

FEATURE

Rubibi Interim Decision

Krysti Guest

On 13 February 2006, his Honour Justice Ron Merkel handed down his second interim decision in the Rubibi native title application, which includes the town of Broome¹. The decision follows a previous interim decision on 29 July 2005² and generally finalises the Judge's views on **connection**. The issues concerning **extinguishment** will be heard in early April and are expected to be finalised expeditiously.

Three keys aspects of the connection case were as follows.

- The contest by a group of indigenous respondents, the 'Walman Yawuru', that in accordance with a traditional clan based system, they were the correct native title holding group to the majority of the claim area, as opposed to the applicant's case that native title is communally held by the Yawuru community.
- The State's position that the northern half of the claim area (including Broome) was the traditional country of the Djugan, who were a different society to that of the Yawuru and operated under a different system of law and custom. The impact of colonisation destroyed the Djugan as a community and the Yawuru have since migrated into the Djugan's traditional country. In accordance with Yorta Yorta principles, it was not possible for the Yawuru to claim a traditional connection to Djugan country.
- The State's position that the Yawuru had not established the right of exclusive possession in the claim area, particularly in relation to the townsite, as colonisation had ensured that such a right had become unenforceable.

First Interim Decision on Connection

The findings in the first interim decision on connection were as follows.

- **The Yawuru community is a recognisable body of persons united in and by traditional laws and customs** which, since sovereignty, have constituted a normative system. This system has given rise to native

title rights and interests in the claim area possessed by the Yawuru community.

- There are **two traditions of law operating in the claim area** - referred to as the 'northern' tradition and the 'southern' tradition. These two traditions are kept separate in terms of practice but it is common for Yawuru men to go through both the northern and southern law.
- The **source** of the Yawuru community's traditional laws and customs is the southern tradition as laid down in the *Bugarrigarra*.
- The southern tradition formed part of the traditional laws and customs of the Yawuru community at sovereignty and is still acknowledged as governing all aspects of the traditional life of the Yawuru community. Whilst the present form and practice of these laws and customs has changed in significant respects from sovereignty, the changes do not take these laws and customs outside the normative system, on the grounds that traditional laws and customs are not fixed but evolve over time in response to new or changing social and economic exigencies.
- Native title rights and interests in the respective claim areas were, and still are, possessed only by and on behalf of members of the **Yawuru community and not by or on behalf of members of any of the clans constituting that community**. Hence the Walman Yawuru submissions failed. The anthropological evidence of the necessary relationship between language and territory was significant in this finding.


Second Interim Decision on Connection

Identification of the Native Title Determination Area and the Native Title Holding Group

In determining **whether the Djugan was a distinct tribe at sovereignty** with traditional ownership of the northern part of the claim area **or whether the Djugan were a sub-group of the broader Yawuru community**, the Judge noted that a difficulty in identifying the relevant native title community at and since sovereignty was that there little reliable anthropological or linguistic evidence which properly considered the differences between the Yawuru and the Djugan. However, the Court concluded that it was more likely than not that the Djugan and the Yawuru practised different traditions of law

¹ *Rubibi Community v State of Western Australia* (No 6) [2006] FCA 82 (13 February 2006)

² *Rubibi Community v State of Western Australia* (No 5) [2005] FCA 1025 (29 July 2005)



and were associated with different parts of the claim area at sovereignty.

Significantly, **these differences did not necessarily mean that since sovereignty the Djugan and the Yawuru each possessed their own discrete communal native title rights and interests.** In determining this issue, the Court gave particular weight to the views of senior Aboriginal people recorded prior to the commencement of the native title trial.

The Judge rejected the State's submissions that the appropriate inference from the practice of the two traditions is that two different traditional societies existed at sovereignty which gives rise to two different native title holding groups. The Court found that each of these traditions **is underpinned by and derived from the one source, the common belief in the Bugarrigarra.** This is reflected in the fact that many of the traditional laws and customs of each tradition were the same or substantially similar (eg the Djugan and Yawuru skin system). It is also reflected in the fact that participation by men in both laws is not regarded as creating a cultural conflict and this leads to the inference that the traditional laws and customs of the Yawuru community provided for the practice of both traditions in the Yawuru claim area. Whilst the Djugan had some cultural distinctions to the broader Yawuru community (for example practising primarily the northern tradition), **the Bugarrigarra designated the Djugan as being a sub-group of the Yawuru speaking community**

In coming to this conclusion, Merkel J noted that an important aspect of both the northern and southern tradition is that, under the *Bugarrigarra*, both traditions placed Yawuru language in Yawuru country and the evidence of senior law bosses from the region was that Yawuru country is where Yawuru language is spoken. The expert linguistic evidence was to the effect that Djugan and Yawuru were dialects of one language (Yawuru), although the speakers of the two dialects belonged to culturally distinct groups.

Aboriginal oral history from recordings both prior to the claim and during the trial points strongly to the Djugan being part of the contemporary Yawuru society. The Court found that since sovereignty, the Djugan sub-group have been absorbed into the broader Yawuru community and the practice of the northern tradition and other cultural distinctions

minimised. This absorption did not detract from the Yawuru's entitlement to Yawuru country, as it was no more than a cessation of the acknowledgment of some discrete traditional laws and customs acknowledged by a sub group. It does not mean that the communal Yawuru native title has expired in the northern part of the claim.

