



RUBIBI COMMUNITY V STATE OF WESTERN AUSTRALIA (NO 6)

Federal Court of Australia (Merkel J)
13 February 2006 (Corrigendum 15 February 2006)
[2006] FCA 82

Native title — whether one community may claim native title rights and interests over country of another group — relationship between different groups for purposes of native title holding community — nature of succession — criteria for membership of Yawuru community — whether Yawuru had exclusive possession and occupation rights to parts of claim area where native title has not been extinguished — whether the Yawuru community is historically connected to northern parts of claim area.

Facts:

The Yawuru community sought determination of a native title claim in relation to land in northern Western Australia. The area began south at Bungarrangarra and extended north to Willie Creek, including the Broome area. Minimal disagreement arose in relation to the Yawuru community's historical connection to the southern parts of the claim area. However, significant controversy existed about whether the Yawuru community had the requisite historical connection to the northern parts of the area. Most of the evidence established that the northern parts were historically associated with a group known as the Djugan, rather than the Yawuru.

The central conflict was whether, at sovereignty, the Djugan constituted a different community to the Yawuru. The respondents argued that, historically, the Djugan were a separate tribe from the Yawuru, and that the Djugan, not the Yawuru, possessed native title rights and interests in the northern area. The respondents also submitted that even if the Djugan had been subsequently absorbed into the Yawuru community, this had occurred post-sovereignty and could not result in the native title rights and interests of the Djugan being transferred to the Yawuru.

The applicants argued that the Djugan were a clan or subgroup of the Yawuru, who spoke a dialect of Yawuru and always formed part of the Yawuru community. Further, the applicants contended that the traditional laws and customs of the Yawuru community allowed for a succession by the

Yawuru to Djugan country, and that such a succession had occurred.

The parties also contested the membership criteria for the native title holding group. The Yawuru applicants provided evidence that persons known as the Goolarabooloo, who were descendents of Lulu, constituted part of the Yawuru community. The Yawuru argued that a person could become a member of the native title holding community according to the principle of 'recognition'. Members of the Yawuru community considered Lulu to be a part of their community because he had assumed the role of a senior law man and played a major role in protecting sacred sites in Yawuru. No evidence was adduced that Lulu identified himself as a Yawuru man.

In relation to the nature and extent of native title, the Yawuru claimed that the community was entitled to exclusive possession and occupation of the Yawuru claim area, excluding the intertidal zone where there had been no extinguishment of native title.

Preliminary issues relating to the native title claim made by the Yawuru community were resolved by Merkel J in *Rubibi Community v State of Western Australia (No 5)* [2005] FCA 1025, and should be read in conjunction with the present case. In his interim reasons, Merkel J held that the Yawuru community were a recognisable body of persons likely to be descendants of the Yawuru community at the time of sovereignty. He found that the traditional laws and customs of the Yawuru had continued as the normative system under

which the native title rights and interests were claimed. These laws and customs, still acknowledged and observed by members of the Yawuru community, satisfied the requisite spiritual, cultural and social connection to land and waters in the Yawuru claim area as required by s 223 (1)(b) of the *Native Title Act 1993* (Cth) ('the NTA').

Held, as to the identification of the native title determination area:

1. The relevant community possessing native title at and since sovereignty is the Yawuru community, of which the Djugan is a subset or subgroup: [84].
2. While the early ethnography regarded the Djugan and Yawuru as different tribes, it does not follow that each group possessed their own communal native title rights and interests at and since sovereignty in respect of the northern and southern areas respectively: [32].
2. On the balance of probabilities, irrespective of whether in anthropological terms they were correctly designated to be separate tribes, the extensive connections and commonalities between the Djugan and the Yawuru (including their common Yawuru language) resulted in the Djugan being designated by the *Bugarrigarra* as a subset or subgroup of the Yawuru speaking community at and since sovereignty: [82].
3. The absorption of the Djugan into the broader Yawuru community does not detract from the entitlement of the Yawuru community to native title in relation to Yawuru country. The cessation of the practice of the northern tradition by part of the Yawuru community is no more than a cessation of the acknowledgment and observance of some of the discrete traditional laws and customs acknowledged and observed by one of the subgroups constituting the native title holding community. The continuity of the practice of the southern tradition provided a continuity of the practice of the traditional laws and customs that provide the foundation for the Yawuru community's entitlement to native title in the Yawuru claim area: [83].
4. Over time and in accordance with the traditional laws and customs acknowledged and observed by the Yawuru community (including the Djugan as a subset of that community), that community succeeded to any discrete or specific connection or association the Djugan had with the northern area: [94].

Held, as to the criteria for membership of the native title holding community:

1. Persons referred to as the Goolarabooloo are not part of the Yawuru community for the purposes of a native title holding community: [107].
2. It is possible that a person who is not of Yawuru descent, but who has assumed the role undertaken by Lulu, may be regarded by community members as having been incorporated into the Yawuru community. However, Lulu was a Nygina man who did not identify himself as a Yawuru person or as a member of the Yawuru community. Lulu's descendants, who did not have a Yawuru parent, also did not identify themselves as Yawuru: [107], [104].
3. Further evidence would be required to establish a principle of 'recognition': [110].
4. It is necessary for the person who is incorporated or adopted into a community to genuinely elect to become part of that community: [110].

