The same conciliatory spirit is embodied in the 14 principles. They address the rights of both groups in a fair and equitable way, covering issues such as the rights of pastoralists to graze commercial livestock, protection of Aboriginal sites of significance, recognition of the traditional responsibilities of Aboriginal people to look after country, and acknowledging the need for orderly processes for resolving access disputes.

In a gesture aimed at building on the good progress thus far, the agreement notes the 'extensive goodwill' that already exists between the parties and the need for this to continue in an environment of 'mutual respect and open communication'.

GLSC Executive Director Brian Wyatt described the principles as a significant step forward for Indigenous culture and for defining the rights of Aboriginal people.

"Pastoral lease areas and our traditional lands are one and the same. We congratulate the PGA for its commonsense approach to the burning and enduring need for Indigenous people to stay close to their country," Mr Wyatt said.

PGA President Barry Court said the PGA had always believed that negotiation was far better than litigation and had encouraged its members to take this path. 'These Access Principles give pastoralists the ability to formalise the goodwill that has continued to exist between station owners and their Aboriginal friends,' he said.

The NNTT's Bardy McFarlane said the groundbreaking agreement would assist Indigenous groups and pastoralists to identify their rights to the land and determine how those rights will successfully coexist.

'This set of principles is a major step forward as it provides a guide for the development of agreements between Indigenous groups and pastoralists, and relationships between the groups should further strengthen as a result of this first step."

'The Tribunal congratulates all the parties involved. This is yet another example of what can be achieved through straight talking and cooperation,' Mr McFarlane said.

Neowarra v State of Western Australia **[2003] FCA 1402 (8 December 2003)**

Dr Lisa Strelein

The application for a determination of native title by the people of the Ngarinyin, Worrorra and Wunambal areas of the Wanjina-Wunggurr region of the Kimberley in Western Australia was determined by Justice Sundberg in December 2003. The judgement in *Neowarra v WA* [2003] FCA 1402 recognised exclusive possession native title over a part of the determination area and co-existing rights with a variety of tenures, predominantly pastoral leases.

Treatment of expert evidence

The judge acknowledged that the primary genealogical evidence and evidence of the laws and customs and normative system was that provided by the Aboriginal claimants themselves [42]. Supported by archaeological anthropological and historical evidence, his Honour found that Indigenous people were present in the area at the acquisition of sovereignty and were established in an organised society [61(3)].The genealogies, assisted by expert witnesses, established that the claim group were the descendents of the previous inhabitants of the area.

The judge largely accepted the anthropological and linguistic evidence from experts for the applicants. Criticisms from the respondents that the 'experts' were too close to the applicants were rejected by Sundberg J. His Honour expressed his respect for the candour of the experts in discussing the inherent risks of anthropological research, in working closely with communities whilst retaining a level of professional objectivity, and he accepted that the evidence was not only 'expert' but, in fact, the closeness to the community was part of the qualifications and expertise that made the evidence reliable and useful to the court [113, 116].

Defining the Group

The judge was not concerned with the idea that the 'Wanjina-Wunggurr' community may be an anthropological construct or of recent origin as a descriptive label and accepted that it need not even be a term used by the claimants themselves [395] (see also *Ward* [239]). While the claimants identify as Ngarinyin, Worrorra and Wunambul, and by their Dambun (clan) relationships, they also clearly articulate the extent of the society with which they share a system of law and custom, particularly in relation to land, and that is the extent of the Wanjina-Wunggurr community.

Despite repeated objections from respondent parties, various kinds of conglomerate groups have been accepted in a large number of determinations under the NTA. His Honour suggests that the reasoning of the High Court and lower courts in *Ward* is directly comparable, in which the Miriuwung Gajerrong community was accepted as the appropriate native title holding group. Variants on this theme include *Hayes (the Alice Springs determination)* (1999) 97 FCR 32, in which three estate groups were recognised as holding title; in *Yarmirr* (1998) 156 ALR 370 five clans claimed a communal title; and, most recently, in *Lardill (Wellesley Island)* a composite of groups were recognised as sharing laws and customs that define them as a normative society for the purposes of native title.

