National Native Title Tribunal

NATIVE TITLE Hot Spots

No. 24, May 2007

Contents

Recent cases

Appeal in Larrakia (Risk) – Full Court

***Risk v Northern Territory* [2007] FCAFC 46**

French, Finn and Sundberg JJ, 5 April 2007

Issue

The main issue in this appeal was whether the primary judge was right in deciding that native title did not exist in relation to areas in and around Darwin. The main ground for that finding was that neither of the groups claiming native title (the Larrakia people or the Danggalaba/Kulumbiringin clan) possessed rights and interests under traditional laws and traditional customs in the sense required by s. 223(1)(a) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

In *Risk v Northern Territory* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19), his Honour Justice Mansfield (the primary judge) dismissed claimant applications made on behalf of the Larrakia people and the Danggalaba clan/descendants of Kulumbiringin ancestors. His Honour later made a determination pursuant to s. 225 of the NTA that native title did not exist in the area covered by those applications.

Appeals against the judgment were subsequently filed by William Risk and others, on behalf of the Larrakia, and Kevin Quall, on behalf of the Danggalaba/Kulumbiringin.

The Larrakia decision at first instance

The primary judge found, on the evidence:

- at sovereignty, there was a society of Indigenous persons (the Larrakia) who had rights and interests possessed under traditional laws and traditional customs that gave them a connection to the land and waters of the claim area; and
- that society continued to exist up to the first decade of the 20th century and continued to enjoy rights and interests under either the same or substantially similar traditional laws and customs as those that existed at settlement.

However, the primary judge concluded that Larrakia did not satisfy the requirement that they currently possessed those rights and interests under traditional law custom, as required by s. 223(1)(a), because:

- their current laws and customs were not 'traditional' in the sense explained in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58, (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3*)*;
- there was both considerable ambiguity and some inconsistency about the current laws and customs of the Larrakia people;
- there were significant changes in those laws and customs as they existed at sovereignty which stemmed from, and were caused by, a combination of the historical events which occurred during the 20th century;
- those events gave rise to a substantial interruption in the practice of the laws and customs of the Larrakia people as they existed at sovereignty;
- the present laws and customs of the Larrakia people were not simply an adaptation or evolution of the traditional laws and customs of the Larrakia people in response to economic, environmental, historical and other changes—at [23].

Mansfield J concluded that the evidence showed that:

> The Larrakia community of today is a vibrant, dynamic society, which embraces its history and traditions. This group of people has shown its strength as a community, able to re-animate its traditions and customs, following a period when, as Justice Gray described it in the Kenbi [land claim] Report, 'government policies and social attitudes dictated the integration of Aboriginal people into non-Aboriginal society'—at [15].

The Larrakia appeal

The three grounds of the Larrakia appeal were that the primary judge:

- failed to deal with a significant body of oral evidence bearing on whether there had been a substantial interruption in the acknowledgement of traditional laws and the observance of traditional customs;
- misapplied *Yorta Yorta* in finding that the Larrakia's traditional laws and customs had been 'discontinued' at some stage during the 20th century;
- was wrong in failing to adopt the findings of fact made by the Aboriginal Land Commissioner in the Kenbi land claim—at [25].

Ground 1: treatment of the evidence

According to French, Finn and Sundberg JJ, it was not part of the Larrakia's case on appeal that (on the totality of the evidence) the primary judge could not have come to the conclusion he reached. Rather, this was a 'process-type complaint', i.e. the fact that Mansfield J did not refer to what Larrakia considered to be critical evidence in his reasons for decision showed that he did not either consider it or take it into account—at [68].

Their Honours said it was simply a misreading of the primary judge's reasons to say that he dealt only with the oral evidence as to contemporary society in the last decade because the primary judge made it clear he had regard to all the oral evidence—at [34].

The court was also dismissive of the Larrakia's complaint that the oral evidence to which the primary judge referred was not considered and evaluated. In one particular instance, it was noted that it 'was not much of an example of…alleged delinquency' since the primary judge referred to that witness's evidence 'on seven occasions'—at [37].

Their Honours took several 'senior and important witnesses' as examples of the way in which the primary judge dealt with the evidence, an approach exemplified in what was said in relation to one of those witnesses:

> [The primary judge]…was not obliged to record or summarize everything the witness said. Having read Barbara Raymond's witness statement and the transcript of her evidence, we are in no doubt that his Honour's references to her evidence disclose that he was conversant with the evidence as a whole, and had regard to it. The fact that he mentioned specific aspects of it does not mean that he did not have regard to the whole of it—at [41].

The court said that:

> On any appeal it is incumbent on the party asserting error to establish it to the satisfaction of the [appellate] court. Where it is claimed that the [primary] judge ignored relevant evidence, that evidence should be identified and its relevance explained…Only then can an appellate court address the ground of appeal. It is not the court's function to attempt to determine from the evidence what the appellant might consider to be relevant, and then determine whether the judge overlooked it…
>
> It is to be remembered that the ground of appeal…is not that the evidence before the primary judge did not entitle him to conclude that there had been an interruption…Rather the ground is a process-type complaint…
>
> There is nothing to indicate that the primary judge failed to consider all the evidence…It is true that his Honour did not record or refer to all of it. But he was not obliged to. He did, however, make copious reference to the essential parts of the evidence of most of the ochre [sic] witnesses, and some reference to the evidence of all of them–at [67] to [69].

It was noted that:

- the primary judge had before him a complex case with 47 Aboriginal witnesses, many expert witnesses, a great deal of documentary material and a hearing which lasted 68 days; and
- in cases such as this, 'considerable caution is appropriate before the Full Court infers that crucial evidence was not evaluated and necessary findings of fact were not made'—at [70] to [71].

However, in this case, the court did not need to resort to 'admonitions of caution' because:

> [W]e are clearly of the view that the primary judge amply discharged his duty to consider

all the evidence, and referred in his reasons to such parts of it as were relevant to the resolution of the issues that were before him. He did not ignore evidence crucial to those issues—at [72].

The contention that the primary judge failed to consider and evaluate the evidence was, therefore, rejected.

Ground 2: misapplied Yorta Yorta

The Larrakia appellants argued that s. 223(1)(a), as explained by *Yorta Yorta*, was misapplied because Mansfield J:

- failed to consider whether the body of laws and customs currently acknowledged and observed had its origins in the laws and customs that existed at the time of the assertion of sovereignty;
- impermissibly compared the body of laws and customs at sovereignty with those that existed today, determined they were different and, on that basis, concluded that the requirements of s. 223(1)(a) had not been made out (the book-end error);
- found there had been an interruption based, in part, on the disruption in Larrakia's physical presence in the Darwin area when physical presence was not a necessary requirement of s. 223(1)(a);
- relied on the disruption in Larrakia's continued observance and enjoyment of their traditional laws and customs when such continued observance and enjoyment was not a necessary requirement of native title because s. 223(1)(a) is not directed to the enjoyment or exercise of rights and interests but rather to the possession of them;
- required Larrakia to show not only that they observed traditional customs but that the knowledge of those customs was transmitted in the traditional manner.

As to the 'book-end' error, at [81], French, Finn and Sundberg JJ noted that the 'necessary approach' was outlined in *Yorta Yorta* at [56], where the majority said:

> [I]t will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.

Their Honours agreed that a 'book-end approach' would be insufficient and dangerous because:

- it may lead to a conclusion that native title had continued to exist throughout the relevant period, when in fact the claimant group's customs and laws had been discontinued and later revived;
- if the laws and customs of the present day were not the same as at sovereignty, it failed to ask the critical question, which was whether the traditional laws and customs had ceased or whether they had merely been adapted—at [82].

The court also agreed that, if the primary judge had adopted the 'book-end' approach, then he had misunderstood *Yorta Yorta*—at [82].

However, their Honours found the primary judge did not adopt such an approach:

> His Honour's findings that Larrakia did not maintain the acknowledgement of their traditional laws and observance of their traditional customs are based upon evidence, particularly from older members of the Larrakia group, that practices they had engaged in during the first half of the twentieth century did not last into the second half. The submission that his Honour inferred interruption from change is not supported by a close reading of his reasons. No inferences needed to be drawn, since it was apparent to his Honour on the evidence that there had been a substantial interruption—at [83].

Further (among other things), it was noted that:

- the primary judge's careful setting out of relevant passages from the majority judgment made it impossible to accept that he misunderstood the *Yorta Yorta* test;
- the primary judge found there was evidence of a combination of circumstances that interrupted, or disturbed, the presence

of the Larrakia people in the claim area during several decades of the 20th century in such a way as to affect their continued acknowledgement and observance of traditional laws and customs as those laws and customs existed at sovereignty;

- it was this that led the primary judge to find that their current laws and customs were not 'traditional' in the sense explained in *Yorta Yorta*—at [87] and [97].

French, Finn and Sundberg JJ found no error in the process by which the primary judge informed himself of the *Yorta Yorta* test and applied it to reach his conclusions—at [98].

In relation to the matters pertaining to physical presence, Larrakia said the primary judge imposed a requirement that they must now have 'substantially uninterrupted possession' of the claim area and exercise of their native title rights, neither of which was mandated by s. 223(1)(a). While the point was not pursued in oral argument, it was not abandoned either and so their Honours dealt with it—at [100].

It was noted that the primary judge referred to *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*, summarised in *Native Title Hots Spots* Issue 1), where Gleeson CJ, Gaudron, Gummow and Hayne JJ said that the absence of evidence of some recent use of the land or waters did not, of itself, require the conclusion that there can be no relevant connection—at [103].

French, Finn and Sundberg JJ were satisfied that:

- the primary judge was aware that a failure to continue to live on the claimed land or exercise the claimed rights was not necessarily fatal to a native title claim;
- read in totality, it was clear that the primary judge's conclusion on interruption was not based on either the dislocation of the claimants from Darwin or their failure to continue to exercise many of their native title rights;
- rather, the primary judge recognised that these were both evidence and symptoms of a more fundamental discontinuity in the traditional laws acknowledged and the traditional customs observed—at [103] to [104].

The submission that the primary judge found that, if transmission of knowledge of customs was not undertaken in the traditional way, then the customs themselves were no longer traditional was found to be of no assistance to the Larrakia:

> That is because the trial judge's findings about the interruption to the customs observed by Larrakia went far deeper than just the manner of their transmission. His Honour found that the laws acknowledged and customs observed by Larrakia as a whole were interrupted between the [Second World] war and the 1970s. Consequently, even had Larrakia been able to show a continuing tradition of transmission of knowledge of their customs and laws, the interruption to the rest of their practices was fatal to their case.
>
> In any event, this submission is unsound. A tradition of passing on knowledge by word of mouth may in itself constitute a traditional custom. That is what his Honour appears to have found here. Its discontinuance is therefore further evidence of the interruption to Larrakia's society generally. No doubt the failure of a claimant group to continue to pass on knowledge of other customs and laws by word of mouth will not necessarily be fatal to their claim. But it may be evidence of an interruption in customs and laws generally. It is a factor that the trial judge rightly took into account in coming to his conclusion—at [106] to [107].

Ground 3: Kenbi land claim report

Larrakia also complained that, while the Kenbi land claim report and the evidence on which it was based were received into evidence, the primary judge was not prepared to adopt, or have regard to, the land commissioner's findings that Larrakia had, under Aboriginal tradition, attachments to country and, therefore, rights to forage over, occupy and use country associated with those attachments. This was said to be a miscarriage of the exercise of discretion conferred on the primary judge by s. 86 of the NTA.

The primary judge gave the following reasons for declining to adopt the land commissioner's findings:

- the Kenbi land claim covered an area distinct from that involved in the native title proceedings;
- not all of the witnesses who gave evidence in the native title proceedings were called in the land claim proceedings;
- the expert evidence in the Kenbi land claim was, in part, from different witnesses, related to issues which arose under the *Aboriginal Land Rights Act 1976* (Cwlth) that were different from those under the NTA and was in respect of different land;
- the matters to which the land claim findings related were, to varying degrees, the subject of additional (and in some instances different) evidence in the native title proceedings.

Their Honours considered that the primary judge's reasons were 'were apposite and relevant' and found no error that could impugn the exercise of discretion available under s. 86 of the NTA—at [113] and [114].

The Quall appeal

French, Finn and Sundberg JJ noted that the issues in this appeal were of a 'quite different character' to those raised by Larrakia. Mr Quall said the primary judge was wrong in failing to:

- consider the substance of the case advanced by the Danggalaba/Kulumbiringin at trial;
- properly identify the relevant society that was the source of the traditional laws and customs by which, at sovereignty, the Larrakia people had rights and interests in the application area;
- provide proper reasons for his decision, if he did consider the case advanced by the Quall appellants—at [115].

As there was 'sharp disagreement' between the parties as to what the Quall case was at trial, French, Finn and Sundberg JJ found it necessary to consider in some detail both the original native title determination applications and the evidence and submissions made at the trial—at [115].

Underpinning the disagreement was an assertion by counsel for Mr Quall on appeal that, at trial, the Danggalaba/Kulumbiringin claimants based their entitlement to native title on the traditional laws and customs of 'the Aboriginal society in the region stretching from' Cox Peninsula to West Arnhem Land, a society they said included the Larrakia people and had been referred to variously as the 'Top End society' or 'people of the Top End'—at [115] to [116]. See also [130].

Their Honours began 'with a note on nomenclature'. There were 11 claimant applications for which Mr Quall was the applicant. In two of them, the native title claim group was referred to as 'members of the Danggalaba Clan'. In the remaining nine, the group was referred to as (listed) 'descendants of Kulumbiringin ancestors and constitute the Kulumbiringin according to Aboriginal law and custom [sic]'—at [118].

The submissions by the appellant explained that 'Kulumbiringin' was the term used by the Larrakia people to describe themselves at the time of sovereignty and that the word 'Danggalaba' referred to a clan, or subset, of the Kulumbirigin tribe. (The primary judge found that, though the Larrakia patrilineal clan system had ceased to exist, the Danggalaba was the one clan that continued to exist.) In the material before the appeal court, usage of these descriptors was not consistent and Mr Quall occasionally used the terms 'Danggalaba Larrakia' to refer to the clan—at [118].

Their Honours noted, by way of example, one of the 11 applications made by Mr Quall which referred to the native title claim group as "'Kulumbiringin' (elsewhere referred to as 'Danggalaba clan')"—at [120].

Mr Quall particularly stressed that his claim group was 'local in that our traditional land interests have a firm and fixed focus on and within a limited area of Darwin' and the Cox Peninsula 'and its islands'—at [126] and [129].

The claim groups in the various Quall applications were comprised variously of eight named persons or the family groups of four named elders. Three of those four elders gave evidence in support of the Larrakia case. In his final submissions at trial, Mr Quall confined the claim group to members of the Batcho family, of whom he was one—at [132].

Mr Quall was unrepresented at trial.

Their Honours observed (among other things) that:

- Mr Quall did not indicate, at the opening stage of his evidence, a positive case that derived from the laws and customs of a 'Top End society' but instead focussed on the Danggalaba clan;
- Mr Quall's evidence at trial covered a significant range of detailed matters about sites, customs and practices and the primary judge was impressed by his knowledge of the particular laws and customs of which he spoke;
- in his oral evidence at trial, Mr Quall accepted that, at sovereignty, the Larrakia people had traditional laws and customs under which they occupied the land and, while the others stopped practising the laws and customs which existed in 1825, the Danggalaba people did not—at [134], [137] and[143].

The primary judge characterised the Quall case in this way:

> Mr Quall…submitted that the Larrakia people ought not be awarded native title over the claim area, as the group is simply a language group. He submitted that the members of the Larrakia applicant groups have lost their culture, and that it is the Danggalaba clan (or the Kulumbiringin clan) who have continued to observe and acknowledge traditional laws and customs and to maintain their connection to the relevant land and waters.

Mr Quall was legally represented on appeal. His counsel submitted that:

- the primary judge had fallen into error in not addressing all of Mr Quall's contentions that his rights and interests came from Aboriginal law;
- specifically, the contention of a Dreaming which stretched from Cox Peninsula to West Arnhem land, and a moiety system which connected the different Aboriginal peoples along that track and gave rise to rights and responsibilities in different families (or clans) for different sites along that track, was not addressed;
- while this case was not put explicitly to the primary judge, it was reasonably apparent, given Mr Quall's submissions at trial—at [158] to [160].

In their consideration of these submissions, their Honours:

- understood the difficulties experienced by a primary judge in divining what actually is the case being advanced by a self-represented litigant;
- acknowledged the distinct advantage the primary judge had in coming to an informed appreciation, over the course of a lengthy hearing, as to what the case being put by a litigant in person was and that, unless a mistake is 'palpable', an appeal court ought be slow to interfere with the views of the primary judge;
- observed that submissions are not evidence, noting that the primary judge was alert to this and indicated that he had regard to Mr Quall's submissions only to the extent that they had a foundation in the evidence;
- stated it was impermissible on appeal to construct a different case to that put at trial by focussing selectively on parts of the evidence that could have lent support to a different case, were it in issue between the parties at trial—at [164] to [166].

French, Finn and Sundberg JJ were, therefore, satisfied that the primary judge neither mischaracterised, nor failed to deal with, Mr Quall's case as advanced in his application and as presented at trial—at [167].

Their Honours concluded:

> Bearing in mind both his Honour's observation that the only evidence directly supporting this claim came in effect from Mr Quall; and the changing composition of the claim group to which we earlier referred in passing, the dismissal of the claim in this manner was unobjectionable. The case was in substance disposed of on the basis of insufficiency of evidence. His Honour's reasons make quite plain where that insufficiency lay—at [178].

Their Honours disposed swiftly of the ground in relation to the adequacy of the reasons:

> Having concluded that his Honour did consider and answer the case put at trial, but that he did not have to consider the case advanced in this Court as being Mr Quall's case, we necessarily must reject this ground of appeal as well.

> His Honour's reasons for the decision he gave, as we have said, were concise but clear—at [181].

Decision

Both appeals were dismissed.

Attorney-General's intervention

Shortly before the hearing of the appeal, the Attorney-General for the Commonwealth intervened pursuant to s. 84A(1) of the NTA. The reason for intervening was to submit that the course set in Full Court decisions determined since the High Court's decision in *Yorta Yorta* departed from the principles laid down by the majority in that decision.

The Full Court decisions referred to were *De Rose v South Australia* (2003) 133 FCR 325; [2003] FCAFC 286 (summarised in *Native Title Hot Spots* Issue 8), *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCFCA 110 (summarised in *Native Title Hot Spots* Issue 15) and *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135, (summarised in *Native Title Hots Spots* Issue 16).

The Attorney-General also submitted (among other things) that the first instance decisions in *Sampi v Western Australia* [2005] FCA 777, *Rubibi Community (No 5) v Western Australia* [2005] FCA 1025 and *Bennell v Western Australia* [2006] FCA 1243 (summarised in *Native Title Hot Spots* Issue 15, Issue 16 and Issue 21 respectively) departed from what was said in *Yorta Yorta*. These first instance decisions are all currently under appeal—at [4] and [5].

The court noted that, while intervention by the Attorney-General under s. 84(1) was 'as of right', it was a matter for the court to decide the extent of the intervention 'having regard to the issues agitated' by the other parties and 'the matters that actually arise for decision'. After considering all the submissions made on appeal, the court decided it was not necessary to deal with any of the matters raised by the Attorney-General because of the 'limited issues…that call for decision'—at [8].

Costs of the intervention

Subsection 84A(2) allows the court to make a costs order against the Commonwealth in cases where the Attorney-General intervenes. Their Honours said:

> Given that the matters raised in the Attorney's initial submission did not otherwise arise on the appeals, and that it should have been apparent that the appeals were an inappropriate vehicle in which to raise them, and that the intervention was at a very late stage and must have caused considerable inconvenience to the parties, it is appropriate that the Commonwealth pay the other parties' costs of the intervention—at [182].

Appeal in Blue Mud Bay (Gumana) – Full Court

Gumana v Northern Territory [2007] FCAFC 23

French, Finn and Sundberg JJ, 2 March 2007

Issues

This case deals with two appeals, one dealing with issues arising under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA) and the other with issues arising under the *Native Title Act 1993* (Cwlth) (NTA).

The key issue in the ALRA appeal was whether, under grants made pursuant to the ALRA, the land trust holding those grants had exclusive possession to the intertidal zone.

The key issues in the NTA appeal were:

- whether s. 47A applied to the inter-tidal zone;
- the status of spouses to a clan estate in any determination of native title;
- whether the native title 'bundle' included the right to control the use and enjoyment of the determination area by other Aboriginal people governed by native title holders' traditional laws and customs.

Background

The Yolngu people are, under the ALRA, the recognised 'traditional owners' of parts of north-east Arnhem land, including the area known as Blue Mud Bay. In 1980, grants in fee

simple down to the low water mark of Blue Mud Bay (i.e. including the inter-tidal zone) were made to the Arnhem Land Aboriginal Land Trust (the land trust), as representing the Yolngu, pursuant to the ALRA (the ALRA grants).

In the 1990s, the Yolngu:

- started a number of proceedings against the Northern Territory of Australia seeking declarations that the Director of Fisheries did not have the power to issue fishing licences in the tidal waters that were covered by the ALRA grants (ALRA proceedings);
- filed a claimant application under the NTA seeking recognition of native title in relation to the water that flowed over, and the area adjacent to, the ALRA grants (NTA proceedings).

The ALRA proceedings and the NTA proceedings were heard together by his Honour Justice Selway in 2004 — see *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50 (*Gumana No. 1*). However, as Selway J died before making final orders, his Honour Justice Mansfield gave 'full effect' to Selway J's reasons in *Gawirrin Gumana v Northern Territory (No 2)* [2005] FCA 1425. These decisions are summarised in *Native Title Hot Spots* in Issue 14 and Issue 16 respectively.

The land trust, the Northern Land Council and the Yolngu (in their capacity as traditional owners under the ALRA) appealed against the decision in the ALRA proceedings (ALRA appeal). The Yolngu, this time in their capacity as native title holders, also appealed against certain findings in relation to the determination of native title. The Commonwealth and the Northern Territory then cross-appealed against some aspects of the native title determination (NTA appeal)—at [11] and [12].

The ALRA appeal

In *Gumana No. 1*, Selway J held that:

- the ALRA grants gave the land trust an estate in fee simple to the low water mark but did not confer the right to exclude persons exercising public rights to fish or navigate in the inter-tidal zone i.e. between high and low water mark;
- the *Fisheries Act 1988* (NT) (Fisheries Act) was capable of operating concurrently with the ALRA.

Selway J's findings were based on the authority found in *Commonwealth v Yarmirr* (2000) 101 FCR 171 (Full Court in *Yarmirr*) that the grant of a fee simple to a land trust under the ALRA over the inter-tidal zone did not:

- include the water flowing over that zone; and
- confer on the land trust the exclusive right to control access to the water overlying that zone.

In the ALRA appeal, the court (their Honours Justices French, Finn and Sundberg) 'independently' considered the correctness of the findings of the Full Court in *Yarmirr* and decided it was 'plainly wrong' and 'ought not…be followed'—at [91].

This conclusion came as a result of a consideration of the ALRA. Section 253 of the NTA defines 'waters' to include (among other things) the foreshore i.e. 'the shore, or subsoil under or airspace over the shore, between high water and low water'. The ALRA does the converse i.e. where an estate in fee simple is granted to the low water mark pursuant to the ALRA (as in this case), the foreshore is 'land' and *not* 'waters of the sea' or the seabed.

Given the 'declared beneficial purpose' of the ALRA and, after an examination of its structure and its context, their Honours concluded that:

- a grant in fee simple to the low water mark made pursuant to the ALRA was intended by Parliament to confer an exclusive right over the inter-tidal zone;
- therefore, the Fisheries Act must be read down so as not to authorise either entry by the public or the issue of permits or licences for the purpose of fishing in that area;
- fishing in the water flowing over the inter-tidal zone of the ALRA grants from a boat would be 'no less a trespass …than would fishing from the surface of the land in that zone'—at [92] to [94], [99] and [103] to [104].