Held, as to the nature and extent of native title:

1. The Yawuru community used and occupied the Yawuru claim area at and since sovereignty and has maintained its religious and spiritual connection with that area. The findings concerning that use and occupation; *rai*; the consequential totemic relationship with country; the linking of places with traditional stories; hunting and gathering in the intertidal zone and on the land; a commitment to 'protect country', to 'look after country' and a right, particularly for senior Yawuru law men and law women, to 'speak for country'; relate to numerous sites and locations throughout the Yawuru claim area: [112].
2. The native title rights and interests possessed by the community are possessed throughout the claim area, rather than in particular sites in that area: [112].
3. A right exists to require that permission is sought by strangers to access Yawuru country: [115], [116].
4. There may be some areas which have been in common usage but this does not mean that native title has been extinguished in these areas. Accordingly, there is a possible exception in respect of exclusive possession in relation

to areas of that kind, which will be determined in a later judgment: [117].

5. Notwithstanding a possible exception to extinguishment, the Yawuru community is entitled to exclusive possession and occupation of the Yawuru claim area (excluding the intertidal zone) where there has been no extinguishment: [118].

6. Rights should be limited to exclusive possession and occupation and do not extend to 'use and enjoyment'. The right claimed to 'speak for' the land is subsumed in the global right of exclusive possession and occupation: [118].

Case Extract:

...

(e) The remaining issues

10. The interim reasons are to be read together with these reasons in which I use terms that are defined in the interim reasons ...

11. Following delivery of the interim reasons, the parties requested that the remaining issues be referred to mediation. As the mediation did not resolve those issues, they now need to be determined. The remaining issues are:

- (a) the identification of the native title determination area;
- (b) the criteria for membership of the native title holding community;
- (c) the nature and extent of the native title rights and interests possessed by the native title holding community;
- (d) the native title rights and interests that have been extinguished.

12. In these reasons I determine the first, second and third of the above four issues. In doing so, I have approached the evidence on the basis that I am satisfied, on the balance of probabilities, that the Yawuru claimants have established that the *traditional* laws and customs, which I have found in the interim reasons are being currently acknowledged and observed by the Yawuru community in relation to the Yawuru claim area, have evolved from the *traditional* laws and customs acknowledged and observed by the Yawuru community in relation to that area at the time of or shortly after colonial contact, and therefore at sovereignty.

13. Because of the complexity of the extinguishment issues, the passage of time since they were formulated and decisions of the Court on extinguishment since the formulation of those issues, I propose to give further directions concerning the determination of the extinguishment issues that the parties still wish to argue.

2. The native title determination area

(a) Introduction

14. The Yawuru claim area starts down south at Bungarrangarra, proceeds north to include the Broome area and finishes in the north at Willie Creek. The claim area extends to the eastern inland boundary and includes the coastal waters in the intertidal zone between the high water mark on the western land boundary and the lowest astronomical tide. South of the claim area is Karrajarrri and Nyangumarta country, south-east is Mangala country, north is Jabirr Jabirr, Nyul Nyul and Bardi country and north-east is Nygina country. There was little dispute about the Yawuru community's historical association and connection with the southern parts of the Yawuru claim area. However, there was a substantial dispute about whether the Yawuru community was historically associated or connected with the northern parts of the claim area.

(b) The southern area

15. In the interim reasons, save for the broad finding that the Yawuru community possesses native title rights and interests in at least some of the land and waters situated in the Yawuru claim area, I did not determine the land and waters in the claim area in which native title rights and interests are possessed by the Yawuru community. The clans constituting that community were generally regarded as including the clans known or recorded as Walman, Minyirr, Leregon, Julbayi, Langandjano and Idarr. However, I determined that the native title rights and interests possessed in the claim area were communal rights and interests held by and on behalf of the Yawuru community, and were not group rights or interests held by or on behalf of the members of any clans comprising the Yawuru community. In particular, I determined that the Walman Yawuru clan did not have the group native title rights and interests in the areas in which they claimed native title or in Minyirr, which includes certain beaches and adjacent areas in and around Broome.

16. There was little dispute about the boundaries of the claim area south of Broome ('the southern area'), which were recognised by senior law men from neighbouring 'country'. However, a significant dispute concerned whether historically, the Djugan community, rather than the Yawuru community, were entitled to the native title rights and interests claimed in the area in, adjacent to and north of Broome and extending to Willie Creek ('the northern area').

(c) The northern area

(i) Introduction

17. The evidence established that the northern area was historically associated with a group known as the Djugan. A Djugan application for native title in the northern area was filed in 2000, but was subsequently discontinued.

18. The State's case is that historically the Djugan were a tribe that was distinct from the Yawuru tribe and that, at and since sovereignty, the Djugan possessed native title rights and interests in the northern area ...

19. It follows, so the State argues, that even if the Djugan subsequently lost their separate identity as a tribe, and were absorbed into the Yawuru community, that occurred post-sovereignty and cannot result in the historical native title rights and interests of the Djugan community becoming native title rights and interests possessed by the Yawuru community. Accordingly, so it is argued, the native title determination area cannot include the northern area. The Western Australian Fishing Industry Council generally adopted the State's submissions on this issue.