In the alternative, Merkel J noted that if he was incorrect and the Djugan did have native title rights and interests in the northern area discrete from the rights of the Yawuru community, then the Yawuru community had succeeded to those rights through an appropriate succession process.


Finally, an important issue arose in relation to whether a non Yawuru man known as 'Lulu' and his descendants ('the Goolarabooloo') were members of the Yawuru community. Through historical events, Lulu assumed the role of a senior law man in relation to both the northern and southern tradition of the Broome area. Accordingly, the Yawuru claimants argued that Lulu have been incorporated into the Yawuru community. Whilst the Judge accepted that incorporation had happened in a general way, he determined that because Lulu had never self identified as a member of the Yawuru community then he could not be part of **native title holding community** because traditional Yawuru laws and customs appear to require an element of self identification or 'direct election' to that community in these circumstances.

The Judge left it open for the Yawuru claimants to further argue that a principle of 'recognition' by the community was in accordance with traditional laws and customs and was sufficient for incorporation into a native title holding community.

Nature of Connection

Merkel J reiterated his earlier view that 'there is no simple dichotomy between the traditional laws and customs that are connected with land and waters and those that are not.' However, it was clear from a wholistic view of the laws and customs acknowledged by the Yawuru community that they have maintained the requisite connection to the land and waters in the claim area.

The native title rights and interests are possessed throughout the whole of the claim area and not merely in relation to particular sites.



Further, contrary to the significant submissions of the State, the claimants were entitled to exclusive possession (excluding the inter-tidal zone) in light of their right to 'speak for', and 'give permission' for access to, Yawuru country. Agreeing with Sunberg J in *Neowarra*,³ Merkel J determined that the existence of this right or permission is not undermined by the fact that it is difficult if not impossible to any longer enforce such a right.

Merkel J raised a concern at how the right of exclusive possession and occupation can operate in any practical way in urban and other areas of common use by the general community and indicated that, absent extinguishment, there may be an 'exception' in respect of exclusive possession for areas in common usage. He indicated this would be considered when the issues of extinguishment are finalised in April.

Finally, it was determined that within the inter-tidal zone, apart from the fact that the native title rights and interests claimed are non-exclusive, these rights and interests should be the same as the rights claimed in the land areas as there was no basis for such a distinction under traditional laws and customs.

Conclusion

The establishment of exclusive possession to the whole of the claim area is a significant victory for the Yawuru community, particularly in light of the history of intensive colonisation in Broome and the vigorous contest by non-indigenous and indigenous respondents over the past decade (both within and outside of the courtroom) to the legitimacy of the Yawuru's claim.

The Court's decision is consistent with the complex and flexible application of the requirements of 'connection' applied by the Full Court in the *Alyawarr*⁴ and *de Rose*⁵ cases and Sundberg J in *Neowarra*. However, the Yawuru will need to await the outcomes of the extinguishment submissions in April, including the important question of the effect of a declaration of the Broome townsite on native title, to reveal the practical implications of this victory.

³ *Neowarra v State of Western Australia* [2003] FCA 1401 (8 December 2003)

⁴ *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (29 July 2005)

⁵ *De Rose v State of South Australia (No 2)* [2005] FCAFC 110 (8 June 2005)

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WHAT'S NEW

Legislation

NTA Reforms

[Information about the proposed NTRB reforms](#) is available at the [OIPC website](#). See also [Questions and Answers - Changes to Native Title Representative Body \(NTRB\) Arrangements](#)

Attorney-General's Dept. Claims Resolution Review homepage (Review to improve the Resolution of Native Title Claims) Just added: [Guide to Making Submissions To The Claims Resolution Review](#)

See also the [Attorney-General's](#) site at for: [Technical amendments to the Native Title Act 1993 Discussion Paper](#); and [Guidelines on the provision of financial assistance by the Attorney-General under the Native Title Act 1993: Consultation draft](#)

Please visit:

<http://www.ag.gov.au/nativetitlesystemreform> for more information about the reforms.

Other

The [Aboriginal Heritage Bill \[FINAL\] Exposure Draft/Victoria](#) is available for download from http://www1.dvc.vic.gov.au/aav/heritage_bill/

[Amendments to the Mining Act 1978 \(WA\) Mining Amendment Act 2004](#)

The Mining Amendment Act 2004 (WA) was passed by Parliament on 26 October 2004 and, apart from the Warden's Court amendments, will be proclaimed and in operation from 10 February 2006. For more information visit: <http://www.doir.wa.gov.au/mineralsandpetroleum/>

Australia. Senate. Environment, Communications, Information Technology and the Arts Committee. [Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005](#). Canberra: Committees Hansard. 8 February 2006. [Aust - cultural heritage; legislation] Report of the committee of inquiry into the bill. For more information visit http://www.aph.gov.au/Senate/committee/ecita_ctte/atsiheritage2005/report/index.htm