Decision on ALRA appeal

In respect of the ALRA appeal, the court declared that the Fisheries Act:

- had no application in relation to areas within the boundary lines of the ALRA grants;
- did not confer on the territory's Director of Fisheries a power to grant a licence under the

Fisheries Act that authorised or permitted the holder of that licence to enter and take fish or aquatic life from areas subject to the ALRA grants; and

- was invalid and of no effect with respect to areas subject to the ALRA grants, including the water that flowed over the land subject to those grants—at [105].

The native title appeal

At first instance, Selway J found (among other things) that:

- section 47A of the NTA applied to the whole of the area covered by the ALRA grants and so the extinguishing effects of those grants must be disregarded for all purposes under the NTA;
- however, s. 47A did not permit the court to disregard 'non-recognition' at sovereignty of the native title holders' exclusive right to occupy the inter-tidal zone because of the inconsistency between the public rights to fish and navigate at common law in the waters of those areas and the asserted exclusive native title right.

On appeal, their Honours found that the native title holder's complaint on this point required an inquiry into the concepts of 'recognition' and 'extinguishment' under the NTA as they emerged from the authorities. It was decided that;

- the concept of extinguishment found in the NTA was premised on the existence of a native title right or interest that was 'recognised' by the common law at sovereignty and so subsequently able to be 'extinguished' by the 'creation' of an inconsistent right or interest by the new sovereign;
- this was consistent with the requirement in s. 223(1)(c) that native title rights and interests must be rights and interests 'recognised by the common law of Australia';
- from the time of its reception in Australia, the common law recognised public rights to fish and to navigate i.e. the common law of this country never recognised any exclusive native title rights to the territorial sea or the inter-tidal zone;
- section 47A could not rectify the 'failure' of the common law to ever recognise certain classes of native title rights and interests, such as an exclusive right to occupy the inter-tidal zone—at [125] to [127] and [134].

The court rejected the Commonwealth's complaints in its cross-appeal that:

- the spouse of a Yolngu clan member did not necessarily have a connection with that member's clan estate for the purposes of s. 223(1)(b); and
- the rights and interests of those spouses were not necessarily native title rights and interests as defined in s. 223(1)—at [135].

Their Honours noted that, in *Northern Territory v Alyawarr* (2005) 145 FCR 442 ; [2005] FCAFC 135 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16), the Full Court rejected a substantially similar argument on the basis that the relevant 'connection' for the purposes of s. 223(1)(b) was the connection between the community as a whole and the area the subject of the claim—at [142].

In this case, the Commonwealth attempted to distinguish *Alyawarr* on the ground that the rights and interests were not held communally—at [143].

French, Finn and Sundberg JJ rejected this contention because:

- the native title holders' case was always pleaded as a 'communal' claim, which the Commonwealth had not contested, pleading rather that there may be others with whom the native title holders might share a 'collective entitlement';
- the pleadings did not raise a case that, if the native title holders were to succeed, then they could do so only on a 'non-communal' basis;
- the Commonwealth was content for the native title holders to have a communal 'land-based' native title determination;
- the anthropological propositions Selway J accepted both reflected and supported the 'communal' claim, as did his Honour's findings; and
- the determination of native title made by Mansfield J recognised and recorded a communal entitlement—at [145] to [151].

The court noted that, in *Alyawarr* at [79], it was said that determinations recognising the existence of native title made under s. 225 covered: '[A] range of possibilities which depend upon the nature of the society said to be the repository of the traditional laws and customs that give rise to the native title rights and interests claimed'.

French, Finn and Sundberg JJ went on to find that:

> What emerges from the discussion [in *Alyawarr*]…is the flexible approach adopted by the courts arising out of the flexible language of s. 223(1) of the Native Title Act – whether the rights and interests found are 'communal, group or individual', and of s. 225(a) – who are the persons holding the 'common or group rights'. The answer will depend upon the evidence—at [159].

Their Honours concluded that:

- Selway J's reasons made it clear he intended the native title rights and interests to be held communally by the native title holders and that Mansfield J had so determined;
- thus, in accordance with *Alyawarr*, it was not necessary to enquire whether there was a 'connection' between a clan member's spouse and the determination area;
- the relevant question was whether there was a connection between the community as a whole and the land and waters and '[c]learly there is'—at [160].

It was observed that: 'It is a curiosity of the Commonwealth's cross-appeal that many of the anthropological propositions with which its expert agreed [at trial]…lead directly to the failure of the cross-appeal'—at [163].

The other ground on the cross appeals in the NTA proceedings, raised by both the Commonwealth and the territory, was that the determination made by Mansfield J recognised a native title right to make decisions about access to, and the use and enjoyment of, the determination area by Aboriginal people who recognised themselves as governed by the traditional laws and customs acknowledged and observed by the native title holders.

While their Honours had some difficulty with this aspect of Mansfield J's determination, in the circumstances the court did not feel the issue needed to be pursued because the right under challenge could not be recognised in a native title determination:

> It is settled by the highest authority that a native title right that is inconsistent with the public's right of access to the inter-tidal zone and outer waters for fishing and navigation is not recognised by the common law for the purposes of s. 223(1)(c)…Aboriginal people are part of the public, whether they do or do not recognise themselves as governed by the traditional laws and customs acknowledged and observed by the appellants, and accordingly have, since the assertion of sovereignty, had the right to fish in and navigate the inter-tidal zone and outer waters—at [170] and [171].

Decision on the NTA appeal

The court dismissed:

- the native title holders' appeal in relation to s. 47A;
- the Commonwealth's cross-appeal on the rights of spouses.

Both the Commonwealth's and territory's cross-appeals regarding access by other Aboriginal persons were allowed.

Comment

Their Honour's decision regarding rights in the inter-tidal zone applies only to areas within the boundaries of land grants made under the ALRA. The principle established by the High Court in *Commonwealth v Yarmirr* (2001) 208 CLR 1 that 'exclusive' native title cannot exist in either territorial waters or the inter-tidal zone continues to apply in relation to native title.

Postscript

The territory unsuccessfully sought a stay of orders pending the outcome of any appeal: see *Arnhem Land Aboriginal Land Trust v Northern Territory* [2007] FCAFC 31, summarised in this issue of *Native Title Hot Spots*.

Stay of orders refused – Blue Mud Bay

Arnhem Land Aboriginal Land Trust v Northern Territory [2007] FCAFC 31

French, Finn and Sundberg JJ, 16 March 2007

Issues

The issue in this case was whether declaratory orders of the Full Court of the Federal Court made in *Gumana v Northern Territory* [2007] FCAFC 23 (the *Gumana* appeal, summarised in this issue of *Native Title Hot Spots*) could be stayed until the High Court either:

- refused special leave to appeal; or
- finally determined any appeal for which special leave was granted.

Background

On 2 March 2007, the court (among other things) made declaratory orders in the *Gumana* appeal that the *Fisheries Act 1988* (NT) (Fisheries Act):

- had no application in relation to areas within the boundary lines of the Arnhem Land (Mainland) and Arnhem Land (Islands) grants (ALRA grants) made under the *Aboriginal Land Rights Act 1976* (Cwlth);
- did not confer on the Northern Territory Director of Fisheries a power to grant a licence authorising or permitting the holder to enter and take fish or aquatic life from areas subject to the ALRA grants; and
- was invalid, and of no effect, with respect to the area subject to the ALRA grants—see *Gumana v Northern Territory* [2007] FCAFC 23 (summarised in this issue of *Native Title Hot Spots*) at [105].

The territory foreshadowed its intention to seek special leave to appeal to the High Court against the court's judgment in relation to the Fisheries Act in the *Gumana* appeal. All parties consented to seeking orders for a stay of the declaratory orders on that point, with a view to preserving the status quo pending the outcome of the special leave application.

Their Honours Justices French, Finn and Sundberg considered whether there was power to stay the declaratory orders made in relation to the Fisheries Act in the *Gumana* appeal. It was decided that there was no basis for, or any utility in, the orders sought in this case, having regard to the case law. This was despite the fact that the orders proposed were sought by consent because the court 'will not make an order by consent unless it is within power and appropriate'—at [5] and [7] to [8].

Their Honours considered that making the orders sought in this case could be misleading and engender a false sense of security:

> If licences issued under the…Fisheries Act…do not validly authorise fishing in the intertidal zone the position is not changed by staying the declaration. Nor is the essential dilemma resolved by delaying entry or 'suspending' the operation of the declaration whatever that may mean—at [8].

It was noted that this did not prevent the parties from making any agreement they wished pending the outcome of the special leave application. Without expressing a conclusion, their Honours said:

> [I]t may be that it is possible under s. 19 of the ALRA for the Northern Land Council to grant a licence to all holders of licences issued under the Fisheries Act to continue to operate in the intertidal zone in accordance with the terms of their licences until the special leave application is heard and determined—at [9].

Decision

The proposed consent orders granting a stay of the declaratory orders were not approved.

The Wongatha decision

Harrington-Smith v Western Australia (No 9) [2007] FCA 31

Lindgren J, 5 February 2007

Issue

The question before the Federal Court in this case was whether or not a determination of native title should be made in relation to a large part of the Goldfields area in Western Australia. It was decided that no determination under s. 225 of the *Native Title Act 1993* (Cwlth) (NTA) should be made.

Dismissal the appropriate order

His Honour was of the view that:

> The various Claim groups [in this case]…failed to establish their claims [on the merits]…In all cases except the MN [Mantjintjarra Ngalia] claim, the applications were also [found] not [to be] authorised. In those cases, the Court lacks jurisdiction to make a determination of native title…
>
> Ultimately, the kind of order to be made in a failure of proof case is one of discretion…It may give rise to difficulty if, for example, in the MN proceeding (in which authorisation was not in issue) there were to be a determination that native title did not exist in the…overlap area, while there was only a dismissal of the Wongatha application in relation to the remainder of the Wongatha claim area—at [4006] to [4007], referring to *Western Australia v Ward* (2000) 99 FCR 316 at [219].

Dismissal rather than a determination under s. 225 ostensibly means that fresh claimant applications can be made (i.e. the prohibition on further proceedings found in s. 68 does not apply). However, Lindgren J did note that:

> I need not discuss the question of the effect of a dismissal if, for example, an individual were in future to apply for a determination that he or she had individual rights and interests, or if a different group were I future to apply for a determination that it has group rights and interests…Nothing that I have said is intended either to preclude or to encourage the advancing of any such claim—at [4008].

On this issue, see also the summary of Commonwealth's non-claimant application below.

Background

Eight overlapping claimant applications made under s. 61(1) of the NTA were before the court: the whole of the Wongatha and Cosmo Newberry (Cosmo) applications and, to the extent that they overlapped the Wongatha claim area, the Mantjintjarra Ngalia (MN), Koara, Wutha, Maduwongga and the two Ngalia Kutjungkatja applications (NK1/NK2). Only Wongatha, Wutha and Cosmo were on the Register of Native Title Claims when this decision was made. The 'mud map' on the following page shows the relationship between the various applications.

In this summary, reference to the 'Wongatha claim area' means the area subject to the Wongatha application, including all of the overlapping claim areas.

The eight claimant applications originated in 35 earlier applications (the antecedent applications), 33 of which were made under the old Act i.e. the NTA as in force prior to 30 September 1998, when most of the provisions the *Native Title Amendment Act 1998* (Cwlth) (the Amendment Act) took effect.

Pursuant to s. 67(1), the court decided to hear the Wongatha claim because it had the maximum number of overlaps. This was the first time so many claims were dealt with in the one proceeding and 'the burden' of hearing them was 'great'—at [8] to [9].

Due to the length and complexity of the reasons for decision, the background to each application is noted here only to the extent necessary to assist in understanding the reasons and not all legal issues are dealt with. Further, the structure of the reasons for decision is not followed. Rather, an attempt is made to synthesise the critical findings. For more details, readers are referred to the reasons for decision.

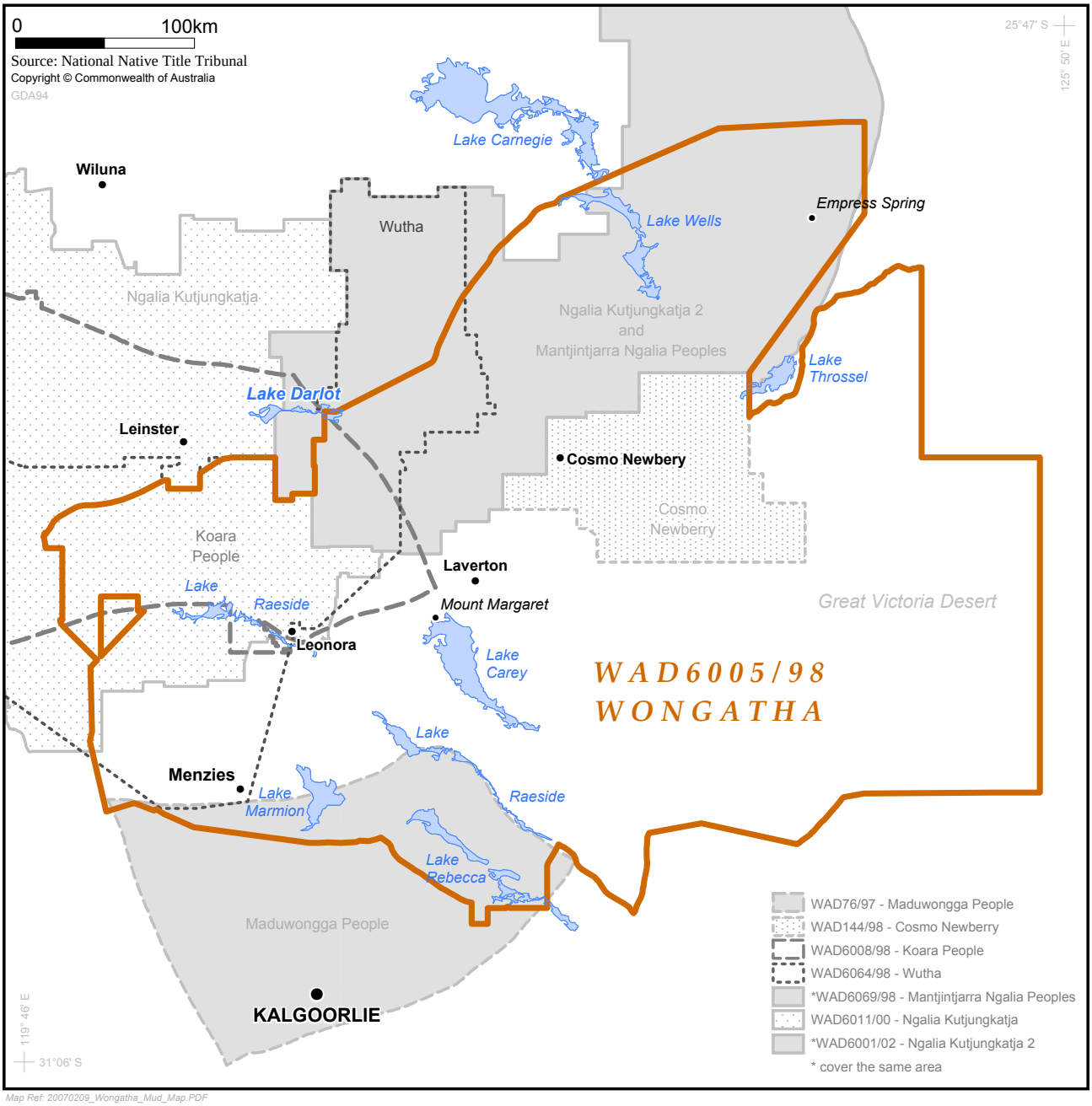
Western Desert Cultural Bloc society

All eight claim groups relied on the Western Desert Cultural Bloc (WDCB) as the relevant 'normative society'. The court noted that the expression 'Western Desert Bloc' derived from a 'seminal article' published in 1959 by Professor RM Berndt and was a concept now 'well accepted'– at [304] to [307], [495] to [499] and [714].

His Honour Justice Lindgren concluded that:

> With considerable doubt, and not withstanding the many references in the [anthropological] evidence to 'societies', regional variation and dissimilarities between cultural practices in different parts of the Western Desert, I will assume without making a finding, that the WDCB is a single normative society—at [1003]. See also [552] and [1275].

However, while this much was accepted, it was noted that:



> [V]irtually everything else touching the WDCB was in issue: whether it is a society united by the acknowledgment and observance of laws and customs; its characteristics; its geographical extent; and whether the respective Claim groups continue to acknowledge its body of traditional laws and customs—at [539]. See also e.g. [307], [738] and [1275].

Geographical extent of WDCB

One of the issues Lindgren J determined was the western boundary of the WDCB at sovereignty. After a lengthy discussion of the evidence, it was concluded that it extended west, through a 'fading out' zone, to a line running from Menzies to Lake Darlot—at [705]. See the discussion at [540] to [699] and the mud map above.

This meant that any native title claim in relation to any part of the Wongatha claim area west of that line failed to that extent—at [705], [2408], [2725], [3372] and [3696].

Inferences in relation to WDCB

His Honour was prepared to infer that:

- the WDCB was a single normative society for the purposes of the NTA (i.e. a body of persons united in and by its acknowledgement and observance of a body of laws and customs) that existed at sovereignty and had continued to exist down to the present day;

- at sovereignty (i.e. in 1829), that body of laws and customs provided for 'multiple pathways' through which an individual might hold rights and interests to land and waters;
- the Wongatha claim area, up to but no further west than a line running from the town of Menzies to Lake Darlot (the Menzies-Lake Darlot line), was, at sovereignty. subject to that body of laws and customs—at [738] and [1292].

Applicable legal principles

His Honour summarised the relevant law, noting (among other things) that:

- sections 223 (definition of native title) and 225 (definition of determination of native title) of the NTA were of 'pivotal' importance to all applications for a determination of native title made under the NTA;
- the native title rights and interests to which s. 223(1) refers are those possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples at the time of sovereignty which survived the acquisition of sovereignty;
- in an NTA context, 'laws and customs' and 'society' (i.e. the body of persons united in, and by, its acknowledgment and observance of a body of law and customs that have a normative content) are interrelated in that laws and customs are sustained only by a society which continues to acknowledge and observe them;
- therefore, if there is, currently, no society that acknowledges traditional laws and observes traditional customs, then native title rights and interests no longer exist and it is not enough that particular individuals acknowledge and observe them or 'hope for their restoration';
- those seeking recognition of native title must establish the content of the body of pre-sovereignty laws and customs on which they rely in order to establish that the normative system has continued because it is the continuance of that system that supports the existence of native title rights and interests today;
- the claimants themselves should not be expected to be able to articulate the relevant normative system because there might be a 'range of aspects of the [relevant] normative system operating at all sorts of levels' and 'it does violence to the complexity of that living system to draw up a list of normative acts';
- in this case, because all eight claims were made by reference to the traditional laws and customs of a larger 'overarching' society (i.e. WDCB 'society'), the claimants must prove they continued to acknowledge and observe the traditional laws and customs of the larger overarching society and possessed rights and interests under the laws and customs of that society;
- post-sovereignty adaptations of pre-sovereignty laws and customs must be rooted in (allowed by) the social structures of the relevant Indigenous society (i.e. in this case, the WDCB) as those structures existed at sovereignty;
- as all the claimants in this case contended that the relevant traditional laws and customs had been adapted in response to the impact of European settlement, difficult questions of fact and degree emerged, not only in assessing what, if any, significance should be attached to the fact of change or adaptation, but also in deciding what it was that was changed or adapted—at [67], [89], [95] to [96], [99], [111] to [112], [993] and [998], referring to *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3) and *De Rose v South Australia* (2003) 133 FCR 325; [2003] FCAFC 286 at [57] to [58] (*De Rose*, summarised in *Native Title Hot Spots* Issue 8).

It was also noted that non-Aboriginal people, such as the parent or a spouse of an Aboriginal person, cannot be recognised as holding native title—at [3738], referring to ss. 225 and 223 and the definition of 'Aboriginal people' in s. 253.

In relation to the continuity of acknowledgement and observance for the purposes of s. 223(1)(a), it was said that:

- the 'body' or 'system' of traditional laws and customs must be one that is 'truly regarded' by the members of the claim group 'as still yielding norms that are authoritative for them';

- 'acknowledgement' must be of a traditional law **as a law** i.e. acknowledgement of it as rightly imposing obligations or conferring rights ;
- observance of a traditional custom signifies intentionally acting in conformity with it;
- where the issue was one of current acknowledgment of law and observance of custom, 'the evidence must show that the person today acknowledges a law in that sense [i.e. as 'rightly coercive or right-giving'] or acts in conformity with a custom';
- present-day knowledge of laws and customs is a condition of acknowledgment and observance for the purposes of s. 223(1)(a) but is not, of itself, sufficient;
- general wide non-compliance with the body of traditional laws and customs may be evidence that the normative system no longer has 'existence and vitality';
- it is possible that traditional laws and traditional customs continue to be acknowledged and observed during periods when those claiming them have not maintained a physical connection with the claim area;
- however, 'the length of the time of non-use or non-occupation may, depending on the circumstances, have an important bearing on whether traditional laws and customs continue to be acknowledged and observed'—at [103], [110], [328], [936], [946], [975] and [998], referring to *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCFCA 110 (*De Rose (No. 2)*, summarised in *Native Title Hot Spots* Issue 15 and *Yorta Yorta* at [52].

Meaning of 'communal', 'group' and 'individual' in s. 223(1)

According to Lindgren J's analysis, all eight applications in this case were made, not on behalf of the WDCB, and not on behalf of individuals, but on behalf of groups within the WDCB—at [1140].

His Honour said:

> [T]he expression 'communal, group or individual rights or interests' [in s. 223(1)] reflects a taxonomy. The 'community' is the 'society' which sustains the traditional laws and customs in question, and is therefore the largest possible right or interest owning entity…At the other extreme is the individual. Any right or interest owning entity lying between the individual and the community is a 'group'…Everything depends on the content of the traditional laws and customs—at [536], referring to *De Rose (No 2*) at [27] to [44]. See also this case at [1135].

Burden of proof

It was noted that those seeking recognition of the existence of native title carry the burden of proving, on the balance of probabilities:

- that they continue to acknowledge and observe the pre-sovereignty laws and customs of the relevant society (in this case, the WDCB);
- the content of the applicable pre-sovereignty laws and customs;
- any modern adaptations 'permissible' under those traditional laws and customs; and
- that their claim group, on a fair overall view (i.e. not every member), continues to acknowledge and observe those laws and customs, subject to the 'permissible' adaptations—at [339] to [340] and [717].

His Honour acknowledged that some, or all, of these requirements may not be susceptible of proof but that was what the NTA required—at [736].

Lindgren J considered it:

> [R]easonable to expect the parties to formulate the pre-sovereignty law or custom in question, to refer to adaptations to be allowed for, and to come up with a suggested present day form of the law or custom—at [970].

Drawing inferences

His Honour noted that written records for the Goldfields did not exist prior to the arrival of non-Indigenous people in 1890s (some 60 years after the date of sovereignty) and that 'any evidentiary vacuum' worked against the claim groups. However, since there was no evidence of any 'important or relevant event' in the intervening period, Lindgren J inferred that 'the situation that existed immediately when the written record began was like that at sovereignty' and that 'retrospective' inferences could be drawn—at [294] to [296].

It was noted that:

> There may be argument about particular laws and customs, including whether some of these are laws or customs at all, but there can be no argument that there are records of acknowledgment and observance of laws and customs uninfluenced by the European presence, that provide a basis on which I may properly infer that the same laws and practices were being acknowledged and observed in 1829—at [1302].

However, there were constraints on the inferences the court could draw:

> It is, for example, one thing to infer from European observation of the presence of semi-nomadic Aboriginal people in the Wongatha Claim area in and after 1869 that semi-nomadic Aboriginal people were to be found in the Wongatha Claim area in 1829. It is another thing to infer that the latter were the ancestors of the people observed and would have 'occupied' the area where the former were observed…
>
> [T]he shorter the period that has to be covered by an inference of retrospective continuance, the better. In the present case, the acknowledgment and observance of pre-sovereignty laws and customs may have been affected by events since European settlement in, say, the early 1890s: including the migration from the desert to the towns and settlements of the Goldfield; the abandonment of the nomadic life in the desert; and the dominance of the non-Aboriginal culture. The point is that where, as here, the task is to ascertain what the pre-sovereignty body of laws and customs was, I prefer to look first for the earliest available evidence of laws and customs as they existed after first contact. Admittedly, in some cases, the earliest available record may have been made long after first contact—at [296] and [341].