20. The Yawuru claimants' riposte was that the Djugan were a clan or subgroup of the Yawuru people, spoke a dialect of Yawuru and always formed part of the Yawuru community that possessed native title rights and interests in the Yawuru claim area. In addition, the Yawuru claimants contended that, in order to prevent Djugan country from becoming 'dead country', the traditional laws and customs of the Yawuru community provided for a succession by that community to Djugan country and such a succession had occurred in the present case.

21. In *Rubibi Community v The State of Western Australia* [2001] FCA 607 ('*Rubibi*'), which concerned the Yawuru community's claim to the law ground at Kunin, the evidence

concerning the Djugan led me to conclude (at [99]) that 'at least in relation to their traditional connection to Kunin, the Djugan people are a subgroup of the Yawuru people'. At the hearing in this proceeding, which related to the establishment of native title in the Yawuru claim area, a considerably greater body of evidence was adduced in relation to the Djugan. An aspect of that evidence was that, unlike the Yawuru who practiced the southern tradition, the Djugan practiced the northern tradition ...

22. The main factual questions contested by the parties were whether at sovereignty the Djugan were a different tribe or community to the Yawuru and whether since sovereignty the Djugan have continued to be a different tribe or community to the Yawuru. Before turning to consider the evidence that is relevant to those questions it is appropriate to make a brief observation in relation to the difficulties involved in determining the identity and nature of the community occupying the Yawuru claim area at and since sovereignty.

23. Although colonial contact occurred in the area late in the nineteenth century there was little reliable anthropological or linguistic research until the late 1920s and the 1930s. As I later explain, while that research is helpful, it only incidentally touched upon the distinction between the Djugan and the Yawuru.

24. In an endeavour to determine the identity and nature of the Yawuru community, I have considered all of the evidence but have given particular weight to the evidence concerning the views expressed by Aboriginal elders prior to the commencement of the present native title claims. The reason for that is that those views are based primarily on the traditional laws and customs passed down to those elders from their elders and can be taken to reflect a traditional view of the matters being addressed. While I do not discount the more recently expressed views in relation to the same matters, it is inevitable that, to some extent, those views may have been influenced by the existence of the native title claims.

(ii) The Djugan 'tribe'

25. The early ethnography supports the State's case that at sovereignty the Yawuru 'tribe' was associated with the southern area and the Djugan 'tribe' was associated with the northern area. Bischofs (1908) distinguishes between the two tribes and Connelly's Map of the Distribution of Tribes in Western Australia (1932) shows the 'Juken' tribe at Broome.

Elkin, whose findings were based on his fieldwork in the Kimberley region in 1927-1928, clearly associated the 'Yauor' tribe with the southern area and the 'Djukan' tribe with the northern area. It is also clear that Elkin saw the Djukan as being culturally distinct from, rather than a clan or subgroup of, Yawuru. Worms also identified the Djukan and Yawuru as separate tribes in his notebook but Worms' listing of the 'Nadja' and 'Nangu' of the Karajarri tribe as separate tribes raises a question about the criteria applied by Worms, who was not an anthropologist. Also, as was pointed out by the Yawuru claimants, Worms recorded that the Djukan spoke a dialect of Yawuru, that the features of the country occupied by the Djukan were described in the Yawuru language and that Yawuru local groups occupied areas within, or very close to, the areas said to be occupied by the Djukan.

...

29. It is, however, clear from the early ethnography and other evidence that the Djukan were devastated by the colonisation of their land and by the early 1900s were struggling to survive as an identifiable group. The sudden and early disintegration of the Djukan explains why the subsequent ethnography concerning the Djukan was so problematic. In spite of the shortcomings of that ethnography, the Yawuru claimants were not able to point to any early ethnography that expresses a view contrary to that contended for by the State or which supports their claim that no significant distinction is to be drawn between the Djukan and the Yawuru at sovereignty.

30. Although the oral history evidence adduced by the Yawuru claimants, and some of the recent ethnography, supports the view that at the present time no significant distinction is drawn between the Djukan and the Yawuru, that view is consistent with the absorption of the Djukan community into the Yawuru community during the twentieth century, rather than inconsistent with the views expressed in the early ethnography.

31. I am satisfied that the evidence establishes that:

- (a) the early ethnography regarded the Djukan and the Yawuru as different tribes;
- (b) the Djukan and the Yawuru were associated respectively with the northern and southern areas in the Yawuru claim area;
- (c) the Yawuru practiced the southern tradition in the claim area and that the Djukan practiced the northern tradition in the claim area; and
- (d) it is more likely than not that the Djukan and the

Yawuru practiced different traditions and were associated with different areas in the claim area at sovereignty.

32. However, it does not follow that the Djukan and the Yawuru each possessed their own discrete communal native title rights and interests at and since sovereignty in respect of the northern and southern areas respectively. The entitlement of different groups to communal native title was considered by the Full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 ('*Alyawarr*') at 466-475 [78]-[112]. The Full Court, after citing a number of cases, observed that members of a 'community' may possess communal native title rights and interests, albeit that they are 'intramurally allocated' to different groups or subsets of the community. Although each of the cases cited by the Full Court turns on its own facts, their Honours (at 475 [112]) accepted that the evidence of 'extensive connections' across the claimant groups supported the primary judge's characterisation of those groups as 'one native title holding community' that had the necessary connection with the land in the claim area 'at a communal or claim group level'.