His Honour distinguished the findings of Justice O'Loughlin in *De Rose* at first instance in which the submissions of one expert, that there was a Yankunytjara, Pitjantjatjara, Antikurinjawa community, were dismissed. Sundberg J noted that, unlike the case before him, that opinion was not supported by either literature or, most importantly, by the evidence of the claimants [398]. Interestingly, the full Federal Court in the appeal in *De Rose* found that, in fact, the claimants in that case were part of a much larger normative society of the Western Desert and that their entitlement under native title over a particular area must be determined under the traditional laws and customs of the Western Desert community.

Justice Sundberg described this inquiry as the question of the 'native title recognition level' when determining rights held as 'communal, group or individual' rights and interests under s223(1). His Honour determined that it was appropriate for the community to claim communal rights to the area, within which certain groups and individuals will hold various rights and interest as determined by the laws and customs that define the broader Wanjina-Wungurr community. More ever, he suggested that a determination at any lower level would not fully reflect the basis upon which rights and interests were conferred or transmitted.

It appears that in its application, the definition of the community in *Yorta Yorta* based on the operation of a body of law and custom, rather than the specific rights and interests over land, provides a degree of flexibility in the way that groups are determined for the purposes of recognising native title.

Law and Custom

The claimants gave evidence of the Wanjina belief system that was the central differentiating factor that defined the 'boundaries' of the society [167]. Together with the laws that defined the rights and interests of individuals – the Wunggurr place and the Wanalirri story – a broad normative system was established. The judge also considered evidence of the knowledge and use of language, kinship relationships with respect to land and marriage, naming practices, maintenance of sites and stories, ceremonial rituals and performance, mourning/burial practices, and transmission of knowledge to younger generations.

The trial judge considered the High Court's interpretation in *Yorta Yorta* of the word 'tradition' when used to explain law and custom under s223 of the NTA. He noted that in order to be 'traditional' the claimants must demonstrate first, the laws and customs must have been passed from generation to generation, second, they must have existed before the assertion of sovereignty and, third, have had a continuous existence since then [162].

Care must be taken when applying this reasoning. The High Court in *Yorta Yorta* talked

about a system of laws and customs that define a society. That is what must have existed at the time of sovereignty. Justice Sundberg noted that although he would examine the laws and customs individually, the system must be looked at as whole in order to obtain an accurate picture.

His Honour recognised a connection between the law and customs now acknowledged and observed by the claimants and those laws and customs in existence at the acquisition of sovereignty finding that they derive their content from the normative system in existence at the time. However Sundberg J also acknowledged that such a connection may be inferred by the Court from the evidence.

The respondents contended that the acknowledgement of laws and customs has been washed away by the impacts of European settlement, the settling by the claimants in communities and the dilution of knowledge about the laws and customs and lack of enforcement. His Honour referred to the High Court decision in *Yorta Yorta* and held that an interruption to exercise is not necessarily fatal to a claim unless the interruption is so substantial that it results in the creation or requires the recreation of an altogether different normative society (*Yorta Yorta* HCA [89]).

Mere change and adaptation of laws and customs, while operating within the traditional norms was not an interruption under the reasoning of *Yorta Yorta*. Similarly, laws and customs need not be 'mandatory' in order to be normative. A custom does not cease to exist, and nor to does a person cease to be a member of a society if they do not obey the normative rules. His Honour uses the example of speed limits in Australian Road Traffic Laws to demonstrate this point [310]. His Honour considered that change and adaptation of the manner in which laws and customs are observed should accommodate modern circumstances including opportunities to take commercial benefits from traditional practices such as painting.

Physical absence, like absence of the exercise of rights generally, is not fatal to a claim. Justice Sundberg highlights that it is the possession of rights and interests, not the exercise of those rights and interests that is central to the inquiry [40]. In relation to 'connection' under s223(1)(b), his Honour suggests that 'little is required to constitute continuing connection'. It was certainly not considered necessary to live permanently on the claim area in order to maintain connection. Relying on the High Court in *Yorta Yorta*, his Honour held that the maintenance of connection depends upon the content of the laws and customs, and on the evidence in this case the traditional laws and customs accept that connection is maintained through assertion and acceptance [350-1].