What was required in this case was:

> [E]vidence addressing the long term association of indigenous groupings within the Western Desert with particular areas, and the stability of those groupings and associations over time, before I would infer, if asked to do so, that a situation in these respects which existed in say the early twentieth century had existed in 1829—at [348].

But there was a 'conundrum':

> Those who observed, recorded and analysed were Europeans, and were, therefore, to varying degrees, part of the intrusion and disturbance. The dislocation gathered pace as settlement progressed – and as the number of alien observers increased. To state the obvious, there were no pre-contact European recorders, and the post-contact (in particular, post-settlement) recorders could document only a situation already disturbed, to an extent that depended on the date and place of the observations, as a result of the European influence. This fact has particular relevance to the issue of population movement from the desert in the north, north-east and east to places of European contact—at [349].

Distinguishing features of WDCB law and customs at sovereignty

The question: 'What was the traditional (pre-sovereignty) body or system of laws and customs of the WDCB?' was relevant to:

- the continued acknowledgement and observance of the body of laws and customs by the respective claim groups; and
- the identification of the particular pre-sovereignty WDCB laws and customs that provided for the possession of rights and interests in land and waters—at [1294].

The 'distinguishing' features of pre-sovereignty (i.e. traditional in the NTA sense) WDCB laws and customs were identified by his Honour from earlier anthropological writings as being:

- an absence of 'dual organisation' (i.e. absence of moiety divisions), which was merely noted because no claim group in this case said otherwise;
- the same kinship system, the terms of which the people knew and the associated rules of which they observed;
- a mythology 'marked everywhere by a common theme' i.e. the *Tjukurr* or *Tjukurrpa* (Dreaming), which was said by Professor AP Elkin to bind

together 'local groups' and, by Professor RM and Dr CH Berndt, to be 'the axis upon which the culture of these desert people revolves';
- a variety of local totemism with two classes, one determined both by birthplace or conception and the *Tjukurr* for that place (the Dreaming totem) and the other being a dream (but not a Dreaming) totem;
- spirit-child beliefs, which the court noted was not a belief testified to by any claimant;
- cicatrization to mark fully initiated men, which the court noted was no longer practiced within the Wongatha claim area;
- that descent from an ancestor was not a basis of a landholding unit—at [291] and [745] to [827].

In relation to totemism, Lindgren J noted that, 'importantly', Professor Elkin said it was the birth/conception totem that provided a person with a connection to one of the Dreaming tracks or paths, and so to the land i.e. it was birth or conception on the mythological path that really made or constituted a person's 'country'—at [770].

His Honour concluded that, under the traditional (i.e. pre-sovereignty) laws and customs of the WDCB:

> [W]hatever may be the nature and extent of the 'country' or 'ancestral estate', it derives from the individual person's having been born or conceived on a *Tjukurrpa* (Dreaming) track or site there—at [770].

Behaviour governed by the traditional WDCB kinship system found to be evidenced in the earlier literature included:

- avoidance relationships, with the most noted being that between son-in-law and mother-in-law;
- the responsibility of in-laws for arranging funerals;
- identification by reference to skin group for ceremonial and trading purposes;
- distribution of kangaroo meat;
- deference to older kin;
- bestowing of names of forebears (*thamu* or *kaparli*) on grandchildren—at [761] to [762].

From the evidence, his Honour also inferred retrospectively that at, or before, sovereignty, the law and custom of the WDCB was that:

- all males must be initiated and so become *watis* (men) and that they must not marry or raise a family otherwise;
- a two-stage burial process was to be followed;
- the relatives of a deceased person, and others who knew them, must remove themselves for a time from the place of death—at [820], [823] and [827].

Regional variation

His Honour noted that the expert anthropologists who testified in this case generally accepted what many of the earlier ethnographers noted i.e. that there was a 'high incidence of regional variation in various laws and customs' across the WDCB—at [711].

However:

> No serious attempt was made…to identify those variations that apply in the area within which the Wongatha Claim area falls, or in any particular part of that area, against which current acknowledgement and observance can be assessed—at [712].

Further:

> According to this approach [i.e. regional variation as put by one of the expert anthropologists] it is never possible to demonstrate cessation of acknowledgement or observance because it is not possible to come up with a satisfactory account of the body of laws and customs that operated within the Wongatha Claim area at sovereignty—at [716].

Loss of tradition as opposed to regional variation

On the evidence, it was found that the conception/birth (Dreaming) totem, identified as a characteristic of the WDCB, was not a characteristic of any of the claim groups in this case. It was put to the court that this might merely indicate that Wongatha claim area was a region within the Western Desert where this was never a feature, rather than evidence of a loss of a 'tradition'.

His Honour found that:

> The general absence of a [traditional] WDCB characteristic from claimants may be attributable to [either] loss or to regional

variation. If claimants fail to prove regional variation at an earlier time, I would find loss to be the explanation. The reason is that the onus of proving continuous acknowledgement and observance of the body of pre-sovereignty laws and customs rests on a claim group, and this involves, as its starting point, proof of the content of the body of laws and customs that were being acknowledged and observed in the claim area at sovereignty—at [784].

Traditional groupings in the WDCB

All the expert anthropologists in this case agreed that the model of 'land-owning patrilineal clans' did not apply to the WDCB. However, as Lindgren J noted:

> There remain[s]…the definition of the land the subject of ownership as 'a given site or constellation of sites'...The theme that the land owned is identified by reference to, *Tjukurr* sites or tracks and had a religious dimension, has been a recurrent one in anthropological writings…and does not seem to have been departed from—at [838].

The estate/range dichotomy promulgated by Professor WEH Stanner in 1965 was also noted:

> The estate was the traditionally recognized locus…of some kind of…group forming the core…of the territorial group…The range was the tract or orbit over which the group, including its nucleus and adherents, ordinarily hunted and foraged to maintain life—at [844].

This dichotomy was used (with some modifications) in relation to 'recent monographs on specific Western Desert people' by Professors FR Myers and R Tonkinson and:

> Professor Myers did not depart from Berndt's understanding of the Dreaming and Dreaming sites and tracks as underlying the subject matter of land ownership. He emphasised the individual as the owner, and the variety of pathways between the individual and that subject matter, by which ownership might be 'accomplished'—at [853].

A tie to the Dreaming was also present in Professor Tonkinson's work who, like Professor Myers, referred to 'a variety of avenues of connection to the estate'—at [855].

Pathways to country under WDCB traditional law and country

His Honour noted that the notion of 'multiple pathways' identified in the earlier anthropology included that:

- what was important was a certain stretch of territory and its totemic associations;
- usually, a number of *Tjukurr* sites were involved, with the majority having totemic connections;
- a child born at one place 'inherited' all the totemic aspects linked with that place, including its physiographic features, and it was the totality of these totemic aspects that made up the 'country' of that child's birth;
- it was not always the actual birth site that was important but the fact that birth took place within the territory or constellation of sites associated with the principal 'economic' site (usually a waterhole);
- the constellation of *Tjukurr* sites with which a child's birth was associated was that child's 'estate';
- *ngurra* , as their 'camp', was a transient human product whereas *ngurra*, as their 'country', endured because its creators were outside of the immediate social world;
- a fundamental link in the chain was a person's identification with a birth/conception Dreaming and its place because that person was its 'incarnation';
- a person's 'estate' was their traditional heartland and consisted of a limited number of important waterholes and sacred sites–at [839] to [878].

From this, his Honour concluded that the multiple pathways concept under traditional WDCB law and custom meant that:

- exploitation, such as by camping, hunting and foraging over an 'orbit of occupation' or 'range' or 'run', did not give rights and interests in the 'large' area so exploited;
- any recognition of rights and interests in land was based on the *Tjukurr* (Dreaming);
- the subject matter of a person's 'ownership' was defined by reference to a *Tjukurr* site or constellation of *Tjukurr* sites or tracks;

- a person's 'estate' was not limited to the actual site, sites or Dreaming track but extended to related, or nearby, topographical features and its size could vary greatly;
- while 'ownership' was at the level of the individual, the individuals who 'owned' the same 'estate', via the *Tjukurr*, could be seen as constituting, in a loose sense, a landowning 'group';
- the individual's place of birth/conception was the primary form of connection to that 'estate' but there were others, which had led to anthropological acceptance of the notion of multiple 'pathways of connection' to the estate—at [810], [859] and [879].

Conclusion on ownership under WDCB traditional laws and customs

Based on the evidence, the court concluded that, in accordance with the traditional (i.e. pre-sovereignty) laws and customs of the WDCB:

- 'ownership' of an area was at the level of the individual;
- the 'subject matter' of ownership (i.e. the area of land and waters in which rights were held) was based on, or defined by reference to, *Tjukurr* (Dreaming) sites or tracks;
- there were multiple pathways by which the individual had the status of owner; and
- the landowning group comprised those individuals who were owners of the same subject matter—at [859], [1292], [1315] and [1317].

Membership criteria of the claims in this case

It was said that a 'multiple pathways of connection' model underlay the Wongatha, MN, Koara and Wutha claims (the GLSC claims) and the Cosmo claim and that an 'apical ancestor model' or a 'cognatic descent model' underlay the Maduwongga and NK1/NK2 claims. However, Lindgren J was of the view that: 'The difference between the two models is not always clearly borne out'—at [310] to [311].

The membership criteria for the GLSC claims were, essentially, put in the same terms:

- the person traced their ancestry, considered in genealogical, occupational and/or socio-cultural terms, to a person whose 'country' was recognised by other members the relevant claim group as being located within the claim area; or
- the person was born and grew up in the relevant claim area; and (in both cases)
- that person's connection to the relevant claim area was recognised by other members of the relevant claim group—at [283] to [285], [2013], [2471] and [2749] to [2750].

Each of the GLSC claim groups acknowledged that the native title rights and interests claimed were shared with certain unidentified individuals from both the other three GLSC claim groups and the Cosmo and NK1 claim groups—at [136] to [137], [157], [171] and [190].

The fact that the membership criteria for the GLSC claim groups were identical was a problem for the overlap areas because:

> [A] person whose connection is to the overlap [area] will satisfy the membership criteria of more than one Claim group, and the only basis on which he or she will be a member of one and not of the other or others, is that one recognises his or her connection, and the other or others do not—at [129].

Lindgren J was also of the view that the boundaries between the Koara and Wutha claim groups were so blurred that the evidence suggested that they were not distinct at all—at [2760].

The membership criteria for the Cosmo claim, which were found to be similar to those of the GLSC claims, were:

- a personal connection to the Cosmo claim area, including through the person's own birth or the birth of his or her ancestors; or
- the assertion of a claim to Cosmo country; and
- recognition of the person's claim by the Cosmo claim group in accordance with traditional decision-making processes—at [286] to [287], [3035] and [3051].

The Wongatha claim group accepted that some Cosmo claimants may have rights and interests within the Wongatha/Cosmo overlap area but insisted the Cosmo claim group must accept that

there were Wongatha claimants who had rights and interests within the Cosmo claim area. The Cosmo claim group insisted on its exclusive rights to the overlap area—at [2887] to [2888].

His Honour identified 'the essential nature' of claim group composition insisted upon by both the Cosmo and the GLSC claimants as: '[A]n area of land is decided upon, apparently by those who took the initiative to make an application under the NTA, and the group membership flows from that decision'—at [3025].

For example, Lindgren J observed that:

> In their testimony, the Cosmo claimants resisted, to varying degrees, suggestions that persons who are not presently Cosmo claimants may have rights and interests within the Cosmo Claim area...
>
> Sometimes place of birth of the person or of his or her ancestor within the Cosmo Claim area was said to support the holding of rights and interests within that area…but place of birth was not ranked as so important when a witness was confronted with the case of either (a) a listed Cosmo claimant who did not satisfy that criterion, or (b) a Wongatha claimant who did satisfy it…
>
> [I]t is difficult to avoid the impression that any personal or family link to the Cosmo Claim area will be treated as sufficient if the Cosmo claimants desire that the person be a member, and that none will suffice if they do not—at [2883], [2885] and [3045].

His Honour said the evidence did not explain, by reference either to traditional WDCB laws and customs or otherwise, why the Cosmo claim area was an appropriate 'unifying aspect' in the first place and that 'ultimately', the Cosmo claim 'stands or falls', as the GLSC claims did, as 'based on the model of an aggregation or pooling' of claimed 'my country' areas—at [3026] and [3028]. The problems with this 'model' are discussed further below.

The 'defining' criterion for membership of the Maduwongga, NK1 and NK2 claim groups was said to be descent from an identified ancestor. However, the way their cases were run at trial indicated to his Honour that they also 'attempted' to show connections between individual members of the claim group and their respective 'my country' areas. Therefore, the reasoning in relation to the kind of 'connections relied on' by the GLSC and Cosmo claim groups 'to generate rights and interests in land and waters' was found to apply equally to Maduwongga, NK1 and NK2—at [289].

His Honour also made the following critical comment:

> I cannot recall any claimant [who testified] who claimed a 'my country' area defined by reference to Dreaming, sites or tracks…What appears to have happened…is [that]… sedentarisation and urbanisation have placed distance between the claimants and Dreaming sites and tracks…[T]he claimants have invoked the multiple pathways concept to define the subject matter of their claims, that is to say, their 'my country' areas [without reference to the *Tjukurr*]. I do not see this abandonment of the *Tjukurr* basis of the subject matter of ownership as a permissible adaptation [of the traditional laws and customs of the WDCB]—at [879].

His Honour pointed out that, in the *De Rose* case (discussed further below), it was found that there were four pathways to connection through traditional WDCB law and custom, to which the additional requirement of recognition was added. The evidence in this case did not 'establish a finite number of criteria to be applied' to all claimants within the eight claim groups and there was disagreement between some of them as to what the pathways were—at [806].

It was noted that:

> If it is…not possible to identify a limited number of pathways of connection which will of themselves make a person a member [of a particular claim group], then recognition of a claimed connection by the present members from time to time of a Claim group becomes all important. Indeed, the group than takes on the appearance of a self-defining voluntary association—at [805].

Summary of reasons for dismissal on the merits

As noted:

- all eight claims were characterised as being made by a 'group' claiming to hold 'group rights and interests' in the claim area pursuant to the traditional laws and customs of the WBCB;
- Lindgren J was of the view that, under traditional WDCB laws and customs, the relationship of an 'owner' to the 'subject matter' they 'owned' (i.e. the area of land and waters over which they held rights) was not mediated by any 'group' other than a group defined by reference to the *Tjukurr*; and
- none of the claimants who testified appeared to claim their 'my country' area by reference to the *Tjukurr* i.e. Dreaming sites or tracks.

Therefore, putting the question of authorisation (which is dealt with below) to one side, it was found that all eight claims failed on the merits and should be dismissed because:

- the evidence did not establish that any of the claim groups were recognised by WDCB traditional laws and customs as being capable of possessing 'group' rights and interests in land or waters;
- the evidence did not establish that the 'group' rights and interests claimed existed in any part of the Wongatha claim area under WDCB traditional laws and customs;
- the evidence did not establish that, at sovereignty, WDCB laws and customs provided for either an ancestral group of the each claim group to possess group rights and interests in the Wongatha claim area or for individuals to be able to form themselves into such a group;
- none of the claim areas were, directly or indirectly, ultimately defined by reference to *Tjukurr* (Dreaming) sites or tracks;
- the evidence did not establish that the claimants, as constituting the relevant claim groups, had a connection as a group with the Wongatha claim area **by** the traditional laws and customs of the WDCB, as required by s 223(1)(b)—at [1167], [1923], [2408], [2725], [2893], [3372] and [3696].

In addition, all but Maduwongga failed on the merits to the extent that each claim group, and each claim area, arose out of a pooling, or aggregation, of claims of individual rights and interests to 'my country' areas and the NTA did not provide for the making of a determination of native title that recognised 'group' native title rights and interests in those circumstances—at [1167], [1923], [2408], [2725], [2893] and [3696].

In other words, individuals who claimed to have rights and interests in respect of 'my country' areas had, at some point, aggregated themselves into claim groups of their choice for the purposes of the NTA, rather than already being part of landholding groups identified by the traditional laws and customs of the WDCB i.e. *Tjukurr*-based groups—at [909].

Wongatha, Koara, Wutha and NK1/NK2 were also rejected because:

- many of the claimants were the descendants of Western Desert people who migrated into the Wongatha claim area post-sovereignty, usually under the influence of European settlement, from other parts of the Western Desert; and
- it was not established that their ancestors had any connection with the Wongatha claim area at sovereignty or that those ancestors, or the claimants descended from them, either had, or acquired, rights and interests in the Wongatha claim area in accordance with pre-sovereignty WDCB laws and customs or, in the case of NK1 and NK2, any connection with any part of that area in accordance with pre-sovereignty WDCB laws and customs—at [1167], [2408], [2725] and [3696].

In relation to MN, it was said that:

> In so far as it may be relevant, it is not shown that the ancestors of the MN claimants had any connection with, let alone rights and interest within, the Wongatha/MN overlap at sovereignty. The most that is shown is that the range of certain more recent ancestors may have extended down into the very northernmost tip of the Wongatha Claim area—at [1923].

Of the Cosmo claim, it was said that:

> While particular Cosmo claimants can point to earlier times when they or their ancestors lived, or had other connections with, particular places within the Cosmo Claim area, the present

> Cosmo Claim group has resided at the Cosmo Aboriginal Community only since 1989/1990, and **as a group** its connection to the Cosmo Claim area dates only from that time—at [2893], Lindgren J's emphasis.

To the extent that the Madugwongga and NK1/NK2 claims were based on either a 'clan' or a 'tribe' model, it was found that was not supported by the expert evidence of the traditional laws and customs of the WDCB—at [320].

Wongatha, Koara, Wutha, Maduwongga and NK1 were also rejected to the extent that the area each group claimed was west of the Menzies-Darlot line—at [1167], [2408], [2725] and [3696].

The most significant of these findings are further discussed below.

Group claims and proof

In relation to 'group claims' generally, it was noted that:

> [T]he individual members of the group (claimants) [must] have rights and interests **by reason of that membership**…As ever, the governing consideration is the traditional laws and customs. But [to prove a group claim] the individual's rights and interests will always arise from his or her membership of the group; they will not arise directly and without group mediation, from the laws and customs of the [relevant] society—at [536], Lindgren J's emphasis.

His Honour had no difficulty with the proposition that there may be differences as to rights and interests enjoyed as between the group's members or the fact that particular members, or classes of members, may have special rights and interests—at [1145].

As all of the claims in this matter were characterised as 'group' claims to 'group' native title rights and interests, the following observations are of particular relevance:

> In the case of a claim of communal or group rights or interests, s 223(1)(a) requires the claimant community or group to establish that they have those rights and interests under traditional laws acknowledged and traditional customs observed **by that community or group**…Accordingly, not only…must the sustaining 'society' [WDCB in this case] continue to acknowledge and observe the laws and customs: if the native title claim group is not that society but only part of it [as in this case], that group must also acknowledge and observe them. Whether it does so again raises questions of fact and degree…
>
> Much depends on the particular law or custom being considered– some behaviour involves only a single actor (eg refraining from marrying a person of a wrong skin group), while other behaviour involves multiple actors (eg corroborees, funerals)—at [100] and [325], referring to *De Rose (No 2)* at [57] to [58], Lindgren J's emphasis.

The question in this case was whether it was proven that the traditional laws and the traditional customs of the WDCB society provided for 'group' native title rights and interests to be possessed by the various claim groups in their respective claim areas. As noted earlier, his Honour was of the view that it was not. See also e.g. at [318] to [319], [538], [894], [909] and [923].

Difficulty of proof of group claims by semi-nomadic people

The court noted that:

> The indigenous people of the Western Desert led semi-nomadic lives. They roamed over large areas, determined primarily by the availability of water and food…
>
> The question arises, on what basis, if any, a sparsely populated, vast and arid area could be divided into areas of the kinds represented in the present case in which groups of the present kinds had group rights and interests. This is not to suggest that the indigenous people of the Western Desert did not have, through the Dreaming (*Tjukurrpa*), a close and religious relationship to the land. It is, however, to raise the question as to the basis of their pre-sovereignty groupings, and, in particular, as to how one particular group of such people,

as distinct from another, had group rights and interests in relation to a particular area.

More than one witness referred to the notion of territorial 'boundaries' as something foreign to Western Desert culture, and as something that the advent of native title had forced onto the indigenous people—at [297] to [299].

Lindgren J also noted that:

[T]he system of norms in question must have had 'vitality' since sovereignty. There is a difficult question as to what this requires in circumstances in which the laws and customs belonged to semi-nomadic people who now live sedentary lifestyles in towns or Aboriginal communities…

The [Wongatha, Koara, Wutha, MN], Maduwongga and NK1 and NK2 claimants appear to live basically sedentary lifestyles in towns and cities…Some of the MN claimants live in a community established in the early 1980s at Mulga Queen. Nearly half of the Cosmo claimants now live at the Cosmo Aboriginal community, established in 1989/1990—at [327] and [811].

Post-sovereignty migration was not an adaptation of traditional migration

His Honour accepted the evidence showing that there had been post-contact migration from the desert to the fringes of European settlement in the Goldfields 'with, over time, a numerical dominance or overwhelming, if not a total displacement, of the local [pre-sovereignty Indigenous] population'—at [656] to [657], [701] and [1907].

This evidence showed that:

Drought and the effects of the European presence combined to push or draw Aboriginal people from the desert towards European resources…[T]he towns and settlements provided a strong incentive to leave one's 'traditional' country and to camp at or near European centres—at [1077] and see also [1068] to [1076]. See [550] to [700] for a survey of the evidence.

One critical finding was that that there had been 'unnatural' migration following first contact:

Although there is evidence that initially some of the people returned periodically to the desert, and although there are questions whether those from the desert displaced the local Aboriginal people, the general proposition that over time there was a general draining of the desert in favour of the fringes of European settlement is not disputed.

While claimants can point to ancestors who had various kinds of post-contact association with places within the Wongatha Claim area, I cannot infer, without more, that those ancestors' own ancestors at sovereignty had connections to those same places. Indeed, in many cases there is positive evidence that the post-contact ancestors migrated to the outskirts of townships and to ration depots in the Goldfields in the closing years of the nineteenth century and the first half of the twentieth century, from places to the north, north-east and east of the Wongatha Claim area.

Whatever the effect of pre-contact 'traditional' migration within the Western Desert (due to drought, for example) may have been under Western Desert laws and customs, migration to points of European contact because of certain attractions there is something quite different. **I do not accept that the latter was an adaptation of the former**—at [301] to [303], emphasis added and see [1043].

In other words:

The post-settlement migration was heavily influenced by European settlement. The attractions of food, water and rations, and later jobs, money, medical services, education and shelter, progressively…drew people from the desert. **This migration was not 'traditional' and was not an adaptation of traditional migration**—at [636], emphasis added.

While his Honour did not think that there had been a 'total displacement or forcing out of the existing population', he was of the view that:

- the families and small groups who came out of the desert post-contact and 'congregated on the fringes of European settlements, came to overwhelm or dominate the local population';

- to the extent that the migration was intra-Western Desert, it had not been shown that that those coming in from the desert acquired, under WDCB traditional laws and customs, rights and interests in the places they migrated to;
- whatever WDCB traditional laws and customs might have provided in relation to acquiring rights and interests by migration or population shift, the choice of the fringes of European settlement was not traditional;
- it might have been different if it was proved that, had Europeans had never come, the same migration would have occurred (i.e. that drought or other 'pre-European' causes would have 'brought about the migration that occurred') but no attempt was made to establish this and it might impossible to do so—at [703] to [704].

As a result, it was found that the evidence in this case did not establish that the Western Desert people who came to live on the fringes of European towns and settlements or near ration stations acquired rights and interests in the 'new' area under traditional WDCB laws and customs and so it did not matter that the 'migration' was 'intra-Western Desert' i.e. that the place they left and the place they went to were both within the Western Desert—at [520]. See below in relation to distinguishing *De Rose* on this issue.