33. Accordingly, it is necessary to consider the totality of the evidence concerning the Djukan and the Yawuru in order to determine whether, notwithstanding their cultural and other differences at and since sovereignty, the Djukan and the Yawuru are one native title holding community that had the necessary connection with Yawuru 'country' at a communal level.

(iii) Yawuru 'country'

34. Extensive evidence was adduced to the effect that Yawuru 'country' included the northern area. The evidence, which included the views of senior law men and women, was not seriously challenged. The evidence of senior law men from 'country' adjacent to the claim area and the evidence adduced as to the views of senior Yawuru law men and women was that Yawuru 'country' consisted of the southern and the northern areas. Peter Clancy, a senior Mangala law man regarded the northern area as being within 'Yawuru Country because the old people told me'. A senior Nyangumarta law man stated that the shared law that comes from the *Bugarrigarra* included 'the whole lot of that country up to Willie Creek'. Evidence adduced as part of the Walman Yawuru case was also to the effect that 'Mimi', a senior Yawuru law woman who lived in Broome up to the

1950s, had claimed that Yawuru country included Broome and extended up to Willie Creek.

35. O'Connor, the anthropologist called by the Walman Yawuru, conducted field work during the early part of 1992 in which he had engaged in 'wide-ranging regional consultation of Aboriginal Elders'. In his subsequent report based on that fieldwork, O'Connor concluded that the 'Yawuru people are the traditional owners of the Broome area'. The report is significant as it is clear from the early ethnography that the Broome area was associated with the Djugan. O'Connor stated in evidence that he had not, subsequently, received any information from an elder who he would regard as having an authoritative view on traditional law and custom, that would cause him to depart from the following four propositions, which he stated in his report.

...

42. In addition to the above evidence, much of which predates the present native title claims, the Yawuru claimants adduced a substantial body of evidence to the effect that current members of the Yawuru community regard Yawuru country as including the northern area, which a number of witnesses referred to as Djugan Yawuru.

43. The above evidence is significant as a large portion of it is derived from senior Aboriginal elders whose views are based on their understanding, derived from their elders, of 'country' as laid down by the *Bugarrigarra*, which is recognised and accepted as the source of the southern and the northern traditions practiced in the claim area. Viewed as a whole, the evidence supports a finding that the traditional laws and customs acknowledged and observed by the Yawuru community regard that community's 'country' as including the northern and southern areas.

(iv) Practice of the northern and southern traditions in Yawuru 'country'

44. The State relied upon the practice of the two traditions in the Yawuru claim area to support its claim that the Djugan and the Yawuru were different communities at sovereignty. As I explained in the interim reasons, the northern and southern traditions are distinct mytho-ritual traditions with their own law grounds in the Yawuru claim area and with their own senior law men responsible for those grounds. However, each of the traditions is underpinned by and derived from the one source, which is a common belief in the *Bugarrigarra* ...

48. The fact that a significant number of Yawuru men have gone through both southern and northern law indicates that, although both traditions were kept separate, participation in both by the same person was not viewed as involving any incompatibility or conflict with their membership of the Yawuru community or with the traditional laws and customs of that community. It is also relevant that, although the law grounds associated with the northern and southern traditions were respectively located in the northern and southern areas, there are some places associated with the southern tradition in the northern area ...

52. The above evidence supports a finding that, although the northern and southern traditions were culturally distinct, many of their traditional laws and customs were the same, or substantially the same. Further, it is appropriate to infer from that evidence that the traditional laws and customs acknowledged and observed by the Yawuru community provided for the practice of the northern and southern traditions in the Yawuru claim area. In those circumstances, I do not accept the State's submission that it is appropriate to infer from the practice of the two traditions in the claim area that different traditional communities, and therefore different native title holding communities practiced each tradition ...

(vi) The contemporary Yawuru community

66. The oral history evidence points strongly to the Djugan being part of the contemporary Yawuru community.

67. In an interview in 1993, Elsie Edgar stated that around Broome the Minyirr Yawuru and Djugan Yawuru were 'still Yawuru. But all the same Minyirr and Djugan. One way.'

Phillip Corpus stated that he was told by his 'Mimi' in the 1950s that after the Djugan had 'died off' they became 'one big Yawuru language tribe' because they always spoke Yawuru language.

68. In a 1996 court case, Frank Sebastian stated that he was told by the old people that the Djugan were a clan, 'part of the Yawuru people' and looked after the land from Fishermen's Bend up to Willie Creek. Susie Gilbert's husband, then aged 88, gave evidence in the same case stating that he was made a senior boss man by 'old Taylor Paddy', and that he was the boss of the 'Yawuru tribe', of '[a]ll Yawuru people'. Susie Gilbert's husband also said that around Broome is Yawuru

country and that he had been told by the old people that Yawuru and Djugan were the ‘same thing’.

...

