was rejected because it was:

- 'controversial and unique in the relevant [anthropological] literature' and was not documented in prior ethnography; and
- was not supported by the claimants' evidence.

While the Wanjina–Wunggurr community, like the YPA community, was an anthropological construct, his Honour noted that a community of Ngarinyin, Worrorra and Wunambal people was both documented in the prior ethnography and supported by the evidence of the applicants—at [398].

Native title recognised at community level

His Honour noted that s. 223(1) defined 'native title' as the 'communal, group or individual rights and interests of Aboriginal peoples ... in relation to land and waters'. The applicant's case was that:

- the collective Wanjina–Wunggurr community was the relevant 'Aboriginal Peoples'; and
- the claimants held various rights and interests communally in the application area; and
- in various sub-groups and as individuals, they also hold various sets of rights and interests in various sub-areas of, and places within, the application area.

The court found that:

- there is nothing in the words 'communal, group or individual rights and interests of Aboriginal peoples ... in relation to land or waters' that is an obstacle to the way in which the applicants put their case;
- the evidence showed that the claimants regarded themselves as part of a community inhabiting the Ngarinyin, Worrorra and Wunambal region and emphasised shared customs and traditions that transcended any particular *dambun* or language area;
- both the belief in Wanjina, which was central to this 'sharing', and Wunggurr tradition extended beyond the borders of the application area into the Wanjina–Wunggurr region, as did other practices and customs: moieties, the marriage rules, *wurnan, wudu, rambarr,* traditional burial, *dambun* and kinship rules;
- the evidence was inconsistent with any description of the group or groups that hold the native title rights other than those who are members of the Wanjina–Wunggurr community;
- many witnesses described their laws and customs as those of the 'three tribes' or the 'Wanjina tribe' or by using the words 'Ngarinyin, Wunambal and Worrorra' in

combination, to indicate that the laws and customs are not those of a *dambun* or language country, but of a community consisting of the Ngarinyin, Wunambal and Worrorra peoples and countries;
- the evidence disclosed the existence of a community that transcended individual *dambun* or groups of *dambun*, and also individual language countries—at [384], [386] and [393], referring to *Ward FC* at [160] to [161].

Recognition at *dambun* level was rejected because:
- it would not reflect the evidence that individual members of a *dambun* have kinship links with *dambun* other than their own;
- it would not reflect the succession laws, namely that on the death of the last member of a *dambun*, a neighbouring clan will take over the country, including rights and interests in it;
- it would not accommodate the evidence that close relatives of *dambun* members have rights and interests in the land, such as a right (or entitlement) to enter without asking permission;
- members of some neighbouring clans regard their neighbours as 'really the same as them';
- it was clear that a person whose Wunggurr place was in a *dambun* other than his or her own had rights and interests in the Wunggurr *dambun*;
- a *dambun*-based formulation of native title would not reflect that entitlement—at [387].

A language-based formulation was also rejected because:
- the evidence was that the claimants' laws and customs are not language based- they transcend the area of any one of the three tribes, binding them together as one;
- the language areas are not discrete—there is much evidence that in 'border areas' the country was 'mixed';
- a determination based on language would disenfranchise people who, not being, for example, Ngarinyin, have rights and interests in Ngarinyin country based on a Wunggurr place there, a mother's Ngarinyin language identity, or marriage ties to Ngarinyin country;
- the model advanced by the claimants accorded with the Aboriginal evidence and was supported by well-based and convincing anthropological and linguistic evidence—at [389].