Aggregation or pooling of 'my country' areas was fatal

As noted earlier, s. 223(1) provides for native title rights and interests to be 'communal, group or individual' and, in this case, his Honour had found that all eight claimant applications dealt with were made on behalf 'groups' to 'group rights and interests' in 'group areas'.

However, it was not in dispute that the claims to 'country' made by those claimants who testified were, in fact, founded upon claims by those individuals to their own 'my country' areas. This was, in his Honour's view, 'a fatal problem' because it 'contradicted the assertion' that native title was held by 'groups having group rights and interests in group areas'—at [880] and [884].

Counsel for Maduwongga addressed the issue in the following way:

> [If] the Court takes the view that there must be a traditional law base for the claims, then it may be that what we are seeing…is merely the current political affiliations which are part of how these groups today play out their traditional laws and customs, and obviously their traditional laws and customs are not the same today as they were in 1829.

His Honour responded that he:

- did take the view that the NTA, as explained in *Yorta Yorta*, required that there be a 'traditional law' basis for all the claim groups and all the claim areas before the court; and
- did not think that 'current political affiliations' connected with the making of applications under the NTA satisfied that description—at [926].

Counsel for the Cosmo applicant submitted that there was no need for a determination to differentiate between types of rights and interests held by claim group members when the claim is made on a group basis. His Honour accepted that proposition in general but noted that:

> [T]he starting point in such a case must be the existence of a group, group rights and interests, and a group area, with all members having at least nominal rights and interests in the whole area by reason of nothing more than their membership of the group. If all members had nothing more than their rights and interests in their respective 'my country' areas, this would show that traditional laws and customs did not give rise to group rights and interests at all. That is the position in the case of the present Claims as they are put—at [3084].

Lindgren J concluded that:

> The evidence…shows that, if anything, the claimants, as individuals, have individual rights and interests in a *ngurra* or 'my country' area, as distinct from constituting groups having group rights and interests in group areas…
>
> The level and form of aggregation has been adventitious, resulting from political affiliations at the times when the respective groups were

composed. In the overlap areas, individuals might just as well have been in a different group. Pre-sovereignty laws and customs have not dictated the existence of the groups or their composition.

On the evidence, there are no group rights and interests of any of the kinds claimed in any part of the Wongatha Claim area. It is conceivable that there may be individuals who could establish that they have individual rights or interests in smaller, personal 'my country' areas [presumably, east of the Menzies-Darlot line at least, based on the *Tjukurr*]. No individual has applied for a determination of native title on that basis. The rights and interests claimed would apparently be different from the group rights and interests presently claimed. I do not propose to say anything further about that possibility, and certainly do not mean to suggest that such an application by an individual would or would not have any prospects of success—at [929] to [931].

Further:

The evidence does not establish a set of criteria by reference to which I can establish who, **in their capacity as members of any group**, have rights and interests in relation to the Wongatha Claim area or any part of it, under traditional laws acknowledged and traditional customs observed. The 'my country' areas of individuals are not held by them in their capacity as members of any group…

[I]t is not shown that under WDCB laws and customs, any of the Claim groups have, or that any predecessor groups had, group rights and interests derived from pre-sovereignty laws and customs. Rather, the Claim groups exist because individuals have come together and pooled their claimed countries, not in conformity with traditional laws and customs, but for the purpose of making an application for a determination under the NTA. If any of the claimants within any of the Claim groups possessed traditional rights and interests in relation to land or waters, they are individual rights and interests—at [894] and [902], emphasis in original.

For these reasons alone, his Honour was the view that all of the GLSC applications and the Cosmo application, to the extent each was before the court, should be dismissed. In the case of Maduwongga and NK1/NK2, it was found they should also be dismissed to the extent that they might be based on aggregation—at [932].

It was also found that:

- the agreement to aggregate, or to pool, was conduct governed by the Australian general law, not traditional law, and the group rights and interests claimed could not have existed prior to the making of the agreement to aggregate;
- the agreement to aggregate involved an impermissible alienation (in whole or in part) of each individual's rights and interests in their 'my country' area because, as a result, those rights and interests were subjected to the rights and interests of the claim group, albeit in exchange for rights and interests in the 'my country' areas of all the other members of the claim group;
- while continuity as between the pre-sovereignty 'owners' and today's would not be required unless pre-sovereignty laws and customs said so, the evidence did not show that traditional WDCB laws and customs provided, or with permissible adaptations provide, for individuals to aggregate their rights and interests in 'my country' areas to create a group holding 'group' rights and interests in a 'group' area—at [885], [893], [902], [1129], [1145], [1165], and [3055] to [3056], referring to *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51 and 60 where, among other things, Brennan J said that native title could not be acquired unless the acquisition was consistent with the traditional laws and customs of the relevant Indigenous people.

It was found that the traditional laws and customs of the WDCB did not recognise, 'let alone differentiate between', the respective claim groups—at [1387].

Multiple pathways of connection was a 'non-group' or 'non-corporate' concept

The evidence was that:

- the claimants who testified claimed areas in relation to which they had a 'my country'

relationship personal to them, with the Aboriginal word most nearly synonymous with 'my country' area being *ngurra*;
- their claim to a 'my country' area did not depend upon their membership of a particular group;
- the bases of the 'my country' claims attested to by those who gave evidence included, but were not limited to, place of birth, place of conception, place of birth of ancestors (or any other basis of that person's ancestors), place where they grew up, place where they live and place which the claimant knew and was familiar with;
- a person's 'my country' area could change throughout life and the 'obvious question arises how, if at all, this circumstance can be accommodated to the NTA';
- it was not possible to list the rights and interests of any particular claim group because it was necessary to look at each individual claimant's life story and circumstances to determined what 'bundle of rights' that individual was claiming when they said 'my country'—at [888], [896] and [900].

The testimony of the expert anthropologists was said to show that:

- individual rights and interests under WDCB traditional laws and customs were claimed in as many 'my country' areas as there were claimants before the court;
- an individual's 'my country' area may change throughout his or her life, according to changing affiliations and the activation and de-activation of multiple pathway 'connections';
- rights and interests to 'my country' areas were also held in parts of the Wongatha claim area by individuals who were not claimants in any of the claim groups—at [923].

Neowarra distinguished

Lindgren J distinguished the findings made in *Neowarra v Western Australia* [2003] FCA 1402 (*Neowarra*, summarised in *Native Title Hot Spots* Issue 8 and Issue 9) from those made in the present case because:

- in *Neowarra*, the claim was that a 'cultural bloc' (i.e. the Wanjina-Wunggurr community) held native title communally, with various sub-groups and individuals holding various sets of rights and interests in various sub-areas of the claim area;
- while the evidence in *Neowarra* had a *dambun*-based (i.e. estate-based) focus, the claim was that the only entity that contained all of the rights and interests in relation to the claim area, and all of the persons who respectively held those rights, was the Wanjina-Wunggurr community;
- the evidence demonstrated the existence of a community that transcended both individual *dambun* (or groups of *dambun*) and individual 'language countries';
- the notion of a Wanjina-Wunggur 'cultural domain' that was not a 'novel creation'—at [1146] to [1153].

On the other hand, the evidence in this case did not show the existence, under traditional laws and customs of the WDCB (as a cultural bloc), of the claim groups as groups i.e. the claim groups were not shown to be, in themselves, 'right and interest possessing units within the [traditional] WDCB society'— at [1154].

In relation to s. 223(1)(b) and 'connection' (further discussed below in relation to this case), it was said that:

- the absence of the claimed 'area-related' spiritual activities in this case could be contrasted with *Neowarra*, where the evidence demonstrated that site-related cultural practices, including initiation, were being done within the claim area;
- the central figures of the Wanjina were physically present on the land throughout the *Neowarra* claim area and Wunggurr places were identifiable locations;
- the languages of the claim area in *Neowarra* were related to the land (i.e. they were language countries) and not merely languages spoken by people who live on the country;
- there was a noticeable gap between that description and even a description 'most favourable' to the present claims—at [2389].

De Rose distinguished

The claim made in *De Rose* was that:

- the claim group comprised all the individual Aboriginal people who were *Ngururaritja* (i.e. a person who 'belonged' to a place, a traditional owner, a custodian) and who were connected with the claim area;
- the *Ngururaritja* were part of the greater Western Desert culture;
- the Aboriginal concept of territory was a 'constellation' of locations, often along a Dreaming track, for which those who were *Ngururaritja* had responsibility—at [505] to [506].

In *De Rose* at first instance (accepted on appeal), it was found that the means by which one could become *Ngururaritja* were 'some of those…referred to as the pathways of connection' to 'my country' areas in the present case, namely:

- birth on the area;
- a long term physical association with it;
- birth of ancestors on it;
- geographical and religious knowledge of it; and, in all cases,
- recognition by other *Ngururaritja* —at [516].

However, there were significant differences and this case had to be decided on the evidence i.e. the court was not bound in this case by findings of fact made in *De Rose*—at [501] and [508].

The differences noted included:

- the size of the claim area in *De Rose* was a 'small fraction' of the Wongatha claim area, which was relevant both to the 'constellation' of sites aspect of *De Rose* (which was not the basis of the claims in this case) and to issues that had no relevance in *De Rose*, such as regional variation in laws and customs and membership of overlapping claim groups;
- while a native title claim need not be made over the entire area in relation to which rights and interests were said to exist, it would ordinarily be reasonable to expect proof of the basis for them in the larger area, which was given in *De Rose* but not in this case;
- in *De Rose*, there was a finite number of criteria (or pathways) that applied to all claimants;
- the 'starting point' for defining the claimants in *De Rose* was responsibility for Dreaming sites and the rights and interests of those claimants were grounded directly in the laws and customs of the WDCB, unmediated by any intervening 'regional society' or 'sub-society';
- 'most importantly', the claim area in *De Rose* was defined indirectly by reference to a constellation of Dreaming sites or tracks and the claimants identified their 'country' as an area described by reference to a 'constellation' of sites that were, most often, associated with, and connected by, the *Tjukurrpa*;
- six of the 26 Indigenous witnesses in *De Rose* gave very extensive and detailed evidence of knowledge of the five main *Tjukurrpa* (or Dreamings) that passed through claim area and, overall, all 26 showed a more extensive knowledge of sites and tracks than did most of the witnesses in this case;
- the *Ngururaritja* in *De Rose* were a **traditional group** i.e. a group constituted by their status as custodians of a constellation of Dreaming sites or tracks and united because they were *Ngururaritja* for the area claimed;
- none of the claimants who testified in this case appeared to use *ngurra* (or 'my country') to refer to a constellation of Dreaming tracks of sites;
- while some of the Cosmo claimants who testified referred to *ngururrangka* (akin to traditional owners), the Cosmo claim group and claim area were not defined by reference to a constellation of Dreaming sites or tracks—at [509] to [516], [806], [858], [1022], [1138], [1142], [1277] and [3503].

As to the issue of migration or population shift, his Honour at [519] referred to *De Rose v South Australia* (2003) 133 FCR 325; [2003] FCAFC 286 (*De Rose*, summarised in *Native Title Hot Spots* Issue 8). In that case, the Full Court was satisfied that the trial judge had found the population shifts evidenced in that case:

> [H]ad taken place in accordance with the traditional laws and customs of the Western Desert Bloc and that newcomers to the claim area, depending on the circumstances, could

become *Ngururaritja* for the claim area under those traditional laws and customs—*De Rose* at [241].

Support for this was found in the expert testimony given at first instance, which the Full Court saw as suggesting that:

> [P]opulation shifts in consequence of the "economic realities" of life in a harsh environment were not simply phenomena that post-dated European settlement…And when the population shifts occurred, they could lead to native title rights and interests being acquired under the traditional laws and customs of the Western Desert Bloc—*De Rose* at [245].

Lindgren J also noted at [525] that the testimony of the Aboriginal witnesses at first instance was found by the Full Court to lend further support to the idea that the population shifts in that case were 'traditional'—see *De Rose* at [255] to [259].

Alyawarr relevant

His Honour was of the view that the following passage from another 'more recent' Full Court decision was applicable to the facts in this case:

> Where the society identified as the repository of the traditional laws and customs is **a cultural bloc** [e.g. WDCB] **whose members are dispersed in groups over a large arid or semi-arid area an inference of communal ownership of native title rights and interests derived from its laws and customs may be difficult if not impossible to draw**—at [502], quoting *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr*) at [80], Lindgren J's emphasis. *Alyawarr* is summarised in *Native Title Hots Spots* Issue 16.

Significance of the overlaps

Lindgren J noted that a native title determination must, among other things, identify the group of persons holding the group native title rights and interests with sufficient precision to enable it to be known whether a person is, or is not, part of that group—at [1438], referring to s. 225.

The overlaps between the claim groups in this case presented a 'serious problem':

> The dividing line between the Claim groups before the Court remains a source of bewilderment and confusion for everyone. The question of which claim group a person is in depends on recognition and acceptance, which, in turn, depends on political and other circumstances of the last 20 years or so—at [1158].

For example:

> It is difficult to avoid the impression that a particular connection or lack of a particular connection would be emphasised by a Cosmo witness when the witness wished to justify the person's being or not being a Cosmo claimant. Yet the connections that some Cosmo claimants have to the Cosmo Claim area …seem to be no stronger than those that certain non-Cosmo claimants…have to that area.
>
> The present issue illustrates starkly the problem that arises when the uncertain and chameleon-like concept of multiple pathways of connection [as put in this case] confront the provisions of the NTA in the situation of inter-group conflict—at [2963] to [2964].

His Honour noted (among other things) that:

- the overlaps, and the fact that 'it seemed to be a matter of chance which claim group a person chose to join', suggested either relationships between claim group members that were not related to landholding at all or individual rights and interests rather than the group rights claimed;
- the presence of overlaps, and the lack of agreement as to either who held native title in the overlapping area or what principles should apply to resolve them, may be evidence of the lack of an 'vital' overriding normative system;
- the 'true position' was that claims by groups resembling the claim groups in this case were 'simply alien' to traditional WDCB laws and customs;
- saying, as some of the expert anthropologists did, that the claims arose under the laws and customs of different 'societies' or 'sub-societies' of the WDCB was 'no solution' because, on the

evidence, the court would not know which society's or sub-society's laws and customs applied and, in any event, the claim groups all submitted that the WDCB was the one and only society in question;

- there was no 'obvious independent traditional or historical basis for differentiating' any of the claims groups from any other group of Aboriginal people in the region or any of the claimed areas (as 'a cultural landscape') from other tracts of country;
- each of the GLSC claim groups conceded that certain individuals in overlapping claim groups may hold individual rights and interests in particular 'my country' areas within the relevant overlap area but did not identify those individuals or explain how a sub-set of any other claim group might be identified and their rights in the overlap area established—at [876], [1001], [1004] to [1007], [1015] and [2040] to [2045]. See also [1323] to [1324], [1421] to [1422], [3068] to [3069] and [3555] to [3557].

His Honour drew two conclusions:

> First, there has been much movement and relocation of people since, and under the influence of, European settlement. The semi-nomadic lifestyle has been replaced by a sedentary one. The present Claims have been founded on the locations where people have 'finished up'. The Claim groups have been constructed from the claimants' individual connections to country and affiliations. There is little historical depth to the connections and affiliations because of the disruptive effect of settlement. Generally speaking, the pre-sovereignty ancestors of many of the claimants lived far from where the claimants now live.
>
> Second, so much knowledge has been lost that neither the indigenous people nor the anthropologists whom they have called can any longer say why one Claim group's claim is valid under traditional laws and customs and another not—at [1011] to [1012].

Continuity of acknowledgement and observance

Lindgren J said:

> After careful thought I have decided not to resolve the question whether the Claim groups continue to acknowledge and observe the body of traditional (pre-sovereignty) Western Desert laws and customs [for the purposes of s. 223(1)(a)]…Since I have reached a decision adverse to each Claim's success on other grounds, resolution of the issue is not necessary—at [976].

However, in order to provide 'a complete factual basis' on which an appellate court could reach its own conclusion should appeal proceedings be filed, his Honour decided to set out the 'complete factual basis' for each claim—at [978].

As only one appeal has been filed (by Cosmo, see below), this summary merely illustrates Lindgren J's discussion of the evidence in relation to proof of acknowledgement and observance of the body of traditional WDBC laws and customs. Note that his Honour's comments are premised on the assumption that the claim is a group claim and, therefore, it is the group that must prove acknowledgement and observance.

Drawing inferences from conduct or activities

The court was of the view that:

- in relation to a particular practice or activity (e.g. hunting, caring for country), drawing of inferences as to acknowledgement and observance required careful consideration of that practice or activity, the frequency or rarity of its occurrence as observed, the circumstances of earlier times in so far as they are known and the 'general probabilities';
- in this case, little attempt was made to demonstrate why an inference should be drawn that each claim group, on a fair overall view (i.e. not every member) should be found to acknowledge a particular law or to observe a particular custom—at [345], [959] and [961].

Lindgren J noted that:

- some conduct, such as the avoidance of the use of the names of deceased people, in-law avoidance and not marrying people within certain skin groups, 'clearly' illustrated observance of traditional laws and customs;
- changes from residence in *wiltjas* (bough shelters) to residence in houses, from hunting on foot with spears to the use of motorised

transport and rifles, and from the use of sharp stones to razor blades in the ceremony of male initiation, were all adaptations of traditional practices—at [329] and [332].

However, while it was permissible to infer that 'observed behaviour' was attributable to, or explained by, a law or custom, his Honour was of the view that:

- because some 'conduct' or 'behaviour' (such as residence or hunting on the claim area) was 'equivocal', it must be shown that such 'activities', when done today, were attributable to the exercise of a right arising under traditional law and custom;
- therefore, whether (for example) residence or hunting by an individual in the claim area was 'probative of a standard or norm' required close attention to the reasons why the individual resided in, or hunted on, the claim area;
- the question was whether an 'inference of attribution' be drawn i.e. an inference that observed behaviour was attributable to, or explained by, a traditional law or custom?—at [330] to [331], [948] and [951].

How acknowledgement and observance by a 'group' is proved

His Honour was of the view that:

- whether a particular claim group continued to acknowledge and observe the 'body' of the traditional laws and traditional customs of the WDCB required a fair overall view to be taken and raised questions of fact and degree;
- it was not simply a matter of the proportion of the claimants within a claim group who were called to testify although, if only some witnesses testified in relation to a particular topic, it might be appropriate to infer that evidence from the other witnesses from that group would not have assisted;
- where the evidence was an individual's testimony simply as to their own activity, it would need to be shown that it was appropriate to infer, from the number of witnesses who gave evidence of that kind, that the claim group, on a fair overall view, engaged in that activity—at [956] and [960].

Acknowledgment and observance of the 'body' of laws and customs

It was found that:

- it was not sufficient to find particular traditional laws and customs were acknowledged and observed without attempting to understand what the total traditional (i.e. pre-sovereignty) body of laws and customs was;
- while establishing that one law or custom was still acknowledged or observed would not necessarily establish that the 'body' of traditional laws and traditional customs of which it formed part was still observed there was no 'useful general answer' to how many laws and customs must be proved to be acknowledged and observed;
- rather, an attempt must be made to identify the body of laws and customs of the WDCB society that operated in 1829 and then to determine whether there was acknowledgment and observance that 'amounts to acknowledgment and observance of that body of laws and customs on a fair overall view';
- proof of laws and customs that do not themselves relate to land or waters (e.g. a law and custom about how initiation ceremonies are performed) may contribute to proving the existence of a body, or system, of laws and customs—at [962] to [969] and [1296].

Appropriate measure of acknowledgment and observance

The 'starting point' for determining the appropriate 'measure' of acknowledgment and observance was found to be as at sovereignty i.e. the court must look to the nature and extent of acknowledgment and observance in 1829—at [970].

For example, based on the 'retrospective inference' that virtually all WDCB males were initiated, and that an uninitiated male did not marry or have children, his Honour found that the relevant 'norm' traditionally was that all male claimants must be initiated and must not marry or have children until they are initiated. Measuring the extent of present day acknowledgment and observance of that norm was, therefore, 'straightforward'—at [970].

In the case of other laws and customs, his Honour noted that:

- no particular standard or norm against which acknowledgment and observance was to be measured was proposed by the parties;
- this case would have been more manageable if a more rigorous approach had been taken to formulating the pre-sovereignty laws and customs constituting the body of laws and customs that applied at sovereignty;
- Western Desert people of 1829 did not spend every waking moment acknowledging and observing laws and customs and so the court should not look for evidence that the claimants do so now;
- while allowance must be made for adaptation, the urbanisation and sedentarisation of the claimants were 'necessarily' related to the issue;
- the requirement established in *Yorta Yorta* that the normative system must have had continuous 'vitality' since sovereignty indicated that any acknowledgment and observance might be 'so fragmentary and infrequent' that it would not be probative of a generally operative 'body' or 'system' of laws and customs;
- while questions of degree were clearly involved, in order to sustain the existence of rights and interests, the 'body' or 'system' of laws and customs must be one that was truly regarded by the members of the claim group, on a fair overall view (i.e. not every member, less that 100%), as still yielding norms that are authoritative for them—at [970] to [975] and [1454], referring to *Yorta Yorta* at [47]. See also [1448] and [1723].

Insofar as there was a gap of direct evidence in the period from 1829 to 1874, but no suggestion that there was any 'culturally significant disturbance' in that period, Lindgren J was prepared to infer that there was no change in the nature and identity of the WDBC society, the laws and customs of that society and the rights and interests arising under those laws and customs in that period. However, it was noted that the problem was to 'identify the relevant features of the anthropological landscape'—at [2010].

Use of Aboriginal language

His Honour noted that, while understanding and using a language were not probative of the acknowledgment and observance of a body or system of laws and customs (i.e. did not point to a normative system), they may be relevant to the continuance of a pre-sovereignty culture—at [1743].

On the basis of both the Indigenous witnesses' testimony and the expert linguists' evidence, Lindgren J concluded (among other things) that:

- the mixing of Aboriginal people at various centres of European settlement had made it 'impossible to reconstruct the linguistic landscape that existed at sovereignty';
- while there had been substantial loss of Aboriginal language, there was, and is, a language or dialect of a Western Desert kind called 'Wongatha' or 'Wangkayi' that was, and is still to a more limited extent, used in the south-west of the Western Desert;
- the linguistic evidence indicated that the language spoken by the members of the claim groups or their ancestors was of a Western Desert kind but this did not 'separately identify' any of the claims from each other;
- dialectal groups in the Western Desert were not landowning groups—at [1385], [2849] and [3976]. See also [1447], [1752] to [1753], [2251] to [2264], [2453] to [2459], [2663], [2849], [3336], [3470], [3660] and [3821].

Genealogical connection

The Wongatha applicants 'apparently' attempted to show a genealogical connection between the Wongatha claimants and occupants of the Wongatha claim area in 1829. His Honour said:

> But such a connection is relevant only if there is a law or custom by which membership of the…Claim group is necessarily genealogical or partly so, and/or there exists a law or custom by which native title rights and interests in respect of land are able to be exercised by a person by reason of a forebear's having had such rights and interests—at [1401].

However, the case put by the Wongatha claimants did not rely on a 'ancestor's connection' but on 'birth and growing up in the claim area'. Therefore, 'ancestors are irrelevant'—at [1402].

Caring for or looking after country and protecting sites

The evidence of caring for country and protection of sites required 'special comment'. In his Honour's view:

- it must be carefully studied to see why country was cared for in pre-sovereignty times and why it was cared for today;
- Dreaming sites fall into a special category;
- the important issue was not so much how people behaved on country, and preserved and maintained it as a resource, but whether they did so because they had rights and interests there;
- while confining one's residence at a particular place in order to look after sacred sites there suggested performance of obligation, the evidence did not suggest that this happened nowadays—at [1445], [2557] to [2559] and [3303] to [3304].

Evidence of 'looking after country' on areas that were Aboriginal reserves by, for example, cleaning out rock holes and soaks, 'burning off' and checking that unauthorised prospecting was not taking place, was not probative of the existence of traditional laws and customs in the sense of societal norms, although it was probative of connection or attachment to the area as a matter of fact—at [3298] and [3305].