- (vii) The native title holding community for Yawuru ‘country’

78. The normative system that determines the existence and possession of native title in the Yawuru claim area, both at sovereignty and at the present time, is the system acknowledged to have been prescribed by the *Bugarrigarra* in relation to Yawuru country. As I noted at [367] and [370] of the interim reasons, the southern tradition is *part* of that system and *part* of the traditional laws and customs acknowledged and observed by the Yawuru community. In these reasons, I have considered in greater detail the evidence concerning the role of the northern tradition in Yawuru country. That tradition, which was practiced by the Djugan, was placed in Yawuru country by the *Bugarrigarra*. In determining the content of the normative system under which the native title rights and interests in issue are being claimed, the communal belief in the *Bugarrigarra*, and its role in providing for the southern tradition and the northern tradition in Yawuru country, must be taken into account. When the common source of both traditions is taken into account, there is no reason why each of the traditions should not be taken as recognising and providing for the practice of the other tradition in the Yawuru claim area by local groups who are part of the community of Yawuru persons designated by the *Bugarrigarra* to be speakers of the Yawuru language in Yawuru country.

79. The evidence to which I have referred establishes that, notwithstanding their cultural differences, there were extensive traditional connections and commonalities between the Djugan and the Yawuru, the common source of which was the *Bugarrigarra* in so far as it related to ‘Yawuru’ country ...

81. In my view, an analogous situation arose in Yawuru country where it can be said that the practice of the two traditions did not impair the status of the Djugan as a local group that was part of the Yawuru community at and since sovereignty. In that regard, the relationship created by the *Bugarrigarra* between Yawuru language and ‘country’ is of particular importance in supporting a finding that, at and since sovereignty, the Djugan and the other Yawuru local groups formed one native title holding community.

82. I have concluded on the balance of probabilities that, irrespective of whether in anthropological terms they were correctly designated to be separate tribes, the extensive connections and commonalities between the Djugan and the Yawuru (including their common Yawuru language) resulted in the Djugan being designated by the *Bugarrigarra* as a subset or subgroup of the Yawuru speaking community at and since sovereignty. In my view, that community was united in and by its acknowledgement and observance of a body of laws and customs that each community’s members believed had been laid down by the *Bugarrigarra*, in so far as those laws and customs related to Yawuru country. By those laws and customs, which are the specific laws and customs I described in the interim reasons, the Yawuru community established and maintained the requisite connection, at and since sovereignty, with both the northern and southern areas (including the intertidal zone) of the claim area.

83. As a result of the absorption of the Djugan into the broader Yawuru community during the twentieth century, the practice of the northern tradition by descendants of the Djugan is likely to have been substantially replaced by the practice of the southern tradition by the Yawuru community throughout the claim area. However, I do not regard that as detracting from the entitlement of the Yawuru community to native title in relation to Yawuru country. The reason for that conclusion is that the cessation of the practice of the northern tradition by part of the Yawuru community is no more than a cessation of the acknowledgment and observance of some of the discrete traditional laws and customs acknowledged and observed by one of the subgroups constituting the native title holding community. Further, I am satisfied that the continuity of the practice of the southern tradition provided a continuity of the practice of the traditional laws and customs that provide the foundation for the Yawuru community’s entitlement to native title in the Yawuru claim area. In that regard it is relevant, as was observed by Palmer, that the two traditions shared much in common in relation to their respective traditional laws and customs.

84. For the above reasons, I have concluded that the relevant community possessing communal native title at and since sovereignty is the Yawuru community, of which the Djugan is a subset or subgroup.

85. If, contrary to my view, the Djugan have any discrete rights or interests in the northern area, that would raise the issue of whether, under the traditional laws and customs of

the Yawuru community, that community succeeded to those rights or interests. As that issue was the subject of dispute, it is appropriate to set out my findings on it.

(viii) Succession

86. The three main anthropological witnesses (Samson, Palmer and O'Connor) did not differ substantially in their views of the principles that allow for succession under traditional law and custom.

87. In his Further Anthropological Report, Samson referred to examples of succession, which he described as a 'process that is not completed in an instant but is, rather, a gradual accession of the successors to the land'. Samson added:

'The slow pace is associated with the gaining of region-wide approval. After years of acting as caretakers or trustees of vacant land, the successors by regional assent come to ownership of that land.'

88. Samson's oral evidence was as follows. Succession processes may take longer than one generation and could drag on for many years. In the interim period, the claimants to future succession would have transitional or interim rights such as the right to access the country, the right to use the resources of the country and the obligation to look after and care for the country. Samson was not aware of any case where there had been principled succession to a different tribe's country. However, a south to north succession of peoples of the same tradition would be an easy one, theoretically, because it would be transition within a tradition. There may also, in principle, be a succession between tribes of the same tradition as with clans within a tribe, because, when people face unprecedented contingencies, they are likely to do something about it: cf *Neowarra v State of Western Australia* [2003] FCA 1402 ('*Neowarra*') at [387]-[388].

89. O'Connor explained that 'dead country' was a concept that was well known to anthropologists. Country was regarded under traditional law and custom as losing its spirituality when the traditional owners responsible for the country died out and no-one else assumed responsibility for it. Thus, traditional law and custom provided for succession by neighbouring or related groups in order to maintain the spirituality of the country. O'Connor, citing Sutton's (2001) review of the anthropological literature on succession, noted that:

'group succession seems to rely on territorial proximity and pre-existing systemic grounds for territorial amalgamation – such as commonality of language, shared rights in Dreamings, or shared kin-class standing ... peoples whose countries are contiguous or which intersect or overlap ... may express a higher-order unit at any time.'