Native title rights and interests

Justice Sundberg suggests that to determine the rights 'possessed under traditional law and custom' under s223(1)(a), the laws must be looked at from the Indigenous perspective. His Honour found that the claimants possessed what they would describe as the right to speak for country, to control access, or to own or rule it [495]. While the claimants do not use Australian property law terms to express their own law and custom, the judge found that the evidence sustains a claim to 'possession, occupation, use and enjoyment to the exclusion of all others. His Honour noted that the claims were not disputed by any other Indigenous group and indeed were supported by witnesses from neighbouring groups [379].

With the evidence sustaining a comprehensive right to the land, in the absence of any other non-indigenous interests, s225(b) would not require any greater particularity. More detail may be required where the evidence of laws and customs reveals a more limited set of rights, for example where rights are be shared with other groups. Referring to the applicability of the form of the order in *Mabo* (1992) 175 CLR 1, Sundberg J suggested that even in *Ward* the High Court had accepted that absent extinguishing acts, the trial judge's finding of exclusive possession would have been sufficiently described by the form 'possession, occupation, use and enjoyment' [380-1].

Despite the recognition that traditional laws of the Wanjina-Wunggurr region translated into native title rights and interests in this way, Justice Sundberg suggested that the compre-

hensive right would need to be 'unbundled' into its component parts to determine the impacts of extinguishment [382].

The applicants had suggested that with this underlying recognition of exclusive possession the most appropriate way to determine the impact of extinguishment was by what I would describe as an 'exclusive possession – minus' methodology. That is, the exclusive possession title is reduced by the extent of the interests granted. The Court would assess the rights and interests conferred by the non-indigenous interest and the native title would be extinguished only to the extent necessary to give effect to the right. The exercise of the laws and customs relied upon by the native title holders in establishing their claim would be exercisable subject to the rights of the interest holder. The judge rejected the notion of what he called 'conditional rights' based on decisions of the High Court in *Ward* and *Yarmirr* [475]. His Honour favoured a direct comparison of each law and the rights it confers against the rights conferred. In the result, as demonstrated in *Ward* and later determinations, the grant of any interest in the land, by taking away the 'exclusivity' of the title, denies any ongoing role on the part of the native title holders to make decisions in relation to access and use of their country.

The result of the extinguishing impacts of pastoral leases in the area means that the rights in relation to large tracts of country are limited to general access, hunting and fishing rights for personal communal or ceremonial and non-commercial use. Because the surviving rights are so limited on this approach, the judge took the advice of the High Court in *Ward* and resorted to considering the kinds of activities that could be exercised in pursuit of the native title. These activities, it was said, do not define the legal content of the right but, nevertheless now express the relationship between native title and the other interests in the area.

Such invasive extinguishment is not necessary in order to give effect to the limited rights encompassed by many of these interests, and unnecessarily trenches upon the rights of the native title holders. It does not allow any scope for the operation of rights and interests that continue to exist under traditional law and custom. The compensation implications of the courts' approach to this matter are yet to be explored.

NATIVE TITLE IN THE NEWS

New South Wales

A prominent Aboriginal elder has called for a treaty to be signed between the Albury City Council and its Indigenous community. Pastor Cec Grant, a senior member of the Wiradjuri council of elders, said he was eager to see an agreement, memorandum of understanding or a treaty with the council which would recognise the traditional ownership and role of the Indigenous community. Albury Mayor Cr Patricia Gould said she was not aware of the proposal, but expected it to be given some thought. *Border Mail (Albury Wodonga)* pg 13. 21 February 2004.

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The West Wyalong region is set to receive an economic boost with Barrick Gold commencing construction of the Cowal gold mining development project. Barrick has formed a native title agreement with the Wiradjuri Condobolin native title claim group. Promotion and protection of Wiradjuri cultural heritage will take place in the area, with benefits to flow into the community during the life of the mine. Around 350 construction and 200 permanent jobs are expected to be created over the next 21 months. *Forbes Advocate,* pg 6. 28 February 2004. Wiradjuri claim: NC02/03, N6002/02.

Northern Territory

The first mining/petroleum native title agreement mediated in the Northern Terri-