Lindgren J accepted there was a fair degree of familiarity among the Cosmo witnesses with sites within the Cosmo claim area, that those witnesses knew and (unless *watis*) would avoid a certain men's site and that they observed the 'ritual' of warning the *warnampi* (water snake) of an approach—at [3157].

In relation to Koara, it was found (among other things) that notifying the relevant government departments that a mining company was extracting water out of a sacred site demonstrated caring for a site of spiritual significance—at [2632].

Initiation, gender-restricted law, ritual and ceremony

There was no suggestion that men's law was a distinguishing feature of any particular claim group:

> On the evidence, men's law belongs to all *watis*, whether from the Wongatha Claim area or from elsewhere in Western Australia, the Northern Territory or South Australia. Thus, any rights and interests associated with the status of *wati* are either individual rights and interests or group rights and interests where the group is '*wati*-based'—at [1456].

While satisfied it was appropriate that evidence of male initiation should be given at a very general level (e.g. the fact of initiation, where and approximately when the ceremony occurred), because would be 'unreasonable to expect more having regard to the subject matter', his Honour was of the view that a close analysis of that evidence was required to identify the date and circumstances of the initiation of each *wati*—at [1464] and [1494].

His Honour accepted that 'in theory' a temporary lack of initiated men might not be decisive but thought it hardly suggested the continuation of a vibrant traditional culture rooted in pre-sovereignty times—at [3640].

According to Lindgren J, the 'general effect' of much of the evidence was that:

> [L]aw business and ceremonies have ceased to be vital within the Wongatha Claim area. Some of the witnesses spoke in terms of today's generation not following the law, in contrast with 'the old people', or of male initiation in the area having died out, or of a change brought by Christianisation, or simply of a change in the times…
>
> [I]f male initiation was 'vital' among the Wongatha claimants, not only *watis* but other witnesses also would have been able to give evidence about its currency. The [traditional practice was that the] boys' sisters performed a dance to welcome them back into the community from their time in the bush…It was

a matter of general knowledge when and where ceremonies took place and of the arrival of law men for that purpose: it was only further detail concerning the ceremonies that was secret to *watis*—at [1475] and [1505].

This lack of evidence, as much as 'positive testimony that the law has fallen away', led his Honour to conclude that there was no longer a practice of Aboriginal males being initiated within the Wongatha claim area—[1506] to [1507].

Evidence given by one of the NK1/NK2 witnesses that:

- prior to sovereignty, every male went through the law and that, until he did so, he was not a man, did not learn the stories for country and could not participate in caring for country, was in 'stark' contrast with the situation today 'in the case of all claim groups';
- there was a 'vibrancy' of the law in places to the east and north east of the Wongatha claim area could be contrasted with the evidence in this case—at [3916] and [3918].

It was found (among other things) that:

- the Wongatha claim group did not show that its members continued to acknowledge and observe Western Desert men's law in relation to male initiation;
- the rule that all males must be initiated and must not marry unless they are initiated was not being acknowledged as binding, or observed by, the MN claim group;
- the Koara witnesses' evidence was 'generally unsatisfactory', mostly speculative and did not establish that the Koara claim group was conducting and participating in ceremonies and law business;
- the lack of any initiated males in the present generation of the Maduwongga claim group was an indication of the breakdown of a system of traditional laws and customs and, according to the Maduwongga witnesses, corroborees within the overlap area were 'a thing of the past';
- the Wutha evidence showed that ceremonies and law business that once happened in or around Leonora had long ceased;
- on a fair overall view, it was not shown that the law or custom that males must be initiated continued to be acknowledged by the NK1 or NK2 claim group—at [1507], [2204] to [2205], [2606] to [2613], [2624] to [2625], [2831], [3638], [3643] and [3886]. See also [3935].

As to Cosmo, two recent instances of initiation did not persuade his Honour that the pre-sovereignty rule that all males must be initiated, and may not otherwise marry or raise a family, was being acknowledged and observed today by the claim group because the anthropologist called by Cosmo accepted that, in general, male initiation practice was not acknowledged and observed—at [3143] and [3144].

In relation to acknowledgement and observance of women's law, his Honour found (among other things) that:

- the evidence did not support a finding of acknowledgement and observance by the Wongatha claim group of a law or custom in relation to women's law;
- the practice of female initiation in the western part of the Western Desert generally had not been observed for a very long time;
- the Koara had long since ceased to practice female initiation and, while three of the five female claimants who testified demonstrated a knowledge of secret women's business, there was no evidence of any continuing activity or conduct arising from it;
- there was no evidence of any female Cosmo claimant having been initiated;
- one NK1/NK2 witness had detailed knowledge of a woman's site, and its associated story, and was passing on that knowledge to her grandchildren—at [1510], [1512], [2208], [2615] to [2625], [3337] and [3926].

It was accepted that some NK1/NK2 claimants had knowledge of stories related to a number of sites and, therefore, had assumed a responsibility to protect those sites which, under traditional WDCB laws and customs, gave each a duty to protect those sites. In this respect, 'they acknowledge and observe a Western Desert law or custom'—at [3907].

***Tjukurr/Tjukurrpa* (the Dreaming)**

The evidence indicated that the following matters were at the core of the body of WDCB traditional laws and customs:

- responsibility to learn and to teach the *Tjukurrpa* through the constant and repetitive involvement in song and dance ceremonies;
- knowledge by all adults of important ritual sites, if only so that they can be avoided;
- relationship between *Tjukurr*, person and a place, best encapsulated by the WDCB concept of *ngurra*—at [2063]. See also [1517] and [2057].

Lindgren J noted that a difference in the nature of the evidence given by initiated men (*watis*), on the one hand, and non-*watis* and women, on the other, was to be expected on this topic—at [1522].

In considering the Indigenous witnesses' testimony, his Honour noted the difficulty of what to look for as evidence of continuous acknowledgment and observance of the *Tjukurr*:

> If the *Tjukurr* were to be regarded as nothing more than a mythological explanation of how the physical world came to be as it is, it might not be reflected in behaviour at all—at [1519].

His Honour said that religious belief did not demonstrate itself in 'moment-by moment' observable behaviour, noting that:

> It is a mistake to think that because of the generalised abstractions expressed in anthropological writings and in submissions, we should be insisting on the presence of observable behaviour to that extent—at [3110].

His Honour concluded from the Wongatha witnesses' evidence that:

- 'the days of learning the *Tjukurrpa* through constant repetition of ceremony, song and dance have long since gone';
- although the Wongatha claimants knew less of the *Tjukurr* than their ancestors did, the evidence showed that many of the witnesses knew of particular *Tjukurr* stories and places;
- therefore, it could be inferred that the Wongatha claim group, 'as a whole, has knowledge, varying greatly between members, of various *Tjukurr* sites and stories'—at [1547] and [1568].

Lindgren J found in the MN witnesses' testimony in relation to *Tjukurr* was of a very general kind and all but one had hardly any detailed knowledge of the story or stories associated with sites—at [2060] and [2090].

As to Koara, one witness gave 'impressive' gender-restricted evidence and 'clear and precise' testimony was also given as to the natural features of the landscape and what they signified for women. However, the difficult question was:

> [H]ow the significance of the *Tjukurr* **for the Koara Claim group** today [was] to be assessed'. Four…Koara claimants…gave evidence of what they were told in times gone by. Certainly they knew of *Tjukurr* stories, 'although, generally speaking, the stories were not recounted in any detail'—at [2551], his Honour's emphasis.

As to Cosmo, but with 'some doubt', Lindgren J thought there was enough evidence to support at least a finding that the *Tjukurr* remains of religious importance to the claim group—at [3110] to [3112].

In relation to Wutha, it was not proved that the claim group had a familiarity with Dreamtime stories or that the *Tjukurr* (or *Tjukurrpa*) was of importance in the lives of the Wutha claimants today—at [2797].

As to Maduwongga, Lindgren J held that the evidence was very limited and that there was no evidence of any current acknowledgement or observance of traditional law or custom in relation to *Tjukurr* – at [3570].

While Lindgren J was satisfied that three of the NK1/NK2 claimants had 'a very substantial and impressive knowledge of *Tjukurrpa* stories, sites and tracks' (both within and outside of their claim areas) and saw it as their responsibility to preserve them, given the earlier findings it was unnecessary to decide whether or not an inference should be drawn that 'the general body' of NK1 and NK2 claimants' had the same knowledge and sense of responsibility—at [3880] to [3882].

Most important on this topic was his Honour comment that he could not recall an Indigenous witness called by any of the claim groups who claimed a *ngurra* (or 'my country') area identified by reference to *Tjukurr* sites and tracks—at [1608].

***Yiwarra* (range or run)**

Lindgren J was of the view that:

- the notion of area the subject matter of 'ownership' being identified by reference to *Tjukurr* sites and tracks seemed to have been lost sight of;

- under the influence of the 'multiple pathways of connection' model, some of the Indigenous witnesses equated a person's *yiwarra* ('range', 'run' or 'orbit of occupation') with the person's *Tjukurr*-based 'estate';
- the distinction between the 'estate' and 'range' had become blurred, which led to the identification of grandparents' connections to country to support the claim for 'my country' without more evidence—at [1993] and [1997].

***Ngurra/ngurrara* (country)**

Lindgren J accepted that evidence that an individual claimed country (*ngurra/ngurrara*) by reference to the pre-sovereignty laws and customs, and was recognised by others as doing so, would be probative of present day acknowledgement and observance—at [1570].

His Honour noted that:

- the word most commonly used by the Aboriginal witnesses to refer to their 'my country' area was *ngurra*, which meant both the *wiltja* (bough shelter) where one lived (or, nowadays, the house in which one lived) and a person's 'my country' area;
- other expressions used were *manta* and *parna*, which seemed to be synonyms, meaning primarily 'ground' or 'earth' but, like *ngurra*, bearing a broader meaning of an individual's 'my country' area;
- the expression *ngurrara* presented 'a little difficulty' because the evidence as to its meaning varied somewhat e.g. from the same thing as *ngurra* to being a synonym for *yiwarra* (run)—at [1575] to [1577].

His Honour noted that the meaning of all these terms was not as clearly known and differentiated as it would have been prior to the substantial loss of Aboriginal language in the Wongatha claim area. However:

- the large number of words indicating relationships between people and land in itself pointed to the importance of the land to the people;
- the precise and distinctive meaning of each would have been well known in the past;
- allowance must be made for the possibility that several words with the same meaning originated in different dialects—at [1582].

In the absence of a claim to *ngurra* identified by reference to *Tjukurr* sites and tracks, the multiple pathways of connection model, as represented by the Indigenous witnesses' testimony in this case, presented a 'complex picture' and there seemed to be 'no limit on the kinds of connection that can be relied on, provided they gain acceptance. All depends on assertion and recognition'. The question was: What kind of assertion and recognition by whom?—at [1608].

One of the MN witnesses' claim to *ngurra* was 'typical':

> First, it does not conform to traditional Western Desert laws and customs by identifying a subject area by reference, directly or indirectly, to *Tjukurr* sites and tracks. Second, it is actually a claim based on an ancestor's [*yiwarra*] 'run' or 'range' or 'roaming area'— at [2108].

Access protocols

His Honour was of the view that it was not proven that there was a law acknowledged or a custom observed (either at sovereignty or presently) relating to a right to be asked to access any of the claim areas or any of the 'my country' areas within them and:

> Given the semi-nomadic lifestyle, the vast, arid, inhospitable nature of the Western Desert, and the consequential comparative sparseness of population, it is difficult to imagine how such protocols would be observed—at [1607]. See also [1431].

Pika ngurlu

The expression *pika ngurlu* referred to a place that was not to be visited, or spoken about, by anyone except *watis*. This 'rule' was:

- 'clearly normative, as distinct from a neutral form of observable behaviour';
- not, of itself, one that conferred rights or interests in land or waters but capable of being acknowledged and observed;
- 'obviously' relevant to the issue of continued acknowledgement and observance of the body of WDCB laws and customs—at [1609] to [1611].

It was noted that it was to be expected that some Indigenous witnesses would have only limited information concerning *pika ngurlu* because the precise location of such places, their nature and any associated story or practice were kept secret from all but *watis*—at [2231].

It was found that:

- as to Wongatha, there was still vitality in this pre-sovereignty law or custom, although the occasion for active acknowledgement and observance did not arise as frequently now because of the claimants' 'sedentary and urbanised lifestyles';
- as to MN, although the evidence was limited, there was still some force in the concept obliging some claimants to avoid such places;
- as to Cosmo, evidence that if a stranger goes to a *pika ngurlu* place, the stranger will 'get in trouble from all *watis* right through the land' was accepted;
- as to Maduwongga, the evidence was limited to one site, which was inferred to reflect a norm associated with a men's business site;
- the NK1/NK2 evidence was not extensive, expressed in general terms and related to what witnesses were told as children, which indicated they were not in a position to give evidence of present day avoidance because the occasion simply did not arise—at [1662] to [1664], [2230] to [2232], [3348] to [3349], [3665] and [3963].

Gender-restricted knowledge and protocols
His Honour said this rule had normative content and, although it did not give rise to rights and interests in land or waters, was relevant to the question of acknowledgment and observance of a body of WDCB laws and customs—at [1665].

His Honour accepted that there was a continuing respect among all claim groups for sacred sites and stories and a rule against naming or speaking about them. The sanction for contravention is social disapprobation—at [3346] to [3349]. See also [1683], [2236], [3101] to [3102], [3110], [3155], [3157], [3909] to [3914] and [3921] to [3926].

Section system or similar principles (skin system)
Lindgren J understood this to be a rule that a person must not marry inconsistently with the 'skin' or 'section' system and, accordingly, there must be sufficient knowledge of the system's rules to enable people to obey them—at [1684].

His Honour observed that rules as to whom one must not marry were normative and, although they do not give rise to rights and interests in land, they were relevant to the issue of continuing acknowledgement and observance by a body of traditional laws and customs—at [1686].

On the evidence, his Honour concluded that only Cosmo, acknowledged and observed the skin system—see [1721],[2242], [2647], [3651] and [3971].

As to Cosmo, Lindgren J:

- was impressed with the evidence because each claimant who testified knew their 'skin', the skins of family members and which skin was permitted to them in marriage;
- found that their practice of giving of skins to those who do not have them was probative of acknowledgement and observance of a law or custom (i.e. that every person must have a skin);
- had 'no hesitation in accepting that the Cosmo claimants acknowledge and observe the skin system'—at [3238] to [3240].

Common kinship system
His Honour saw this as a 'distinctive system of kinship terms and conceptualisation of family relationships' rather than a law or custom that imposed obligations or conferred rights. It was characterised by a 'paucity of kinship terms' i.e. only two terms, one male and the other female, for all those at the same generational level to whom the person relates—at [1723]

In relation to Wongatha, Lindgren J concluded that '(n)o clear system emerged' and the evidence revealed a complex situation, made more so by the relationship between the skin and kinship systems. While this might explain the 'seeming inconsistencies in the evidence', his Honour acknowledged that the task of enunciating a 'consistent system comprehensible to the non-Aboriginal mind is…difficult'—at [1741].

As to MN, it was noted that the evidence suggested there was some resort to the distinctive Western Desert kinship system by some of the claimants who testified but there was also use of English

language kinship terms and concepts and that, to see that a kinship system existed, one would need evidence of rules of behaviour associated with its terms—at [2249] to [2250].

As to Cosmo, his Honour found there was still 'vitality in the Western Desert kinship system' and that the Cosmo claim group, at least to some extent, employed that system—at [3216] to [3219].

Dreaming totem

Although the acknowledgment and acquisition of a personal 'Dreaming' totem did not, of itself, point to a norm, his Honour said it could be probative of the continued existence of a pre-sovereignty culture—at [1756].

His Lindgren concluded that this was no longer a feature of any of the claim groups, except perhaps NK1/NK2—at [1765], [2265] to [2273], [3127] to [3130], [3631] to [3633].

For NK1/NK2, there was some evidence as to the importance of place of birth or conception. However, his Honour noted that both applications were made by a group seeking recognition of group rights and interests:

> In the absence of evidence establishing a link between individuals' claims to place of birth or conception and those group claims, even evidence that 100 individuals all claim places of birth or conception that fall within the present overlaps, is not probative of such group claims. What of the non-NK1 and non-NK2 indigenous people who have places of birth or conception within those two overlaps? They also have 'a traditional and cultural association' with those areas…Why are the NK1 and NK2 Claim groups defined so as to exclude them?—at [3865].

Avoidance of the names of deceased individuals

Lindgren J accepted there was evidence of that members of the claim groups continued to observe of a rule against saying the name of a deceased person. It was noted this was a widely followed practice in 'Aboriginal Australia' that extended beyond the Western Desert. His Honour could not be more precise because the evidence did not clearly expose what the exceptions to the rule were, and, therefore, in precisely what circumstances the rule applied—at [1792], [2281], [3159], [3163], [3177] and [3978].

In-law avoidance

Although a rule would be 'normative', the evidence was too slender to support it in this case—see [1812] and [2296] to [2297].

Residence, camping, travelling, using resources

Evidence of instances of 'observable' behaviour (such as residence, travelling and camping, hunting, utilisation of bush tucker and medicine and other natural resources) did not necessarily point to a normative system:

> For example, people must reside somewhere. The question is whether they reside where they do because of some standard or norm. There can be many reasons why people reside where they do…The question is whether all the circumstances make it proper to infer that the choice of place of residence is attributable to a law or custom…Similarly, travelling and camping was to be expected of semi-nomadic people. So were hunting and the use of bush tucker, bush medicine and other natural resources. Did they betoken a norm then? Do they betoken a norm today?—at [1443] and [1444].

It was found that:

- the mere fact of residence is not probative of the existence of laws and customs giving rise to rights and interests in the land resided upon, even less in a much larger area within which that land is located;
- travelling and camping at places within a particular claim area was not, without more, probative of present day acknowledgment and observance of a body of pre-sovereignty laws and customs;
- the distinction between 'residence' and 'camping' disappeared when the camping was long term—at [2137], [2141] and [2147].

As to hunting, his Honour said:

- the question was which characterisation applied to it: 'equivocal' or 'logically probative of the exercise of a traditional right' and, therefore, the evidence given by each individual claimant must be considered carefully as to where they hunted and why;

- if hunting was 'equivocal', then proof of hunting did not assist in discharging the claimants' onus of proof;
- hunting would be probative of a body of laws and customs if, for example, there was evidence of mutually exclusive hunting zones but, on the evidence, the semi-nomadic way of life did not divide the Western Desert into such zones;
- on the contrary, the evidence was that Aboriginal people were at liberty to hunt, forage, drink and camp anywhere and it was, perhaps, difficult to see how it could be otherwise, given the sparsely populated, arid and relatively featureless landscape;
- the claimants' reasons for hunting in this case were inexpensive recreation, to socialise with family and friends, to pass on knowledge and skills gained from previous generations to children and grandchildren and to obtain a supplement to supermarket food;
- the evidence concerning hunting showed there was a connection between claimants and the land in general 'of a kind and degree that non-Aboriginal people do not have' but it was not necessarily probative of a law or custom—at [948], [951] to [954], [2565], [2568], [2806] and [2839]. See also [3948] and [3950].

On this last point, in relation to Cosmo, Lindgren J said:

> I have no doubt that there is a wealth of detailed knowledge among Cosmo claimants as to the best times of the year and of the day, climatic conditions, locations and methods, relating to hunting kangaroos, emus and goannas, and cooking of them. Knowledge and practical skills of these kinds are highly specialised. On the evidence led…, however, they do not point to any particular law or custom—at [3328].

Evidence that:

- a witness slept in a *wiltja* in 1982 that she had made was evidence of the 'comparatively recent construction and use of a traditional form of bush shelter' in connection with 'the non-traditional activity of prospecting';
- building a *wiltja* in 2001 to educate young Aboriginal people, miners and school children was not probative of the acknowledgement and observance of traditional laws and customs but, rather, was 'the re-creating, for modern educational purposes, of a phenomenon of the past'—at [2596] and [2599].

Lindgren J had no doubt that some witnesses retained knowledge of the location of certain waterholes, often derived from their parents' work on pastoral stations. It was also accepted that some claimants still cleaned out rock holes to preserve drinking water, this being, no doubt, a 'practical imperative' in 'former times' and 'important in the interests of human survival'—at [2580].

However:

- it was a 'difficult question' as to whether this 'practical expedient of former times' had become 'an obligation-imposing norm';
- it was not clear the extent to which claimants drank from rock holes today and there was some evidence that claimants took drinking water with them in their vehicles when they go out bush;
- evidence that a claimant's father cleaned up animal droppings so that a waterhole was clean for the next person was not probative of a traditional law or custom—at [2579], [2581] and [2808] to [2809].

Food preparation and food sharing practices

His Honour made the general observation that:

> Over the many thousands of years that the indigenous people of Australia have hunted, cooked and eaten kangaroo, it is not surprising that certain regular butchering and culinary practices developed. Considerations of efficiency and convenience would play a role…
>
> There was evidence that some aspects of the cooking process are secret to *watis*. I do not know what those aspects are: perhaps they are *Tjukurr* stories explaining why the kangaroo must be cooked in one way rather than in another. However, this is speculation—at [1847] and [1849].

Lindgren J found that there was some evidence of acknowledgement and observance of norms relating to food preparation and food sharing

practices among the various claim groups—at [1849] to [1852], [2298] to [2309], [2582] to [2590], [2639], [2822], [3328] and [3980].

Burial practice and dealing with death
His Honour concluded that traditional WDCB laws and customs relating to death and burial were no longer acknowledged and observed by any group, with the exception of Cosmo, where the practice of leaving, for a time, the place where the deceased person lived was found to be a traditional WDCB norm that some of the Cosmo claimants still acknowledged and observed—at [1868], [2664] to [2672], [2854], [3165], [3173] and [3598]. See also [3164] and [3174] to [3176].

Hold, receive, pass on knowledge, instruct and educate
There was (to varying degrees) evidence about intergenerational passing on of knowledge and skills in relation to all the claim groups—see e.g. [1873], [2349] to [2355], [2645] to [2651], [2840] to [2844] and [3580].

Exchanging and dealing in materials
His Honour was not satisfied there was any sufficient evidence to support the existence of a traditional law or custom relevant to the exchange of, and dealing in, materials—at [2640] to [2643] and [2839].

Names and naming
Lindgren J observed that, in 1829, all Aboriginal people were given Aboriginal names. Therefore, insofar as Cosmo relied on simply the use of Aboriginal names, it was not clear what particular law or custom was being invoked. The continued use of such names would be evidence of the continuing identity of the claimants as 'Aboriginal' and, although the Cosmo claimants seemed to emphasise something additional (i.e. the passing on of the name of an ancestor), the law and custom relating relied upon was not made known—at [3185] to [3188]. See also e.g. [3652] in relation to MN and [3979] in relation to NK1/NK2.

Infanticide
His Honour:

- did not know why this 'former practice, compelled by necessity in the circumstances of nomadic movement in the harsh conditions of the desert', was included;
- concluded that the evidence tendered did not demonstrate normative behaviour and was not probative of any contemporary law or custom—at [3190] to [3194].

Adoption
The evidence given in Cosmo of adoption was not, of itself, probative of a Western desert right or duty because it occurred in many societies. It was necessary to both identify the relevant norm and show sufficient instances of adoption resulting from that norm. The evidence did not do this and 'all that can be said concerning adoption is that there are instances of adoption taking place among the Cosmo claimants'—at [3205] to [3207].

Claims to country – Cosmo
His Honour concluded that the claims to country made by the Cosmo claimants who testified were not probative of any particular law or custom but, if the multiple pathways of connection model was supported otherwise, the Cosmo claimants did demonstrate the assertion of such multiple pathways—at [3276] to [3290].

Conclusion on acknowledgement and observance
Lindgren J concluded there was evidence to show *some* acknowledgment and observance of *some* traditional WDCB laws and customs by *some* members of each of the eight claim groups— [1875], [2377], [2686], [2860], [3352], [3672] and [3988].

However, his Honour did not decide whether this evidence was sufficient to lead to the conclusion that there was acknowledgement and observance by each claim group, as a whole, of the body of pre-sovereignty WDCB laws and customs—at [1875], [2378], [2686], [2861], [3353], [3672] and [3987] to [3988].