90. Palmer's evidence on succession may be summarised as follows. Aboriginal succession is well documented in the literature, and usually occurred where the groups had a lot in common and very close ties, perhaps through matri-kin or a common culture, where they shared similar principles embedded in law, teachings and beliefs or were adjacent and had close cultural links. There would be a spiritual and not just a functional basis for the succession because the succeeding neighbouring group would understand that the spirituality of the country was something for which they needed to take responsibility. Succession was not likely between two groups that were entirely different in cultural terms because the incoming group would be seen as strangers to the country and would find it difficult to pass through the necessary process of cultural legitimation. Succession was easier if a commonality of culture was expressed through religious belief, particularly where there was a degree of commonality of shared practices and beliefs.

91. It was not seriously in dispute that, as a result of European contact, the Djugan disintegrated as an identifiable group and became unable to sustain their own legal and cultural tradition. However, as the Yawuru claimants noted:

'The nature of [the Djugan population] collapse was not such that all Djugan people were wiped out or that all features of their culture were destroyed. There are to the present day some living Djugan, and these form part of the Yawuru and are represented in the claimant group. However, the Djugan had to rely upon members of the Yawuru to maintain the basis of their traditional law and culture and, over time, the relationship between the Djugan and the Yawuru evolved to the point where one social grouping remained, the Yawuru.' ...

93. In my view, the information provided by the Yawuru elders to Madiros is consistent with the anthropological view that principles of succession formed part of the northern and southern traditions practiced in the Yawuru claim area. Whether there has been such a succession is a question of fact, the answer to which will depend on the nature and

extent of the connections and matters in common between the two groups claimed to be involved in the succession.

94. As explained in these reasons, historically the Djugan (and their practice of the northern tradition) have been associated with the northern area and the Yawuru (and their practice of the southern tradition) have been associated with the southern area. The extensive connections and commonalities between the Djugan and the Yawuru, which led me to conclude that they formed one native title holding community, also lead me to conclude that, over time and in accordance with the traditional laws and customs acknowledged and observed by the Yawuru community (including the Djugan subset of that community), that community succeeded to any discrete or specific connection or association the Djugan had with the northern area. In this context, I have used the concept of a connection or association, rather than that of a native title right or interest, because of my view that such rights and interests were communal, rather than group rights or interests. However if, and to the extent that, the Djugan had any such rights or interests, I am satisfied that the Yawuru community has succeeded to them. In my view, the general requirements for succession to take place in accordance with traditional law and custom, as discussed by the three anthropologists, have been sufficiently met by the connections and commonalities to which I have referred. Consequently, I am satisfied that the evidence supports a finding of succession by the Yawuru community.

(ix) Connection

95. Finally, as I explained in the interim reasons, there is no simple dichotomy between the traditional laws and customs that are connected with land and waters and those that are not. Nonetheless, it is clear from the above findings and evidence that, by almost all of the traditional laws and customs acknowledged and observed by the members of the Yawuru community, the members of that community have always maintained, at the communal level, the requisite spiritual, cultural and social connection to the land and waters in the Yawuru claim area. Thus, I am satisfied that the essential connection, at and since sovereignty, between the laws and customs being acknowledged and observed by the Yawuru community and the Yawuru claim area has been established by the evidence. Accordingly, the Yawuru community, by those laws and customs, has the connection required by s 223(1)(b) of the NTA to the land and waters situated in the Yawuru claim area.

(x) Conclusion

96. For the above reasons, subject to the question of extinguishment, I am satisfied that the Yawuru community possesses communal native title rights and interests in the northern, as well as the southern, areas.

3. Membership of the native title holding community

...

98. The main dispute in relation to membership of the Yawuru community related to the persons known as the Goolarabooloo. In *Rubibi* (at [100]) I was not satisfied that the Goolarabooloo had a relevant connection to the law ground at Kunin. At the present hearing, further evidence was adduced by the Yawuru claimants in an endeavour to establish that the Goolarabooloo constitute part of the Yawuru community that holds native title rights and interests in the Yawuru claim area.

99. The descendants of Lulu call themselves 'Goolarabooloo'. Lulu's grandson Joseph Roe, who has a Yawuru father, said that 'Goolargun' is a Yawuru word for 'the west, from the northern tradition'. Patrick Dodson understood Goolarabooloo to mean 'people who live on the seaside - in the Yawuru country'. However, O'Connor in his 1992 *Report on the Broome Aboriginal Heritage Study* stated that, according to the Yawuru people he had consulted, 'Kullarrabulu' is a collective name for 'salt water' or coastal people both within and beyond the Yawuru claim area.

100. Although Daisy Bates recorded the existence of the Goolarabooloo in 1908, there remains considerable uncertainty as to the basis of the identification of that group other than that it represents a conflation of two Yawuru words, which suggest that the group includes persons living on the coast in Yawuru country ...

102. Joseph Roe described Lulu as 'A Nygina man who held the southern and northern tradition in this community in this country Yawuru'. Teresa Roe, who was Lulu's daughter, regarded herself as Jabirr Jabirr. Patrick Dodson regarded Lulu as having become part of the Yawuru community, and as having the same rights as a person born of Yawuru parents. Evidence was given by Frank Sebastian that Lulu was like 'an Elder to us' and that he and his descendants 'have the right skin for this country'. However, Patrick Dodson conceded

that he had never heard Lulu expressly identify himself as a Yawuru person.