Connection to claim area – s 223(1)(b)
Lindgren J noted the requirement of connection found in s. 223(1)(b) was additional to the requirements of s. 223(1)(a) and found (among other things) that:

- evidence of a 'spiritual' connection was relevant but it must show a connection between the

claimants and either the particular area they claimed or particular sites, tracks or places there;
- activities such as hunting, use of waterholes and residence, may show an association with the places where they take place but whether that was a connection 'by' traditional laws and customs within s 223(1)(b) was 'another matter'—at [1880], [2379] and [2815].

In Lindgren J's opinion, in a case such as this (i.e. where 'group' rights and interests were claimed), it was the claim group (i.e. the claimants as a 'group' entity) that must demonstrate connection. It was found that:

- the 'connection' required under s. 223(1)(b) was 'connection' **by** the relevant traditional laws and customs;
- none of the claim groups had the requisite connection because none of the claim groups were recognised, directly or indirectly, **by** traditional WDCB law and custom—at [1882] to [1883], [1885] to [1907], [2379], [2687] to [2710], [2862], [3354], [3674] and [3989].

All claims were artificial and NTA driven

His Honour found that there was a 'fundamental difficulty' with identifying the holders of native title in this case because the claims were all 'artificial constructs' that came into being for the purpose of the making of an application under the NTA—at [1439], [1933] and [2475].

For example:

- the 'uniformity' across the four GLSC claim groups as to the nature of laws, customs, rights, interests, and the WDCB society itself was 'an indication of the artificiality…of those various groups and of the arbitrary nature of the boundaries that define the areas claimed by those groups';
- the GLSC claim groups had been 'constructed' in recent times to make claims under the NTA and were not 'landholding groups' under WDCB traditional law and custom and there were no 'group' rights and interests in the respective claim areas;
- the Cosmo claim sprang from a desire to counter other NTA claims made over that area—at [1333], [1438] to [1439], [2050] and [3080].

His Honour also found that:

- inevitably, NTA considerations 'have affected many of the indigenous witnesses' views of the world';
- the introduction of s. 190C(3) meant that, if a person was a member of the native title claim group for more than one claim, then once one of those claims passed the test and was registered, the other or others usually could not;
- this new requirement had an 'immediate and dramatic effect' on the claims in the Goldfields region;
- three solutions appeared to be available and there was evidence of all three i.e. the combining of claims, the express exclusion of persons who were on other claims and 'the race to register';
- there was some evidence about choice as to which parent to follow for country but forcing people to be in one or the other claim group was 'something different' and it had arisen as a result of the requirements of s. 190C(3) rather than WDCB traditional law and custom—at [31], [280] to [281], [300] and [3070]. See also [2539] to [2532].

Findings on authorisation

As noted, Lindgren J was of the view that, on the merits, all of the claims failed. However, his Honour also found that the claims that were required to be authorised (i.e. all but MN) were not and that, as a result, the court had no jurisdiction to make a determination of native title in relation to those claims. What follows is a summary of the reasons on authorisation. Again, because appeal proceedings are only pending in relation to Cosmo, the summary of authorisation issues is directed at the principles applied.

Meaning of 'native title claim group'

His Honour considered the meaning of 'native title claim group', as defined in ss. 61(1) and 253 was critical to (among other things) the question of authorisation. It was found that:

- the phrase 'common or group rights and interests comprising the particular native title claimed' as used in s. 61(1) means the particular bundle of common or group rights and interests **claimed** to be held;

- in contrast, the reference in s 61(1) to 'all the persons (the ***native title claim group***) who, according to their traditional laws and customs hold' those claimed rights and interests is a reference to all the persons who **actually hold them**;
- so, while the result is an 'odd use of language', the expression 'native title claim group' is defined in the NTA as meaning the actual holders, according to their traditional laws and customs, of the particular native title claimed—at [1186] to [1189].

Lindgren J was also of the view that there must be a 'coincidence' between:

- the native title claim group as defined in ss 61(1) and 253 of the NTA (the actual holders of the particular native title claimed);
- the claim group as defined in the Form 1;
- all of the persons who authorised the making of the application, who must also be named or otherwise described in the Form 1, as required by s 61(4)—at [1216].

Below (as in the judgment), 'claim group' is a reference to the group of claimants on whose behalf a particular application was made whereas 'native title claim group' is a reference to the actual holders of the particular native title claimed—see [3].

Authorisation goes to jurisdiction

It was found (among other things) that:

- authorisation is the foundation for the institution and maintenance of a claimant application under the 'new' NTA (i.e. as it stood after the commencement of the Amendment Act) and is fundamental to its legitimacy;
- non-compliance is 'fatal' because it deprives court of jurisdiction to make a determination of native title;
- if the question of whether or not a claimant application is authorised arises, the court must resolve that jurisdictional issue—at [1171] to [1172], [1175], [1186], [1269] and [2896].

Comment

On the last point noted above, in *Risk v Northern Territory* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19) at [94], Mansfield J deferred making a ruling about authorisation until findings were made about s. 223(1)(a) and (b) on the merits. As a result of those findings, his Honour decided it was unnecessary to further address authorisation.

No authorisation if no actual holders

Based on the findings as to the meaning of 'native title claim group', Lindgren J held that there could not be 'an authorisation' for the purposes of ss. 61(1) and 251B unless there were actual holders of the particular native title claimed—at [1189].

Therefore:

- logically, the authorisation issue could be finally determined only after it was determined whether or not there are any actual holders of the particular native title claimed, and if so, who they are;
- where authorisation was challenged, the question would be approached by assuming the claimants as identified in the relevant Form 1 were the actual holders of the particular native title claimed in that Form 1 and addressed as if the court was dealing with a strike-out application under s. 84C—at [1189] to [1193].

Application of s. 84C

His Honour noted that:

- section 84C (which provides the power to strike-out for non-compliance with ss. 61, 61A or 62) assumes that it may be possible for an application to be struck out prior to the final determination of an application;
- the proper interpretation of s. 84C was that strike-out is available once it clearly appeared that, if the application were to succeed *according to its own terms*, the applicant would not have been authorised to make the application by all those persons the court would determine to be the actual holders of the particular native title claimed;
- if an application is made under s. 84C(1) early in a proceeding, the case law indicated that, while s 84C(2) required that it must be *considered* before any further proceedings take place in relation to the main application, the *determination* of a s. 84C(1) application may be deferred pending a determination of the identity of the holders (if any) of the particular native title claimed—at [1173], [1192] and [1264].

His Honour noted that:

- if any of the present claims had failed for lack of authorisation alone, 'interesting questions' would have arisen as to whether this could be 'cured by ratification' or by 'the authorised making of a new application coupled with an order that the existing evidence be evidence in the new proceeding';
- no respondent invoked s. 84C(1) but such an application would have succeeded in relation to the Wongatha claim, thereby saving significant hearing time and costs;
- if the Wongatha application had been dismissed only on the ground of lack of authorisation, a question would have arisen as to whether a costs order should have been made reflecting the respondents' failure to apply under s. 84C(1)—at [1174] and [1264].

Decision-making process used to authorise

His Honour noted that:

- under the NTA, a native title claim group is not given a choice between traditional and non-traditional processes of decision-making for the giving of authority to make a claim;
- paragraph 251B(a) recognises traditional laws and customs as the primary source of the process through which authorisation is obtained;
- it is only if there is no traditional process of decision-making for authorising things of the 'application for a determination of native title' kind that s. 251B(b) applies—at [1233].

Old Act applications and authorisation

After noting that it was not authoritatively settled whether or not old Act claimant applications that were amended after the new Act commenced are subject to the authorisation requirement, his Honour found that:

> [T]he applicable test…is that…[an old Act] application, that was amended after the commencement of…[the new Act], is 'made'…under…[the new Act] if the amended application is properly to be regarded as a 'new application' or a 'fresh application'…I should say…that I do not agree that **any**…amendment [under the new Act] necessarily triggers the authorisation requirement—at [1182], Lindgren J's emphasis.

In a case where the application was amended to redefine the claim group, his Honour was of the opinion that:

> [F]resh evidence or further evidence of authorisation is appropriate before it can be said, in relation to the newly defined claimant group, that the applicants have been authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed—at [2743].

In this case, all of the old Act applications (other than MN) were required to be authorised due to amendments made under the new Act that were characterised as creating 'fresh' or 'new' applications.

Authorisation and 'shared' rights

Where it was acknowledged in the application that the rights and interests claimed were shared with certain members of other claim groups:

- the 'common or group rights and interests comprising the particular native title claimed' was the bundle of rights that remained after the effect of the 'sharing' was allowed for;
- for example, 'sharing' a native title right of access was analogous to members of the public 'sharing' a right to travel over public highways e.g. it was not an 'infringement of one individual's right that another individual lawfully exercises his or her identical right';
- so far as any particular right or interest claimed to be held in common with members of any other claim group was concerned, the applicant need be authorised only by all the persons who, according to their traditional laws and customs, held the particular common or group rights claimed i.e. their claim group—at [1200] to [1202].

Where the application stated that the rights claimed were shared 'in whole or in part' in an overlap area, the words 'in part' were taken to allow for the possibility that only one or some of the rights and interests claimed were shared: "A sharing of, say, only one of the eleven rights and

interests claimed would not signify a sharing of 'the particular native title claimed'"—at [1204].

The implication appears to be that authorisation by the other group/people would be required if it was acknowledged that all the rights and interest claimed were shared with that group/those people.

Authorisation and exclusion of certain individuals

In certain circumstances, the court inferred that particular individuals, who would otherwise have been included in the claim group, had been excluded to 'overcome any problem' posed by s. 190C(3), a condition of the registration test.

In paraphrase, s. 190(3) prevents registration of a claimant application if, at the time of testing the current application, the native title claim group in that application has members in common with that of another, overlapping application and that overlapping application is on the Register of Native Title Claims at the time of testing the current application because it passed the registration test and has not subsequently been removed.

It was found that:

- an exclusion for the purposes of satisfying s. 190C(3) may signify that the 'true' native title claim group did not authorise the application being pursued, even if the reduced group did;
- the NTA does not permit the making of a claim by a sub-group of the 'real' native title claim group;
- exclusions from the 'true' native title claim group may lead to a finding that the application is not being made on behalf of all the actual holders of the 'particular native title claimed' —at [1206], [1208] and [1222].

The rule in *Brown v Dunn*

For Wongatha, it was submitted that little weight should be placed on the respondents' submissions regarding the 'technical' aspects of authorisation as a result of their failure to raise the issue earlier in the proceedings or to cross-examine in relation to it relying, among other things, on an analogy with the rule in *Brown v Dunn* (1893) 6 R 67.

His Honour was of the view that (among other things), no such principle applied and, even if it did, it would not mean that the court would be required to find the applications affected by it were duly authorised—at [1266] to [1268].

Authorisation – Wongatha application

Lindgren J found that the Wongatha application was a clear case of a 'new' application being 'made'. This was because that application was a combination of 20 antecedent claims over various areas made by various claim groups. As a result of the order to combine, a person who had been claimant in one of the 20 antecedent applications 'became part of a much larger group claiming a different native title over a much larger area'—at [1183] and [1185].

The combined Wongatha application 'foreshadowed' that 'the Wongatha people' were the actual holders of the particular native title claimed. It was then amended in November 1999 to exclude certain individuals.

His Honour found that those persons were *not* excluded from the Wongatha claim group because they had previously been included by mistake i.e. because they were not a part of the Wongatha People. Rather, they were excluded because of the 'problem' raised by s. 190C(3).

Therefore:

- the application was no longer being made on behalf of all the actual holders of the particular native title claimed i.e. 'the Wongatha People';
- subsection 61(1) only allows a native title determination application to seek a determination in favour of *all* the members of the 'true' native title claim group and, by reason of the exclusion of certain 'Wongatha People' in November 1999, the Wongatha application did not meet the requirements of ss. 61(1) and (4);
- there was no acceptable evidence to show that the 'reduced group' (i.e. the claim group as described in the combined application as amended in November 1999) had authorised the making of the amended application;
- by reason of the exclusion made by the amendment in November 1999, the making of the combined Wongatha claim was not duly authorised and this may have been an 'irremediable problem'—at [1222] to [1225], [1266].

On the evidence, Lindgren J also concluded that the Wongatha application was not authorised by all the persons who (hypothetically) held the group rights and interests comprising the particular native title claimed for (among others) the following reasons:

- only a very small proportion of the Wongatha claim group (i.e. 40 out of several hundred) voted in favour of the resolution to make the combined application;
- there was no evidence that all the 'Wongatha People' were notified of the meeting and of the resolutions proposed to be put at it;
- it could not be assumed that the references in the minutes of the meeting were to the 20 antecedent claims that were subsequently combined because two of the antecedent claims listed in the minutes were not among the 20 claims that were combined and two of the antecedent claims that were included in the combination were not listed in the minutes;
- there was no sufficient evidence regarding authorisation of amendments made post-1999—at [1243] to [1253].

Authorisation – Koara application

In relation to the Koara application, it was found (among other things) that s. 251B(b) applied and would have been met if it were not for a 'different problem':

> The Koara and Wutha Claim groups' anthropologist definitely states that there are people whom those Claim groups recognise as satisfying the POC [points of claim] membership criteria. That is to say, the Koara and Wutha Forms 1 do not include all of the persons who satisfy the respective Koara and Wutha POCs.
>
> In these circumstances,…the conclusion is inescapable that these other persons are part of the hypothetical holders of the particular native title claimed, and that their authorisation of the Koara application was required by s 61(1)…It follows that the Koara application fails the authorisation test—at [2432] to [2434].

Authorisation – Wutha application

The Wutha application failed on authorisation because (among other things) the anthropological report (referred to above on relation to Koara) showed it was 'inescapable' that there were other people who were part of the hypothetical holders of the particular native title claimed who were required to, but did not, authorise the Wutha application—see [2432] and [2732] to [2737].

Authorisation – Cosmo application

A traditional decision-making process was relied upon for authorisation in Cosmo i.e. s. 251B(a) was said to apply. Paragraph 7 of the claim group description (the exclusion clause) stated that recognition was 'not satisfied by any person who is a claimant in the…Wongatha…claim when the current [Cosmo] application was made'. This was found to absolutely preclude recognition of any person who had a traditional connection to land within the Cosmo claim area and who was also a Wongatha claimant. It was also inferred that it was designed to address the s. 190C(3) 'problem'—at [2959] to [2960].

His Honour said:

> When the connections that certain Wongatha claimants have to a part of the Cosmo Claim area were drawn to the attention of Cosmo witnesses, some of the witnesses would say…that they would agree to the person being a Cosmo claimant if the person wanted to be…The fact is that…[the exclusion clause] absolutely precludes recognition of the connection of any person who is a Wongatha claimant—at [2962].

It was found that:

- the evidence showed that at least some Wongatha claimants had rights and interests in the Cosmo claim area that were at least as strong as those of some of the Cosmo claimants;
- in those circumstances, an evidentiary onus shifted to the Cosmo claim group to establish that those Wongatha claimants did not have those rights and that onus had not been discharged;

- as the exclusion clause had the effect of excluding some people from the 'native title claim group', the application 'was not duly authorised, because it was not authorised by the excluded people'—at [2967] and see also [3012].

Authorisation – Maduwongga application

The Maduwongga application was a combination of three old Act applications that were made 'on behalf of the Maduwongga peoples'. In each of the pre-combination applications, the claim group was defined as a cognatic descent group, with Kitty Bluegum as its apical ancestor. Kitty Bluegum had a daughter, Violet Quinn, and a son, Arthur Newland Snr.

According to his Honour, the claim group for each of the pre-combination applications was made up of:

> [T]he children of…Gertrude Morrison [Violet Quinn's daughter] and their [sic] descendants, Ms [Marjory] Strickland [daughter of Arthur Newland Snr] and her descendants, Ms [Anne] Nudding [daughter of Arthur Newland Snr] and her descendants, Albert Newland [Jnr] and his descendants and, apparently, Christine Newland [daughter of Arthur Newland Snr] and her descendants—at [3362].

When the amendment to combine was made in 1999, there was also an amendment to the claim group description so that the combined application was made only on behalf of Ms Strickland and Ms Nudding and their biological descendants (the Strickland/Nudding group).

In relation to the combined application, it was noted that:

> [T]he Form 1 definition of the Maduwongga Claim group had been changed radically to become only the Strickland/Nudding group… [T]he reduced Strickland/Nudding group…had Ms Strickland and Ms Nudding…as its apical ancestors, and so excluded Phillip O'Donoghue, Donald Ballinger [both children of Gertrude Morrison], Christine Newland and Albert Newland [children of Albert Newland Snr], and their respective descendants. As well, the new definition would exclude any adoptees, present or future, of the two sisters, and of their biological descendants—at [3363].

No satisfactory reason was given for the exclusion of Christine Newland. The reason given for excluding Albert Newland Jnr was that Ms Strickland and Ms Nudding did not accept that he was their adopted brother. As to Mr O'Donoghue and Mr Ballinger, Ms Strickland and Ms Nudding stated that, were it not for the fact that they had 'gone on other claims', they 'would have been' Maduwongga— at [3364] to [3367] and [3417] to [3421].

The oral evidence in relation to the reasons for the exclusion was rejected:

> It is difficult to avoid the impression that the desire to have the Maduwongga Claim registered and to enjoy to the greatest extent possible the valuable right to negotiate, had some influence in the making of the radical reduction in scope of the Maduwongga Claim group—at [3368].

The Commonwealth's submission that the combined application had to be authorised by the 'original' pre-combination claim group was rejected because (among other things):

- in the hypothetical situation considered here, there was no reason why it should be assumed, as against the Strickland/Nudding group, that the members of the original Maduwongga claim group held the particular native title claimed;
- the proposition that, where there has been a change in the definition of the native title group, s. 61(1) does not require authorisation by the 'pre-change' claim group was supported by other decisions of the court—at [3386].

However, Lindgren J was not persuaded that Ms Strickland and Ms Nudding were authorised by all members of the Strickland/Nudding group and found (among other things) that:

- Ms Strickland, with the acquiescence of Ms Nudding, took decisions unilaterally in what they perceived to be the best interests of themselves and their children;
- this was not a traditional process of decision-making of 'the Maduwongga People' and was not otherwise within s. 251B(a);
- no evidence was led from their biological descendants showing authorisation or, assuming it to be possible, ratification—at [3433].

Although there was no need to consider them in this case, his Honour noted that there may be:

- private law rights available to members of the original Maduwongga claim group against Ms Strickland and Ms Nudding; or
- procedural safeguards (such as notice to those members) on which the court might have insisted when dealing with the motion for leave to amend—at [3386].

Authorisation – Ngalia Kutjungkatja applications

Based on an assumption that the NK1 and NK2 claimants were the actual holders of the particular native title claimed, and taking the relevant Form 1 as the 'dominant document', each application failed for lack of authorisation because (among other things):

- on the evidence, each claim group was comprised of more that just the three people who testified i.e. Dolly Walker, her son Kado Muir and her brother Paddy Walker;
- a traditional decision-making process was relied upon but no evidence was led of such a process being provided for in the traditional laws and customs of the claim group;
- in any case, it would have to be shown to be a traditional decision-making process in respect of the sub-groups of the 'Ngalia family' as constituted by the NK1 and NK2 claim groups;
- Dolly Walker and Kado Muir, perhaps after discussion with Paddy Walker, decided to make the NK1 application and Dolly Walker, after discussion with Kado Muir and perhaps with Paddy Walker, decided to make the NK2 application, without any attempt to consult with all the claimants constituting those claim groups;
- the onus was on the applicant to identify the persons constituting the claim group and that onus has not been discharged—at [3698] and [3740] to [3750].

Some procedural issues

In his Honour's view:

- all eight claim groups led evidence directed at showing as many 'pathways of connection' as possible to the 'my country' area of the witnesses they called, without close regard to the relevant claim group's Form 1 or points of claim (POC);
- an 'important purpose' of the Form 1 was to state the native title determination sought and, in this sense, it was akin to an ordinary form of application to the court;
- the Form 1 was the 'dominant' document and the POC should be consistent with it;
- not all departures from either a Form 1 or the way in which a case was presented at trial are impermissible but the permissibility of any particular variance depends both on the prohibition in s. 64 on an amendment enlarging the area claimed and on natural justice considerations;
- departures from a Form 1 involve questions of degree, and, generally speaking, cannot be ruled upon hypothetically;
- the court could not make any determination of native title that might be supported by the evidence, even though it 'lies outside the relevant Form 1';
- the court's jurisdiction depends on s. 19 of the *Federal Court of Australia Act 1976* (Cwlth) and ss. 13(1), 61(1), 62 and 81 of the NTA—at [129] to [130], [292] and [356] to [362], referring to *Harrington-Smith v Western Australia (No 5)* [2003] FCA 218 (summarised in Native Title Hot Spots Issue 5) at [56].

Two 'particular kinds of departure' in this case deserved mention because they were so different that, in Lindgren J's view, it would not be open to the court to make a determination in accordance with either of them:

- a determination of individual rights and interests in respect of individual claimants in relation to their 'my country' areas, presumably west of the Menzies-Darlot line, given his Honours findings;
- a determination of group rights and interests in which both the area claimed and the claim group composition were based on constellations of *Tjukurr* sites or tracks, as in *De Rose*, presumably east of the Menzies-Darlot line, given his Honours findings—at [362].

However, Lindgren J was careful to point out that nothing should be implied about the likelihood of

success of either of these two hypothetical kinds of claim—at [362].

Claimants' evidence

In excess of 1600 people were identified as claimants in relation to one or more of the eight claimant applications and 86 of them testified. Evidence was taken in gender-restricted sessions only in relation to sites around Leonora and Laverton.

The 'sweeping' submission by the Cosmo applicant that 'the relative lack of evidence given about men's knowledge of restricted areas' was 'due to the great reluctance of Western Desert men to discuss restricted matters' was rejected:

> It was always open to counsel to seek an order that particular evidence be given in a gender restricted (men only or women only) session... The Cosmo applicant did not do so. I therefore proceed, in relation to the Cosmo Claim, on the basis that there is no testimony that could have been given in such a session—at [393].

Expert evidence

Thirty expert reports were admitted into evidence, authored by eight anthropologists, two historians, two linguists, an archaeologist and an ethno-botanist, all of whom were cross-examined. The 'proper' role of expert witnesses and the weight to be given to both their evidence and genealogies prepared by them are discussed at [395] to [403], [411] and [431] to [432] respectively.

Hot tub reports

Lindgren J found that the utility of joint reports prepared by anthropologists following a court-ordered experts' conference (sometimes called a hot-tub) was diminished because, among other things, their subsequent oral testimony indicated that generalisations made in the joint reports 'masked points of disagreement'—at [406].

Allegations of bias

Attacks were made on the testimony of Mr D Vachon, Dr S Pannell (both anthropologists called by GLSC claimants) and Dr R Brunton (an anthropologist called by respondents with pastoral interests) on the ground of bias, with Mr Vachon and Dr Brunton being attacked in relation to their previous writings and Dr Pannell on her testimony.

In relation to Mr Vachon, the court was satisfied that, 'ultimately', he attempted to form and express his opinions free of bias and, in particular, was ready to make concessions, which was often the hallmark of an independent witness in whom the court could be confident—at [416].

In relation to Dr Brunton, his prior public statements [such as, following the decision in *Mabo (No. 2*), that 'the High Court is now refusing to follow precedent unless it feels like it'] were not of the kind one would expect from 'a person who asks to be accepted by a court as a careful and unbiased expert witness, striving for dispassionate objectivity in thought and language'. However, his Honour was satisfied ultimately that Dr Brunton was aware of his duty to the court, attempted to discharge it conscientiously, was ready to make concessions and demonstrated in this reports a careful (and helpful) regard for factual materials and citation of sources—at [427].

Dr Pannell's evidence gave the court 'some cause for concern', in that:

> She persisted in using questions as an opportunity to expatiate; [and] was, generally speaking, unwilling to make concessions, at least in terms of the question asked… The following submission…is an exaggeration but makes the point:
>
> > *[The] rigour with which she analysed conclusions of earlier ethnographers and anthropologists is in stark contrast to the seemingly mindless acceptance of anything stated to her by a claimant*—at [430].