103. There can be little doubt that Lulu was venerated for having assumed the role of a senior law man in order to protect the southern and northern traditions in the Broome area. He also played a major role in protecting sacred sites in Yawuru country. Lulu *rai* was also in Yawuru country.

104. I am prepared to accept the evidence adduced by the Yawuru claimants that a person who is not of Yawuru descent, but who has assumed the role undertaken by Lulu, may be regarded by community members as having been incorporated into the Yawuru community. However, there is the question of whether such a person would be accepted as a member of the native title holding community under the community's traditional laws and customs if he or she has not self-identified as a member of that community.

105. There was evidence that self-identification or choice was regarded as a criterion for membership of the Yawuru community. In her evidence in relation to the Yawuru claimants' case on cognatic or ambilineal descent, Kimal Barrett, an anthropologist, stated that Yawuru people 'have always had [the] choice to follow their mother or their father. And even going right back, if you go back to the earliest people, you can see people choosing one way or the other, just in this country'. The examples given in the evidence of a choice of following either parent, or of taking country from either parent, were not seriously challenged. While the issue of choice was not explored in detail in the evidence, I am satisfied that it is unlikely that a person of mixed parentage who has chosen or elected not to be a Yawuru person or not to be a member of the Yawuru community, would be accepted as part of the Yawuru community that had a traditional connection with Yawuru country.

106. The traditional laws and customs that evolved in order to take into account cognatic or ambilineal descent must be taken to have included a principle of choice of the kind discussed by Barrett. Without such a principle, it would be difficult to accept that a person's traditional and spiritual connection to the country of that person's parent could be established. Such a principle would also be necessary to enable identification of the 'traditional' community claiming to have maintained its connection to its country and to hold native title for that country. It follows from the foregoing that, for the purposes of the claim of the Yawuru claimants

for a communal native title right or interest under s 223(1) of the NTA, save where both parents of a person are Yawuru, it is unlikely that that person can qualify as a member of the Yawuru native title holding community if by conduct or otherwise he or she has not genuinely elected or chosen to identify as a member of that community.

107. In the present case, Lulu was a Nygina man who did not identify himself as a Yawuru person or as a member of the Yawuru community. The same can be said for Lulu's descendants who did not have a Yawuru parent. In those circumstances, I do not accept that the basis put forward for claiming that Lulu and his descendants (ie the persons referred to as the Goolarabooloo) are part of the Yawuru community has been established. Of course, it does not follow that Joseph Roe is not a member of the Yawuru community. Joseph Roe had a Yawuru father and has responsibility for the northern tradition in the Yawuru claim area. However, if he is a member of the Yawuru community it must be as a result of his election or choice and not as a result of being Goolarabooloo.

108. There is also evidence that, although Lulu claimed 'custodianship' of the Ngumbarl areas north of Willie Creek because the 'country was given to him to look after', he did not claim 'traditional ownership' of that country. Lulu's association with the country south of Willie Creek was far less formal in any traditional sense, yet the Yawuru claimants contend, but Lulu did not, that it nonetheless entitles him and his descendants to be recognised as traditional owners of that country. For the reasons set out above, I do not accept that contention.

109. It follows from the foregoing that Lulu, and the Goolarabooloo as such, are not to be regarded as members of the Yawuru native title holding community.

110. In their draft determination, the Yawuru claimants claimed that persons may be members of the native title holding community by adoption or incorporation if, inter alia, those persons were 'recognised' by, or by descendants of, the apical ancestors as members in accordance with traditional laws and customs. While I accept that membership of the Yawuru community may arise by adoption or incorporation in accordance with traditional laws and customs, I have some doubt about whether a principle of 'recognition' was established by the evidence and I also have some doubt about how such a principle might work in practice. As already explained, I am of the view that a person claimed

to have been adopted or incorporated into the community must have genuinely elected or chosen to have become a member of the community. Whether the evidence has established that there is also a 'recognition' principle is a matter which I will give the parties the opportunity to raise with me if they wish to do so.

4. The nature and extent of native title

111. The communal native title rights and interests ultimately claimed by the Yawuru claimants were expressed as follows:

- (a) In respect of areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded – the right of possession, occupation, use and enjoyment as against the whole world.
- (b) In respect of areas where there has been partial extinguishment of native title, where any extinguishment is not required to be disregarded and that are not intertidal areas:
 - (i) the right to live on the land and waters;
 - (ii) the right to access, move about and use the land and waters;
 - (iii) the right to hunt and gather on the land and waters;
 - (iv) the right to engage in spiritual and cultural activities on the land and waters;
 - (v) the right to access, use and take any of the resources of the land and waters (including ochre); and
 - (vi) the right to care for and maintain and protect the land and waters, including places of spiritual or cultural significance.
- (c) In respect of the intertidal areas:
 - (i) the right of access, move about in and on and use and enjoy the land and waters;
 - (ii) the right to hunt and gather in and on the land and waters, including for dugong and turtle;
 - (iii) the right to access, use and take any of the resources of the land and waters (including the fresh water); and

- (iv) the right to maintain and protect the land and waters, including its places of spiritual significance.
- (d) The native title rights and interests claimed in (b) and (c) are not claimed to confer possession, occupation, use and enjoyment to the exclusion of all others. The rights and interests claimed are:
 - (i) exercisable in accordance with the traditional laws and customs of the native title holders; and
 - (ii) subject to the laws of the State and the Commonwealth including the common law.