That said, Lindgren J did not make a general discount for bias, recognising that:

> [T]here is sometimes a dissonance between a cross-examiner's language and the subtle nuances of anthropological discourse, which… was often the reason why Dr Pannell declined to answer a question without qualification—at [430].

Criticism of some anthropologists' approach

His Honour was critical of the approach taken by some of the expert anthropologists in this case because, among other things:

- the oral evidence indicated some of them were uncomfortable with the notion of a single

WDCB society and, possibly, preferred a model of regional societies with cultural similarities, as the language 'cultural bloc' might more naturally suggest;

- the different positions some took on particular issues reflected the different interests of the parties who retained them;
- both the composition of the claim groups and the boundaries of the claim areas were taken by some as 'givens' because their 'brief' was to research a particular claim group i.e. they did not pose to themselves the question: Who are the persons or group or groups, if any, who, in accordance with traditional Western Desert laws and customs, have rights and interests in the relevant claim area or in any part of it?;
- some gave evidence that indicated they did not seem to have made a critical assessment of any of the Indigenous testimony (in the sense of testing it for consistency or inconsistency with established WDCB laws and customs) but, rather, they made what they could 'of whatever the indigenous witnesses say';
- some did not address 'the causes and implications' of the various overlapping claims, or interview members of overlapping 'non-client' claim groups, with a view to ascertaining why overlapping claims were being made and whether, under traditional WDCB laws and customs, one claim group rather than another might have rights and interests in an overlap area;
- some based their views on an understanding of the word 'acknowledge' that did not conform to its meaning in s. 223(1)(a) and so little or no weight could be placed on any opinion they expressed that there was continuing acknowledgment of traditional laws or customs;
- while some initially proposed a single WDCB society, with local variations in its laws and customs, their final position appeared to be that there were a number of unidentified, undefined societies or sub-societies within the Western Desert;
- some were ready to infer the existence of a vital system of laws and customs from 'client' claimants' fragmentary knowledge of particular alleged laws or customs;
- some made statements such as the 'claim group considers' without clearly identifying what that meant or which members of the group were of that view—at [662], [714], [861], [904] to [905], [947], [1013], [1601], [1943] and [1947].

Appeal by Cosmo

The court extended time for filing an appeal to 5 April 2007. Only Cosmo has appealed. There was no further listing date for the appeal at the time of writing but it will be mentioned at the next call over and there is liberty to apply.

Commonwealth's non-claimant application

The Commonwealth filed a non-claimant application over the whole of the Wongatha claim area on the second-last day of the hearing of this case, apparently to provide the court with jurisdiction to make a determination of native title under s. 225 should jurisdiction otherwise be lacking due to a failure of authorisation.

His Honour stood the non-claimant application over until delivery of judgement on the claimant applications. With respect, in doing so, the court may not have addressed the requirement found in s. 67 that overlapping native title determination applications (i.e. claimant and non-claimant) must be 'dealt with in the same proceeding' to the extent of any overlap.

As his Honour declined to make a determination of native title under s. 225 (i.e. that native title did not exist) in relation to any of the claimant applications, it was noted in the reasons for decision that the Commonwealth was 'at liberty to have its non-claimant application listed'—at [4009].

The Commonwealth indicated at a directions hearing held on 30 April 2007 that it intends to proceed with the non-claimant application and seek a determination under s. 225 that native title does not exist in the Wongatha claim area.

In support of this (among other things), the Commonwealth submitted that:

- the court had before it all of the persons who might claim to be native title holders in the Wongatha claim area, either as applicants/ native title respondents in the claimant application proceeding or as respondents in the Wongatha non-claimant proceeding;

- the court should proceed immediately to determine the non-claimant application on the same evidence as in this case, relying upon ss. 67 and 86;
- in the absence of a determination that native title does not exist, if claimant applications are made in the future over the Wongatha claim area on alternative bases to those that had been dismissed, questions of Anshun estoppel and/or abuse of process may arise;
- the underlying public interest is that there be finality in litigation.

The parties are to file further submissions by 21 May 2007 as to what directions should be made to progress the matter. It is listed for further hearing on 24 May 2007.

Injunction sought to prevent removal from claims register

Harrington-Smith v Native Title Registrar **[2007] FCA 414**

Lindgren J, 12 March 2007

Issue

This case is about two applications seeking orders to restrain the Native Title Registrar from removing or (in one case) amending the entry on the Register of Native Title Claims relating to claimant applications that had been dismissed by the Federal Court until any appeal proceedings had been heard and determined. The main issue was the meaning of the word 'dismissed' in the context of s. 190(4)(d) of the *Native Title Act* 1993 (Cwlth) (NTA).

Background

His Honour Justice Lindgren had (among other things) dismissed three claimant applications: Wongatha and Cosmo Newberry in their entirety and, in so far as the area it covered overlapped the area covered by the Wongatha claim area, Wutha: see *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31, summarised in this issue of *Native Title Hot Spots*.

Paragraph 189A(b) of the NTA provides that the Registrar of the Federal Court must, 'as soon as practicable', notify the Native Title Registrar (the Registrar) of the details of any decision or determination of the court that covers a claim. Subsections 190(4)(d) and (e) relevantly provide that, if notice is received pursuant to 189A(b), the Registrar must, as soon as practicable:

- if the application in question has been dismissed or otherwise finalised – remove the entry on the Register of Native Title Claims (the Register) that relates to the claim; or
- in any other case – amend the entry on the Register that relates to the claim so that it only relates to the matters in relation to which the application has not been finalised.

On an oral application by Wongatha's counsel when judgment was delivered on 5 February 2007, Lindgren J ordered that notice under s. 189A(b) should be delayed for 14 days. This was because the reasons for decision were lengthy and his Honour thought it might be arguable that the expression 'as soon as practicable' permitted a fortnight's delay. A subsequent request to extend that order was declined on the basis that, 'whatever the position may have been immediately upon delivery of judgment…, by 19 February 2007 it could no longer be said that it was not practicable' for notice pursuant to 189A(b) to be given—at [5] to [6].

On 23 February 2007, after receipt of notice given in accordance with s. 189A(b), the Registrar advised the relevant parties that, by 4:00 pm on 28 February 2007, the entries in relation to Wongatha and Cosmo claims would be removed from the Register and any entry in relation to Wutha would be amended in accordance with ss. 190(4)(d) and (e).

On 27 and 28 February 2007, applications were made to the court seeking orders restraining the Registrar from doing as he proposed. The 'final' relief claimed in each proceeding was an injunction directed to preserving the status quo until any appeal against the orders of 5 February 2007 was heard and determined. Separate 'interlocutory' relief was also apparently sought until the applications for final relief were determined—at [10].

At the hearing on 28 February 2007, Lindgren J noted that:

- if the word 'dismissed' in s.190(4)(d) was satisfied by the orders of 5 February 2007, the court would have no power to order the Registrar to refrain from doing what was proposed;
- on the other hand, if the applicants' argument was correct, the statutory provisions would not oblige the Registrar to do what was proposed and any removal or amendment would be unlawful—at [11].

His Honour ordered the Registrar not to remove or amend the relevant entries on the Register until 13 March 2007 or further order of the court to allow all parties time to file and serve submissions on this point.

The submission made on behalf of the native title parties was that the word 'dismissed' in s. 190(4)(d) did not bear its literal meaning. Lindgren J disagreed because:

> I think it clear beyond reasonable argument that the word 'dismissed' is satisfied by a dismissal at first instance following a trial—at [14].

Lindgren J gave three reasons.

The first was that ss. 189A and 190(4) are concerned with 'applications'. Section 61 provides for the applications that may be made under Div 1 of Pt 3 of the NTA. One of those is a 'native title determination application', which may be either a claimant or a non-claimant application. The orders of 5 February 2007 were made in respect of claimant applications. An appeal is not, and is not an aspect of, a claimant application—at [15].

The second was that Part 7 of the NTA reflects an intention that the Register, which is a public register available for inspection, be kept up to date. The frequent use of the expression 'as soon as practicable' in many of the relevant provisions emphasised that intention. If a claimant application remained on the Register after it had been dismissed by the court, then that legislative intention would be frustrated—at [16] to [18], referring to ss. 63, 64(3) and (4), 66, 66A, 66B(3) and (4), 186(1)(g) and 187.

The third was that, until a claimant application was heard and determined, it was not known whether the claimants did, or did not, have native title in relation to the area claimed. Therefore:

> The Register represents a compromise between conflicting interests pending the hearing and determination of a claim. That compromise is that the Registrar is required to enter particulars of a claim [made in a claimant application] where [the Registrar]…is satisfied of certain matters on a prima facie basis. Registration gives rise to certain benefits to [registered native title] claimants…Once there has been a dismissal, the reason for the compromise has disappeared, and one would expect the prima facie position to be supplanted—at [19].

Decision
The proceedings were dismissed—at [20].

Postscript
As a result of this decision, on 13 March 2007 the Registrar removed the details of the Wongatha and the Cosmo Newberry claims from the Register and amended the entry in relation to the Wutha claim in so far as it related to the area also covered by the Wongatha claim.

Registration test review – Butchulla

Doolan v Native Title Registrar [2007] FCA 192

Spender J, 23 February 2007

Issue
In this review of a registration test decision, the main issue before the Federal Court was whether the term 'the applicant' in s. 61 of the *Native Title Act 1993* (Cwlth) (NTA) meant 'all of the persons authorised by the native title claim group and no fewer' or 'all of the persons authorised by the native title claim group who, at any particular time, were willing and able to act'.

Background
The Butchulla Land and Sea claimant application was filed in January 2006. This was preceded by the members of the native title claim group holding an authorisation meeting in April 2005. At that meeting, the native title claim group authorised 18 people to comprise the applicant. In November 2005, two of the 18 people who were authorised to be 'the applicant' withdrew. When the application

was made in January 2006, the applicant was comprised of the remaining 16 persons.

In May 2006, the Gurang Land Council (the representative body for the area and the applicant's legal representative) was advised that the Native Title Registrar's delegate had decided not to accept the claim made in the application for registration—see ss. 99 and 190A(6).

Among other things, the delegate considered that the claim group had authorised 18 persons to comprise 'the applicant' and make the application and so was not satisfied that the native title claim group authorised the 16 persons to do so for the purposes of s. 190C(4)(b). The delegate also found that the application did not meet the conditions of s. 190B(5) and, as a result of that decision (and without considering each of them), it followed that the conditions found in ss. 190B(6) and (7) were not met.

A claim registration application was subsequently made pursuant to s. 69(1) seeking review under s. 190D(2) of the delegate's decision. On review, it was contended (among other things) that:

- the delegate had erred in law by concluding that the application did not meet the authorisation requirements found in s. 190C(4)(b); and
- properly construed, s. 61(2) meant that 'the applicant' was constituted by either the group of persons authorised at the meeting or so many of them as were able and willing to constitute the applicant.

The Commonwealth intervened pursuant to s. 84A(1), agreeing that the delegate had been wrong in relation to ss. 190B(5), (6) and (7) but contending that the delegate was correct to find that the application did not meet the requirements of s. 190C(4)(b).

Nature of s. 190D review

A review by the court under s. 190D(2) is not restricted to consideration and determination of a question of law but extends to determinations of issues of fact. The court has power under s. 190D(3) to make appropriate orders to do justice between the parties—see [42] to [47] for a discussion of the relevant cases.

Meaning of 'the applicant'

His Honour Justice Spender considered that the authorisation of a number of persons as the 'applicant' was not an appointment of each of them 'jointly and severally' and that s. 61(2)(c) contemplated 'an authorisation of persons to act collectively, rather than each of them personally'—at [56].

His Honour held that:

- in providing for the authorisation of a group of people to act collectively, in a representative capacity, as the applicant, there was an implication that the 'vicissitudes that accompany joint action' was recognised;
- the appointment at a meeting of a native title claim group of a group of persons to jointly be the applicant was an authorisation of those persons, or so many of them as were willing and able to discharge their representative function, to act as the applicant;
- there was no requirement that there be an express qualification as to that effect;
- the 'applicant' in s. 61(1) was a reference to each of the persons who comprised 'the applicant' for the purposes of s. 61(2)—at [57], [59], [67] and [73].

Therefore, the delegate's decision on s. 190C(4)(b) was found to be wrong.

Directing the Registrar to accept and register the claim

An order directing the Registrar to accept the application for registration on the Register of Native Title Claims (the Register) was sought. The Commonwealth submitted that the appropriate form of relief was an order requiring the Registrar to consider the application according to law.

As noted earlier, the delegate did not consider the rights and interests claimed for the purposes of s. 190B(6). His Honour found that, as a result, the delegate did not properly apply s. 190B(6)—at [84].

Spender J considered there was evidence before the court demonstrating that a number of the 'low-level' rights claimed in the application could, prima facie, be established for the purposes of s. 190B(6). Therefore, the court concluded it was appropriate to order both that the application be

registered and that the Register entry record those claimed rights—at [83] to [88].

Decision

The court ordered that the decision of the delegate be set aside and the Registrar accept the claim for registration. The Registrar was ordered to enter the following rights in the Register of Native Title Claims:

- the right to hunt and fish on the land and waters;
- the right to access and move about on the land and waters;
- the right to camp on the land; and
- the right to gather and use natural products on the land.

The Registrar was also ordered to consider what (if any) of the other claimed rights and interests should be included in the Register pursuant to s. 190B(6), having regard to the entire application and other material in support of it.

Comment

In the two previous s. 190D(2) proceedings where the Registrar was ordered to accept the relevant claim for registration, the application had failed only one condition of the registration test. Therefore, once the court was satisfied that the Registrar's decision on that condition was wrong, 'there were no other grounds upon which' a refusal to register 'could be maintained' and an order that the claim be registered was manifestly appropriate—see *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [62] and *Wakaman People 2 v Native Title Registrar* (2006) 155 FCR 107; [2006] FCA 1198, summarised in *Native Title Hot Spots* Issue 21.

However, s. 190(6A) *requires* the Registrar to *refuse* registration if not satisfied that *all* the conditions of ss. 190B and 190C are met. Therefore, the court should not direct the Registrar to register a claim unless the court is satisfied that all of the conditions on which the Registrar found the application failed are, in fact, met. Otherwise, remittal to the Registrar for reconsideration in accordance with the law is the appropriate course. In this case, while his Honour did make a finding that s. 190B(6) was met, it appears he did not do so in relation to either ss. 190B(5) or (7).

Costs

The applicant sought an order as to costs (initially on an indemnity basis) against the Registrar on the basis that the Registrar had 'unreasonably' maintained a position by allowing the authorisation point to 'remain contested'.

His Honour noted that:

- section 85A applies to s. 190D(2) proceedings;
- the Registrar submitted to the court's jurisdiction, save as to costs, which was an appropriate course to take—at [91] and [94].

Spender J found that:

- the Registrar had not 'unreasonably' maintained his position; and
- it would not have been appropriate for the Registrar to consider the revocation or variation of the registration test decision because, in the circumstances, the Registrar had no power to do so—at [95] to [96].

This was because his Honour was of the view that:

> The power given to the Registrar to make a decision as to registration is not one which can be exercised from time to time…Once exercised, it is spent. Even if I be wrong in that conclusion, this is not a case where the Registrar ought properly to have resiled from the registration decision…The fact that the Attorney-General has sought to argue [the authorisation point]…powerfully underlines the lack of imperative necessity to resile from the registration decision, and, if there was power to resile, it was not unreasonable not to resile—at [99].

Determination of native title – Noonkanbah

***Cox v Western Australia* [2007] FCA 588**

French J, 27 April 2007

Issue

The issue in this case was whether the Federal Court should make a determination by consent recognising the existence of native title in respect of a claimant application made on behalf of the Yungngora people.

Background

The application was lodged with the National Native Title Tribunal in March 1998 and, in

September 1998, became a proceeding in the court following amendments to the *Native Title Act 1993* (Cwlth) (NTA). The area it covered was just over 1,800 km2 in the Kimberley region of Western Australia and included the area covered by the Noonkanbah pastoral lease (held by the Yungngora Association Inc), a small parcel of unallocated Crown land and two unvested reserves.

The court must be satisfied any order is within its power

His Honour Justice French said that, before making a determination by consent under s. 87, the court must be satisfied that the order sought by the parties was both within the court's power and otherwise appropriate—at [3].

Evidence relied upon

In addition to the agreement of the parties and the order proposed, French J considered 'a comprehensive expert report by two experienced consultant anthropologists'. The conclusions reached in that report indicated that the claimants would satisfy the criteria for a determination of native title in the terms sought—at [4] and [12].

His Honour noted (among others) the following points from the report:

- the native title claim group constituted a society whose members identified by reference to the Nyikina language and who considered themselves to be a community, based upon cultural beliefs, practices and ways of doing things that could be traced back to pre-sovereignty times;
- the contemporary system by which rights to land were articulated was either the same as existed at, or before, sovereignty or was directly founded or based upon it;
- ritual experience and knowledge constituted both a means of gaining authority and respect and for realising rights in matters relevant to making decisions about country, as well as other cultural matters;
- kinship relationships continued to be represented within the lives of members of the claim group;
- there was an understanding by adult members of the community of their traditional duties to pass on their knowledge to younger members;
- despite changes over the years, there remained a principled system of rights to country which relied upon normative rules for its legitimation and perpetuation—at [6] to [11].

Recognition of the Noonkanbah struggle

French J noted that:

> In achieving this determination of native title, the people have achieved an important milestone which involves recognition of their rights and interests in their country and of the traditional laws and customs from which those rights and interests spring—at [12].

Decision

His Honour ordered that there be a determination of native title in the terms sought by the parties.

The common law holders

The native title rights and interests are held by the Yungngora people i.e. those Aboriginal people who:

- hold in common the body of traditional law and custom governing the determination area;
- identify themselves as, and are accepted as such by, the holders in common of that body of traditional law and custom; and
- are either descended from any one or more of certain named apical ancestors (listed in broad family groups) or adopted into that group in accordance with traditional law and custom.

The nature and extent of the native title rights and interests:

Native title over the area covered by Noonkanbah station and some unallocated Crown land is:

- the exclusive communal right to possess, occupy, use and enjoy the land and waters; and
- the communal right to take, use and enjoy the flowing and subterranean waters for personal, domestic and non-commercial communal purposes but not to the exclusion of others.

Native title over the remainder of the determination area consists of non-exclusive, communal rights to use and enjoy the land and waters as follows:

- the right to enter and remain on the land and waters;

- the right to camp and erect shelters and other structures and to travel over and visit any part of the land and waters;
- the right to take fauna and flora from the land and waters for personal, domestic and non-commercial communal purposes;
- the right to take other natural resources of the land such as ochre, stones, soils, wood and resin for personal, domestic and non-commercial communal purposes;
- the right to take, use and enjoy the waters and flowing and subterranean waters for personal, domestic and non-commercial communal purposes;
- the right to engage in ritual and ceremony; and
- the right to have access to, care for, maintain and protect from physical harm, particular sites and areas of significance to the common law holders.

The native title rights and interests:

- include the right to take and use ochre but only to the extent that ochre is not a mineral pursuant to the *Mining Act 1904* (WA);
- do not include rights to minerals and petroleum as defined in legislation;
- are subject to, and exercisable in accordance with, the laws of the State of Western Australia and the Commonwealth, including the common law.

Relationship with other interests in the determination area

The relationship between the native title rights and interests and other interests in the determination area, including the Yungngora Association Inc, is set out in the determination.

Determination of native title – Miriuwung Gajerrong #4

Ward v Western Australia (Miriuwung Gajerrong #4 Determination) [2006] FCA 1848

North J, 24 November 2006

Background

A determination recognising the existence of native title was made by his Honour Justice North on 24 November 2006 in relation to the Miriuwung Gajerrong #4 claimant application (MG#4). The reasons for decision were not published until 15 February 2007.

The area covered by MG#4 was about 7 km^2 in the north-east Kimberley region of Western Australia. It was bounded on three sides by the area the subject of the first Miriuwung Gajerrong determination—see *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16; [2003] FCAFC 283, summarised in *Native Title Hot Spots* Issue 8.

In 1998, his Honour Justice Lee made findings in relation an area that included that covered by MG#4. Lee J's judgment was subject to appeal and was eventually resolved by the first Miriuwung Gajerrong determination. However, the area the subject of MG#4 was not included in that determination and Lee J's findings in relation to it (which were not disturbed on appeal) supported the making of a determination recognising the existence of native title.

Power of the court

North J noted that the court must be satisfied both that the consent orders sought were within the power of the court and that it was otherwise appropriate that the orders be made— see s. 87(1) of the *Native Title Act* 1993 (Cwlth).

In this case, the court was satisfied that both the applicant for MG#4 and the State of Western Australia had given careful consideration to the findings made by Lee J and had addressed the question as to whether or not they justified the proposed determination in this case. Therefore, his Honour was satisfied that the requirements of the NTA were met and that the orders should be made.

Determination area

The determination area is made up of areas identified with the Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija languages or dialects.

Each of Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija is a group identified with those respective languages or dialects and the members of those groups are those Aboriginal persons who:

- are descended from a person who is also identified with such language or dialect and country or by adoption by such a person, in accordance with traditional laws and customs; and
- identify themselves as Miriuwung, Gajerrong, Doolboong, Wardenybeng or Gija (as the case may be), under traditional law and custom and are so identified by other members of the respective Miriuwung, Gajerrong, Doolboong, Wardenybeng or Gija groups.

Common law holders of native title

The common law holders of native title in the determination area are**:**

- the members of the Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija groups in respect of Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija country respectively in accordance with traditional law and custom; and
- other Aboriginal persons who are acknowledged by the respective Miriuwung, Gajerrong, Doolboong, Wardenybeng or Gija groups as having rights in the determination area through descent, marriage, spiritual conception, birth or responsibility for sites of significance.

Rights and interests recognised

Over part of the determination area, native title was determined to be an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and waters, subject to some qualifications, including in relation to rights to water.

Over the remainder of the determination area, non-exclusive rights were recognised, including:

- the right to hunt and fish, to gather and use the resources of the area (such as food and medicinal flora, timber, charcoal, ochre, stone and wax) and have access to, and use of, water;
- the right to live on the determination area (defined as entering and remaining on the land), to camp and erect structures for that purpose and to light camp fires;
- the right to engage in cultural activities on the land, conduct ceremonies, hold meetings, teach the physical and spiritual attributes of places and areas of importance, participate in cultural practices relating to birth and death;
- the right to have access to, maintain and protect places and areas of importance on or in the land and waters;
- the right to make decisions about the use and enjoyment of the land and waters by the native title holders; and
- the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.

Water

Native title rights and interests in relation to the flowing, tidal and underground waters of the determination area are non-exclusive rights to:

- hunt, gather and fish on, in and from the flowing, tidal and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs but not for commercial purposes;
- take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs but not for commercial purposes.

Qualifications

The native title rights and interests recognised are subject to, and exercisable in accordance with:

- the laws of the Commonwealth and the state, including the common law;
- the traditional laws acknowledged and traditional customs observed by the native title holders for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) but not for commercial purposes.

Minerals

The native title does not include rights to minerals and petroleum as defined in state legislation. The right to take and use ochre to the extent that ochre is not a mineral pursuant to the *Mining Act 1904* (WA) was recognised.

Relationship with other rights and interests

The other rights and interests noted include those held under various leases and mining and

petroleum tenements, the public right to fish and to navigate in tidal waters and the existing rights of the public to access and enjoy waterways, beds and banks or foreshores of waterways, beaches and stock routes. The relationship between these interests and the native title rights and interests is set out in the determination.

Trustee prescribed body corporate
Pursuant to ss. 55 and 56 of the NTA, the Miriuwung Gajerrong Number 4 (Native Title Prescribed Body Corporate) Aboriginal Corporation was determined to be the prescribed body corporate for the determination area and will hold the native title in trust for the common law holders.

Determination of native title – non-claimant application

NSW Aboriginal Land Council v NSW Native Title Services Ltd [2007] FCA 112

Graham J, 6 February 2007

Issue
The question here was whether the Federal Court should make a determination under s. 225 of the *Native Title Act 1993* (Cwlth) (NTA) that native title did not exist in relation to an area subject to a non-claimant application made under s. 61(1) of the NTA.