112. The evidence in the present case establishes that the Yawuru community, as I have defined it in the interim reasons and in these reasons, used and occupied the Yawuru claim area at and since sovereignty and has maintained its religious and spiritual connection with that area. The findings concerning that use and occupation; *rai*; the consequential totemic relationship with country; the linking of places with traditional stories; hunting and gathering in the intertidal zone and on the land; a commitment to 'protect country', to 'look after country' and a right, particularly for senior Yawuru law men and law women, to 'speak for country'; relate to numerous sites and locations throughout the Yawuru claim area. It is clear from the findings and the evidence upon which they were based, and, in particular, the finding that the Yawuru native title determination area is the area defined by the Yawuru linguistic boundary, that the native title rights and interests possessed by the community are possessed throughout the claim area, rather than in particular sites in that area.

113. A significant area of dispute concerned the Yawuru claimants' claim to be entitled to exclusive possession and occupation of the Yawuru claim area, excluding the intertidal zone, where there has been no extinguishment of native title. The inference of exclusive possession and occupation was claimed to be based on the evidence that, under the traditional laws and customs acknowledged and observed by the Yawuru community, the community has:

- (a) the right to use and occupy the claim area;
- (b) the right to 'speak for' and 'look after' the claim area;
- (c) the right to hunt and use 'bush foods' and 'bush

- medicine' throughout the claim area;
- (d) the right to give permission to others to access the claim area; and
- (e) the right to recognition of the above rights by elders from neighbouring 'country'.

114. The evidence outlined in the interim reasons and in these reasons establishes the continuing existence of each of the above rights. In respect of the right to give permission, evidence was given that it was necessary for non-Yawuru people to seek permission to go to Yawuru country so that, inter alia, they can be informed of the places where they were not to go. Patrick Dodson accepted the modern reality of freedom of movement and claimed that Yawuru people no longer 'have the power, the authority, the ability under the white man's system' to exclude people from Yawuru country. But, he said 'we try to encourage those people to respect the customs and practice of the Yawuru people and the Yawuru country'.

115. There can be little doubt that the evidence establishes that there is a traditional requirement for permission to be sought by strangers to access Yawuru 'country' and that requirement is sourced in the *Bugarrigarra*. However, as a result of both colonisation and modern realities the requirement cannot be, and is not being, enforced.

116. In *Neowarra* at [310] and [371]–[376], Sundberg J explained why he rejected the State's submission that, as the claimed right to give permission is not being enforced, the right should no longer be recognised. As was the case in *Neowarra*, I am satisfied that the evidence described at [160]–[173] of the interim reasons establishes the existence of the right and its content, the source of which is the *Bugarrigarra* in so far as it relates to Yawuru 'country'.

117. I have some concern as to how a right of exclusive possession and occupation can operate in any practical way in urban and other areas in common use by the general community. However, as was explained in *Neowarra*, the difficulty in practical enforcement of a native title right is not a proper ground for denying its existence. Further, as usage is closely linked with the issue of extinguishment I have concluded that the existence and extent of the right is to be considered in that context, rather than in the context of practicality. There may be some areas which have been in common usage but in respect of which native title may not have been extinguished. Accordingly, I propose to consider

whether an exception in respect of exclusive possession is to be made for areas of that kind in my decision on extinguishment.

118. Subject to the possible exception referred to above, I am satisfied that, generally, the evidence supports the inference contended for by the Yawuru claimants of exclusive possession and occupation of the Yawuru claim area (excluding the intertidal zone) where there has been no extinguishment. However, for the reasons given by French J in *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2005] FCA 777 at [1072], the right should be limited to exclusive possession and occupation and should not extend to the broader concepts of 'use and enjoyment'. I also agree with his Honour that the right claimed to 'speak for' the land and to make decisions about its use and enjoyment by others is also subsumed in the global right of exclusive possession and occupation.

119. In conclusion, the evidence and findings to which I have referred support a finding of the existence of the rights claimed by the Yawuru claimants as set out in [111] save that the references to use and enjoyment are to be deleted. Also, the proposed determination of the Yawuru claimants does not state the purposes for which the resources of the land and waters in the claim area, including the intertidal areas, may be accessed and used: cf *Sampi v Western Australia (No 3)* [2005] FCA 1716. I doubt that it is contended that the purposes are to be unlimited or are to extend to a general right of commercial exploitation. In the circumstances, it is desirable that the Yawuru claimants address that issue.

120. I would add that, apart from the fact that the rights claimed in the intertidal zone are not exclusive and are necessarily more limited than the rights claimed in the land areas, I see no proper basis for otherwise distinguishing between the native title rights and interests in that zone and in the land. No such distinction was drawn in the evidence or in the traditional laws and customs acknowledged and observed by the Yawuru community.

121. As there will be some issues as to how the final determination should reflect my findings and conclusions, I propose to afford the parties an opportunity of making further submissions on that matter. There also remains for determination the issues the parties still propose to press in relation to extinguishment, as well as any issues arising out of these reasons. I propose to give directions for an early determination of all of those issues.