Background
The non-claimant application was originally filed by Illawarra Local Aboriginal Land Council (Illawarra LALC) and sought a determination that native title did not exist in respect of certain land at Kembla Grange in New South Wales. Orders were subsequently made that the New South Wales Aboriginal Land Council (NSWALC) be substituted as the applicant in the proceedings and that Illawarra LALC be joined as a respondent.

The area in question had been transferred to the NSWALC under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA). Section 40AA of the ALRA provides that NSWALC may not sell or otherwise deal with land vested in it subject to native title rights and interests unless the land is the subject of an 'approved determination' of native title—see ss. 13 and 253 of the NTA.

It was NSWALC policy to transfer such lands to the relevant local Aboriginal Land Council (in this case, Illawarra LALC) and, in order to do so, to seek an approved determination that native title did not exist.

His Honour Justice Graham was satisfied that:

- no other applications for a determination of native title fell within the external boundary of the non-claimant application;
- no approved determination of native title had been made in relation to the land;
- the determination sought was unopposed;
- orders of this kind had previously been made by the court—at [18], [19], [25] and [28] to [29].

Decision
Graham J made an order, pursuant to ss. 86G and 225 of the NTA, that native title did not exist in relation to the area covered by the non-claimant application—at [30].

Party status – appeal proceedings

Bodney v Bennell [2007] FCAFC 11

Finn J, 16 February 2007

Issue
The question before the court in this case was whether a group of respondents holding pastoral interests should be granted leave to intervene in an appeal against a decision of his Honour Justice Wilcox in relation to native title in the Perth metropolitan area.

Background
Wilcox J handed down his findings concerning native title to the Perth metropolitan area on 19 September 2006 — see *Bennell v Western Australia* [2006] FCA 1243, (judgement on the separate proceeding, summarised in *Native Title Hot Spots* Issue 21).

Prior to making that decision, his Honour had decided to deal with all the claimant applications that covered the Perth metropolitan area (including part of one known as the Single Noongar claim) in a separate proceeding. The State of Western Australia appealed against the judgment on the separate proceeding.

Although they were parties to the Single Noongar claim, the pastoralists seeking to intervene in the state's appeal were not parties to the separate proceeding. They sought leave to intervene in relation to one ground of the state's appeal, which alleged a denial of procedural fairness because (among other things):

- when the judge decided to constitute the separate proceeding, he effectively excluded certain respondents, including the pastoral interests;
- his Honour should have given those respondents an opportunity to become a party once he decided to determine the question of whether there was native title in the whole claim area, not just the Perth metropolitan area, in the separate proceeding.

The pastoralists, in support of their application to intervene, asserted they were denied the opportunity to adduce evidence in relation to, and to cross-examine on, matters in the separate proceeding that affected their interests in the wider Single Noongar claim area.

While his Honour Justice Finn was of the view that it was likely that the pastoralists' contribution would, in essence, parallel that of the state on the particular ground of appeal, he was prepared to grant leave to intervene, subject to certain conditions—at [8] to [9].

Decision

Leave to intervene in relation to the relevant ground was given provided that:

- the pastoralists' legal advisers consulted with the state's legal advisers to determine whether filing of an outline of submissions would make a useful contribution to the appeal;
- if it such an outline was filed, it was no longer than five pages—at [11].

Party status — PNG national

Akiba v Queensland (No 3) [2007] FCA 39

Spender J, 31 January 2007

Issue

This case deals with an application by Pende Gamogab for leave to appeal against a decision of his Honour Justice French in *Akiba v Queensland (No 2)* [2006] FCA 1173 to dismiss his application to be joined as a party to a claimant application. Mr Gamogab is from Papua New Guinea (PNG). French J's decision is summarised in *Native Title Hot Spots* Issue 21.

Background

The claimant application in question is known as the Torres Strait Regional Seas Claim.

French J concluded that Mr Gamogab had an interest that might be affected by a determination in the Torres Strait Regional Seas Claim but decided against joinder in the exercise of his discretion. That exercise of discretion was based on implications arising out of the 1978 Australia-PNG Treaty (the treaty). French J decided it was inappropriate for the native title proceedings to be used as a vehicle to advance the case of PNG villages whose members were not treated as traditional inhabitants by the executive governments of PNG and Australia for the purposes of the treaty (as was the case with Mr Gamogab's village).

Whether leave to appeal should be granted

His Honour Justice Spender noted that all of the parties in this case proceeded on the basis that leave to appeal was required because French J's decision was interlocutory. Spender J accepted leave was required without deciding that question—at [34].

Assuming leave to appeal was required, two issues were then relevant:

- whether, in all the circumstances, the decision of French J was attended by sufficient doubt to warrant it being reconsidered by the Full Court of the Federal Court; and
- whether substantial injustice would result if leave was refused, supposing the decision to be wrong—at [35], referring to *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 397 to 400.

In this case, Spender J was only concerned with the question of whether leave to appeal should be granted and not whether French J's exercise of discretion miscarried—at [38].

Decision

Mr Gamogab was granted leave to appeal on the basis that French J's exercise of discretion was 'tainted by having regard to irrelevant considerations, or by a misunderstanding of what the applicant was asserting as a basis for joinder'—at [61].

Spender J was of the view that:

- that the focus on the treaty as the basis for the exercise of the discretion was arguably 'quite misplaced'; and
- it was at least arguable that consideration of what the treaty provided, and which nationals of PNG had the benefit of it, was 'quite irrelevant on the question of joinder of Mr Gamogab, let alone determinative'—at [48] and [55].

Replacing the applicant – under s. 66B

Walker v Queensland [2006] FCA 1769

Allsop J, 14 December 2006

Issue

The question in this case was whether the court should make an order under s. 66B(2) of the *Native Title Act 1993* (Cwlth) to remove one of the persons constituting the applicant in a claimant application.

Background

A notice of motion was filed seeking an order to remove of one of the persons who jointly comprised the applicant in the Yalanji Peoples' claimant application. The effect of the order sought was to replace the remaining five people for the existing six as 'the applicant'—at [1] to [2] and see ss. 61(2)(c) and 66B(1).

Decision

The name of one of the individuals who jointly comprised 'the applicant' was removed, on the grounds that he was no longer authorised by the native title claim group to make the application and deal with matters arising in relation to it. The applicant was then 'replaced' by the remaining five individuals. The Native Title Registrar was then notified by the court to amend the Register of Native Title Claims accordingly—see s. 66B(3).

Evidence – preservation basis and gender restriction

Eringa No 1 Native Title Claim v South Australia [2007] FCA 182

Mansfield J, 22 February 2007

Issue

The issue in this case related to varying orders made by the Federal Court concerning the reception, at trial, of 'preservation evidence' which was gender restricted in relation to a claimant application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

Under s. 46 of the *Federal Court of Australia Act 1976* (Cwlth) (FCA Act) and O 24 r 1(1)(a) of the Federal Court Rules (FCR), his Honour Justice Mansfield heard 'preservation evidence' given on behalf of a native title claim group, including evidence relating to Aboriginal law which was, under that law, gender restricted.

His Honour had previously ordered that, before 'preservation' evidence was given, each Aboriginal witness was to be informed by their solicitor of the possibility that:

- the court may set aside or vary those orders; and;
- any appeal court may include female members of the judiciary.

This case deals with an application to vary those orders to stipulate that, if gender restricted 'preservation' evidence was given, and the judge then appointed to hear the proceeding was a woman, the applicant would be entitled not to adduce that evidence at trial.

Mansfield J observed (among other things) that:

- pursuant to s. 46(d) of the FCA, preservation evidence did not automatically become evidence in the hearing of the proceeding and it was not necessary, or desirable, for the court to make the order as proposed because it was merely declaratory of the 'uncontested operation' of s. 46(d);
- the exercise of the discretion available under s. 46(d) was guided by s. 82(2) of the NTA, which provides that the court may take account of the

cultural and customary concerns of Indigenous Australians so long as to do so did not unduly prejudice any other party to the proceedings;
- the court had previously exercised its powers to ensure that such evidence was 'duly confined to those entitled to see it';
- the judge hearing a matter, whether male or female, had a role and presence which was an 'inevitable part of the exercise of judicial power' under Chapter III of the Constitution, a 'significant' point—at [7] to [9], [12] and [14] to [15].

In these circumstances, Mansfield J was of the view that declining to make the order sought would not operate as a disincentive to a person providing preservation evidence that included gender restricted evidence, so long as the powers available to the court to ensure that evidence was properly restricted from publication were explained to the witness before they testified—at [17].

Decision

His Honour decided that simply amending the earlier orders to note that a female judge may be appointed to the hearing of the application would make any potential witness aware that the court may be constituted by a judge or judges who are female—at [17].

Reinstatement of a dismissed application

Kullilli People # 2 and Kullilli People # 3 v Queensland [2007] FCA 512

Tamberlin J, 13 April 2007-04-18

Issues

The issues in this case were:

- who had authority to bring a motion seeking to reinstate two dismissed claimant applications and then to set aside orders requiring the people who made those applications to file a new application;
- did the Federal Court have jurisdiction to reinstate the dismissed applications and make those orders;
- if jurisdiction was established, what factors were relevant to the exercise of any discretion in relation to the exercise of that jurisdiction?

Background

As part of a program directed at progressing claims in southern Queensland by (among other things) resolving overlaps, his Honour Justice Tamberlin made the following orders:

- by 1 November 2006, the Kullilli People file and serve a new claimant application that incorporated the terms of certain agreements between them and other claim groups in the area concerned;
- the Kullilli People # 2 and Kullilli People # 3 claimant applications stand dismissed as at 2 November 2006.

When the orders were made, Queensland South Native Title Service (QSNTS), the representative body for the area, was the legal representative for both claims but it subsequently ceased to act. No further order was sought prior to 2 November 2006 and 'as a consequence of this inaction the order came into force'—at [9].

On 13 December 2006, a firm of solicitors applied to have the applications reinstated and to set aside the order that a new claimant application be filed on behalf of the Kullilli People. Both the State of Queensland and QSNTS opposed that application.

Authority to make the reinstatement application

Tamberlin J decided that the Kullilli People were legally represented by QSNTS until both Kullilli People claimant applications were dismissed on 2 November 2006 as a result of his conditional orders.

The firm of solicitors making the application in this case filed an affidavit attaching a copy of an 'authority' (dated 4 November 2006) that 'confirmed' that the firm was appointed to represent the Kullilli 'applicant'. This authority to act was challenged by the state and QSNTS on the basis that it was signed by only nine of the 12 people who jointly constituted Kullilli People's 'applicant' in the two dismissed applications: see s. 61(2)(c) of the *Native Title Act 1993* (Cwlth) (NTA).

His Honour considered that ss. 61(1) and (2)(c) required a claimant application to be made by a person, or persons, authorised by a 'native title claim group'. Therefore, Tamberlin J was of the view that the person, or those persons jointly,

comprised the applicant i.e. if more than one person was authorised, as in this case, then they were, jointly, the 'applicant group'

The request for reinstatement of the applications relied on a resolution passed at a meeting of the native title group in March 2002 which said that decisions of 'the Applicants':

> [A]re generally expected to be made by consensus but, where that is not **practicable** or **possible** in respect of a matter, then, unless there is a need to make the decision immediately…, time will be permitted for each Applicant to consult with his or her families… **Then** a decision about the matter can be made with agreement of 7 or more of the Applicants. (Tamberlin J's emphasis.)

His Honour found that:

- the power to 'enter into an arrangement' with less than all members of the 'applicant group' was contingent on consultation;
- therefore, there was 'at least a real doubt as to the effectiveness of the authorisation relied on by' the firm of solicitors—at [14].

The state submitted that the case law recognised that the role of 'the applicant' was a representative one and that it was not 'competent' for only some of the persons who comprised 'the applicant' to obtain separate legal representation and act other than by unanimous agreement. His Honour was of the view that:

> In these circumstances…there is a significant doubt whether…[the firm of solicitors] has been duly authorised to act. I think the better view is that there is no such authority on the face of the present documents and the evidence before me—at [15].

Jurisdiction

The application to set aside the dismissal order was brought under O 35 rule 7(2)(c) of the Federal Court Rules, which gives the court power to set aside a judgment after it has been entered where the order is interlocutory. In this case, the order of dismissal had been entered. Tamberlin J found that:

> [T]he orders for dismissal effective as from 2 November, is final because it has the effect of dismissing the applications. However, having regard to the conclusion I have reached as to the exercise of my discretion it is not necessary to resolve this question—at [16].

Discretion

Assuming that the court had power (i.e. discretion) to set aside the orders made, his Honour was of the view that it should not be exercised in this case because:

> It is well settled that, although broad, the discretion conferred by O 35 r 7(2)(c) should be exercised in a judicial manner and only in exceptional circumstances…This guideline is based on the principle of finality of litigation which counsels courts to exercise caution when considering whether orders previously made and final on their face and entered should be reopened for consideration and set aside—at [17].

It was noted (among other things) that:

- no satisfactory attempt was made to either comply with the orders and file a new application or have the orders vacated;
- the directions to file a new application were part of a strategy to resolve overlaps and reinstating these applications would create an overlap with another application and result in all the overlapping applications being programmed for trial;
- the Kullilli People could make a new application that was both properly authorised and also removed 'the doubts inherent in the present circumstances'—at [17] to [23].

Decision

The application for reinstatement of the applications was dismissed and the application to set aside the order that a new application be filed was refused—at [24].

Strike-out under s. 84C

Beattie v Queensland [2007] FCA 596

Kiefel J, 27 April 2007

Issue

The issue in this case was whether a claimant application should be struck out pursuant to s. 84C(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

A strike-out application under s. 84C(1) was brought by Thomas Newman, a respondent to

the Western Wakka Wakka People's claimant application. Section 84C provides for strike-out of an application made under s. 61 of the NTA that does not comply with ss. 61, 61A or s. 62.

Mr Newman also sought, in the alternative, an order under O 35A r 2 of the Federal Court Rules (FCR) to stay or dismiss the application on the basis of non-compliance with the court's orders and directions. The State of Queensland, local government respondents and, to some extent, those making seven overlapping claimant applications groups supported Mr Newman's application.

Claimant application

When the Western Wakka Wakka People's claimant application was filed in 1999, it was made on behalf of the descendants of certain named persons and stated that:

- 'these families recognise that they are direct descendants of the Western Wakka Wakka People'; and
- there were no relatives claiming in the Western Wakka Wakka claim area 'other than those named in this claim'.

The native title claimed was said to be subject to, and in accordance with, 'traditional Western Wakka Wakka laws and customs' but the application contained statements that the authority to lodge the claim was 'through practised family customs and practices' and, at another point, 'according to Western Wakka Wakka laws and recent practices of Aboriginal decision-making on behalf of the…descendants group'.

The claimant application expressly stated that the claim group did not assert it comprised the only traditional owners of the area. Her Honour Justice Kiefel noted statements to the effect that:

> [I]n the event that the [Western Wakka Wakka People's] claim is not successful, the claim group would automatically be a party to the Barunggam native title claim [one of seven overlapping claims]. If that latter claim was unsuccessful, those claimants could join this claim—at [8].

An affidavit filed by a member of the claim group deposed that it was comprised of seven family groups or 'lines' from a named ancestor, Jane Darlow. However, a comparison of the list of people deposed to as constituting the claim group with the persons identified in the application showed discrepancies—at [9].

Kiefel J noted that the claimant application spoke of 'Western Wakka Wakka People and their laws and customs', on the one hand, but identified the claimants as 'the descendants of only one member of a family' and referred to customs and practices of 'a family'.

Strike-out application

In support of the strike-out application, Mr Newman submitted that the application did not meet the requirements of ss. 61(1) and 62, including requirements relating to the authorisation.

The claimants submitted it should not be assumed that there were other members of the Western Wakka Wakka People because the descendants named in the application may be 'all that remains of them'.

Keifel J thought this submission was problematic because:

> In *Members of the Yorta Yorta Aboriginal Community v State of Victoria*…214 CLR 422…[49]-[50] it was pointed out that laws and customs necessary to support native title do not exist in a vacuum; they arise out of and define a particular society—at [11].

In this case, there was nothing to suggest the continued existence of a wider group i.e. a society of Western Wakka Wakka persons who observe that society's laws: 'If such a group did once exist, all that remains are the descendants of one person and they are said to follow family customs and practices'—at [12].

It was found that s. 61(1) was not met because (among other things):

- the families in the claimant application may be part of a larger group i.e. the application stated that the Barunggam people had the same native title rights as the claim group in this case, which was demonstrated by the statement in the application that the Barunggam people 'could elect to join in the claim';

- the assertion that the claim group in this case might also join in the Barunggam people's claim was also 'one of a shared right';
- it could be inferred that this claim group identified with the Barunggam claim group but chose to make 'a discrete claim on behalf of the families over a specific area' and it may be that the families in this case were 'but a sub-group of a larger group';
- the only inference that could be drawn from the reference to the Barunggam people in the application was that those persons were accepted as having the same native title interests as the Western Wakka Wakka i.e. no other explanation was possible;
- therefore, the Barunggam people were 'necessary to the authorisation process' for the Western Wakka Wakka application;
- further, the evidence of the claim group showed that the persons who had been treated as the claim group with respect to the application were not the same in every respect as those identified as descendants in the application itself—at [14] to [16].

Her Honour was also of the view that the requirements of s. 62 were not met both because of deficiencies in the mapping and description of the claim area and the deficiency or absence of the required affidavits—at [18].

It was found that amendment would not be sufficient to overcome the extent of the non-compliance with ss. 61 and 62 and, in particular:

> The problem of authorisation cannot…be resolved by amendment of the claim and the question of the proper constitution of the claim group must be addressed—at [20].

Decision

The application was struck out—at [24].

Kiefel J noted that, had s. 84C not been relied upon, the court would have been inclined to use the powers given by O 35A of the FCR to dismiss the application because:

> There has been a complete lack of response to the Court's orders, nothing to show that the claimants are motivated to progress these proceedings and nothing to suggest that there is any purpose to be served by their continuation—at [23].

Replacing the applicant using Federal Court Rules

Chapman v Queensland [2007] FCA 597

Kiefel J, 27 April 2007

Issue

The issue in this case was whether the Federal Court could make orders:

- to remove three people from the group constituting 'the applicant' for a claimant application made under s. 61 of the *Native Title Act 1993* (Cwlth) (NTA) using the Federal Court Rules (FCR); and, if so
- directing the Native Title Registrar (the Registrar) to amend the Register of Native Title Claims (the Register) to reflect that order.

Background

In this case, an application was made by 12 of 15 people authorised to make the Wakka Wakka People's claimant application to have the other three people removed. One of the three people concerned was dead. The other two (Sam Murray Jnr and Reggie Little) had allegedly 'refused to co-operate' with the other 12 and 'evinced an intention' not to act in a representative capacity for the claim group. However, no meeting of the claim group had been held to revoke their authority. All 15 people were authorised at claim group meetings held more that seven years ago—at [1] and [6].

Mr Little and Mr Murray Jnr did not appear at the hearing of this matter.

Her Honour Justice Kiefel noted that:

- where (as in this case), more that one person is authorised to be the ***applicant***, s. 61(2)(c) of the NTA provides that those persons are 'jointly, the applicant';
- section 66B provides a procedure for replacing the 'current applicant' on the ground that the 'current applicant' is no longer authorised by the claim group, or has exceeded the authority the claim group gave, to make the application and deal with matters arising in relation to it—at [2] to [5] and see ss. 62A and 64(5).

Could the constitution of the applicant be changed using the FCR?

The first issue was whether the court was empowered to make an order that the three people who were currently included in 'the applicant', as defined in s. 61 and 253 of the NTA, 'cease to be parties to the proceedings' pursuant to Order 6 rule 9 of the FCR—at [6].

This sub-rule could only apply if each of the 15 persons authorised was, in their own right, a 'party to the proceeding'. If the intention under the NTA was that the 15 people authorised in 1999 were jointly 'the applicant' as an 'entity' and, therefore, an indivisible 'party' to the proceedings, then the court could not rely upon O 6 r 9 of the FCR to remove any of them. Instead, it would require evidence that the claim group had authorised the alteration of the constitution of the applicant in accordance with ss. 64(5) or s. 66B(1).

Nature of the applicant

Her Honour was of the view (among other things) that:

- the reference in s. 61(2)(d) to persons being jointly 'the applicant' did not create a legal entity capable of suing;
- the interest of each member of the claim group was identical and those authorised are representative of the entire claim group;
- the continuance of authority must depend on the terms of the authorisation given, a matter on which the NTA 'did not speak', other than in s. 251B(a);
- the presumption that usually applied to personal appointments could operate i.e. the authorisation of a person was intended to continue until revoked and while that person was willing and able to act in a representative capacity;
- this presumption may yield to other indicia of the claim group's intention i.e. whether or not a person was authorised was a question of fact;
- the requirement under the NTA that the persons authorised act together was not a term or condition of appointment but a statutory requirement having as its purpose the efficient prosecution of claims;
- the reference to the 'current applicant' being no longer authorised in ss. 64(5) and 66B(1) should be taken to refer only to those persons whose authority has in fact been revoked;
- a contrary approach would mean that the 'applicant' in native title proceedings would cease to exist if it transpired that just one of the persons making up 'the applicant' was not a member of the claim group or died, and involve the considerable expense of undertaking another authorisation meeting of the entire claim group—at [9] to [12], referring to *Butchulla People v Queensland* (2006) 154 FCR 233; [2006] FCA 1063 (summarised in Issue 21 of *Native Title Hot Spots*) and *Doolan v Native Title Registrar* [2007] FCA 192, summarised in this issue of *Native Title Hot Spots*.

This approach:

- does not limit 'the grounds for the effective removal of a person' to those found in s. 66B(1);
- rather, it gives effect to the basis upon which authorisation was originally made at—at [13].

Therefore, it was found that the references in the NTA to 'the applicant' did not prevent the authorisation of persons as applicant being viewed 'individually' and so there was no reason why O 6 r 9 should not have operation—at [14].

Comment

There are a number of issues that arise from her Honour's decision on this issue, including that:

- if it transpired that 'just one' of the persons making up 'the applicant' was not a member of the claim group, then s. 61(1) would not be satisfied because it provides that those who may make a claimant application must be members of the native title claim group;
- the 'grounds for the effective removal of a person' in the NTA are not, as her Honour appears to imply, limited to those found in s. 66B(1) because s. 64(5) is available i.e. an application to amend can effectively remove people from the group named as the applicant, provided there is affidavit evidence that 'new' applicant (i.e. those remaining) are authorised by the claim group.

Order 6 rule 9

Based on material before the court, her Honour concluded that the conduct of Mr Little and Mr

Murray Jnr in connection with the claim allowed a finding that neither of them was a 'proper or necessary' party and so an order should be made that each ceased to be a party to the proceedings. This included material indicating that they:

- had not attended any meeting of the 'applicant group' since early 2003, despite invitations to do so;
- had supported an unsuccessful attempt to strike out the Wakka Wakka People's claim;
- would not participate in Indigenous Land Use Agreement negotiations, which led to loss of benefits for the claim group—at [7].

Order to amend register

The issue here was whether, in the absence of an express power, such as that found in s. 66B(4), the Registrar was empowered to amend the Register of Native Title Claims to reflect the order made under O 6 r 9. If there was no implied power, the there would be an 'inconsistency between 'the applicant' on the Register and the parties (i.e. the applicant) named in the proceedings before the court.

Her Honour was of the view that:

- 'a power of amendment or correction' was necessarily implied because s. 186(1) indicated that the Register 'must reflect the true state of affairs as to those persons who comprise the applicant';
- as an order under O 6 r 9 was justified and had been made, the Register should be amended accordingly—at [16] to [17].

It was noted that, in 'contentious' cases, it may be necessary for the court to order the amendment of the Register after a hearing, with or without a declaration as to the right of persons to continue to be an applicant. While a declaration could be made in these proceedings 'as reflecting the foundation for the consequential order under O 6 r 9', Kiefel J thought it did not appear to be necessary—at [17].