FEATURES

The Noongar decision: Bennell v State of Western Australia
(19 September 2006) (Wilcox J)
Lisa Strelein AIATSIS

The decision of the Federal Court in *Bennell v WA* (the Noongar decision) has received a significant amount of coverage in the media since it was handed down in September 2006. The decision was a determination of fact in relation to proof of connection over part of the claim area of the Single Noongar Claim. It is not a final determination of native title. The decision related to a portion of the claim area in and around the Perth metropolitan area, while the whole Single Noongar Claim involves a much larger area covering most of the southwest of Western Australia. The current decision resulted from a very complex procedural history that illustrates the progressive amalgamation of most claims in the southwest.[1]

The State pressed for the 'Perth metro' portion of the claim to continue to be heard. Justice Wilcox therefore identified a 'separate question' for consideration, which was, 'whether native title existed in the Perth area and, if so, who were the persons who held native title and what rights and interests it included'.[2] In doing so, the Court left aside issues of extinguishment and the relationship between any other rights and interests in the claim area.

The applicants needed to show:

- 'The identity of the community whose laws and customs governed the use and occupation of the claim area at the date of settlement
- That this community continues to exist today and continues to acknowledge and observe those laws and customs, albeit perhaps in …[a] somewhat changed form'[3]

The trial involved only 20 days of hearings, 11 of those held on country in 8 different locations across the whole Single Noongar Claim area. The applicants called only 30 Noongar witnesses, while a large number of other written witness statements were also lodged. Only three experts from the applicants and two from the State were heard – each put forward an historian and an anthropologist and the applicants also put forward a linguistic expert.

The judge and the experts all commented that the determination of the factual situation at the time of first settlement was greatly assisted by the large number of commentaries and observations of Aboriginal society, particularly in comparison to other areas of Australia.[4] The judge took the view that the most important material for his purposes was the material that described the situation at the time of first settlement and shortly there after; and the evidence about current observance or acknowledgement of laws and customs.

The findings
To determine how to approach the question, Wilcox J relied on the decision of the High Court in *Yorta Yorta*, supported by *Yarmirr* and *Ward*, and the interpretation of those decisions by the full court of the Federal Court in recent decisions such as *Alyawarr* and *De Rose*.[5] Placing s 223(1) of the NTA at the centre of the inquiry, his Honour turned to *Yorta Yorta* to explain the meaning of 'traditional laws and customs' as a constituted body of normative rules that give rise to rights and interests; that is, an identifiable system of rules, having normative content and that derive from a body of norms that existed before sovereignty. The judge noted that the Court in *Yorta Yorta* had introduced the term society in order to explain what 'binds' the group. They said, 'in this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'.[6]

The judge was therefore primarily interested in whether the applicants could show two things, first that there was a single 'community' for native title purposes (that is, a community that shared laws and customs through which they had a connection to land and waters) at the time sovereignty was asserted in 1829; and, second, whether that same community now existed and had continued to acknowledge those same laws and customs substantially uninterrupted since that time.

[1] [14].
[2] See Wilcox J, statement at the handing down of the decision. For the technical drafting of the question, see [47].
[3] Statement of Wilcox J on handing down of the judgment.
[4] Wilcox J [85].
[5] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 at [32] (*Yorta Yorta*), *The Commonwealth v Yarmirr* (2001) 208 1 at [7] (*Yarmirr*), *Western Australia v Ward* (2002) 213 CLR 1 at [16] (*Ward HC*), *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135; 145 FCR 442 (*Alyawarr)*, *De Rose v South Australia (No 2)* [2005] FCAFC 110; 145 FCR 290 (*De Rose (No 2).*
[6] *Yorta Yorta* at [49], per Gleeson CJ, Gummow and Hayne JJ.

On this latter point, the respondents argued that the Noongar community could not have passed the '*Yorta Yorta* test'.[7] But, Wilcox J adopted the explanation of the High Court in *Yorta Yorta* to determine the meaning of 'substantially' maintained:

> It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement.[8]

In relation to the changes in laws and customs his honour noted four things:

- In time, the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too;
- Universal observance is not necessary. The inquiry is directed to possession of the rights under law and customs, not their exercise;
- The rights and interests must be currently possessed and give rise to a current connection between the claimants and the land and waters claimed;
- The acknowledgement of laws and customs must have continued substantially uninterrupted.[9]

The State also argued that the 'Noongar people' were not a sufficiently coherent group to be considered a normative society. After examining journals and early writings through to the turn of the 20th century, the judge concluded that at 1829 the laws and customs governing land throughout the whole claim area were those of a single community, based on:

- Shared language;
- Shared laws and customs;
- Internal social interaction; and
- Internal consistency

And, he concluded it is appropriate now to call this society the Noongar community.

The judge was impressed by the evidence of the witnesses that demonstrated the continued vitality of the Noongar society. He found evidence of the continuity of society in the fact that Noongar families, despite the impacts of white settlement and government policies have kept in contact with each other. He observed that 'most if not all' of the witnesses have learned some Noongar language, traditional skills in hunting and fishing, traditional Noongar beliefs.

The judge found, more specifically, that the applicants had also proved continuity of connection to land through law and custom. He noted that changes in land rules were unavoidable. Nevertheless, those laws and customs currently observed and acknowledged are a 'recognisable adaptation' of the laws and customs existing at settlement. In particular, 'Noongars continue to observe a system under which individuals obtain special rights over particular country – *their Boodjas* – through their father or mother or occasionally a grandparent.'[10] In addition, Noongars maintain rules as to who may 'speak for' country.

His Honour specifically acknowledged that a native title claim may fail because of a discontinuity in acknowledgement and observance of traditional laws and customs even though there has been a recent revival in them and current acknowledgement and observance, noting the decisions in *Yorta Yorta* and the *Larrakia* case.[11] But, his Honour noted in this case the primary witnesses were able to attribute their knowledge to what they had learned as a child, long before the resurgence of interest.[12]

He concluded that the native title holders are the whole Noongar community on whose behalf the Single Noongar application was made. The Commonwealth had argued that 'it does not necessarily follow that the society is the native title holding group'.[13] The State argued that the native title holding group was something smaller than the Noongar community, although they could not pinpoint what that group might be.[14] In essence both the State and Commonwealth, with other respondents, were arguing that not all Noongar people held rights in the Perth area and therefore, the communal title should be held, and proof of connection (including descent) should be determined at a different, more localised recognition level.[15]

They claimed that the distribution of rights and interests (to the Perth area) should not be left to internal mechanisms of law and custom, but should be determined by the Court. Wilcox J disagreed, concluding that, while 'it is necessary for the Court to determine whether the claimed native title extends to the whole, or any part, of the claimed area… [I]t is not necessary (and it would be inappropriate) for the Court to become involved in issues as to the intracommunal distribution of special rights over portions of the total area, in relation to which native

[7] Wilcox J [83(g)].
[8] *Yorta Yorta* [89].
[9] *Yorta Yorta* [85-9], also *Mabo*, 61.
[10] Statement of Wilcox J. See also [764-91].
[11] *Risk v Northern Territory* [2006] FCA 404.
[12] Wilcox J [449-50].
[13] Wilcox J [77].
[14] Wilcox J [83(e)].
[15] Wilcox J [75-7].

title has been established. The Court leaves it to the community to determine those issues.'[16]

This is consistent with the full Federal Court decision in *De Rose* and a number of determinations, such as *Alyawarr* that specifically include in the rights and interest identified, the right to determine the rights and interests among the group.[17] The judge was in no doubt that the applicants must demonstrate a connection with the area that is subject of the separate question. But, it is not necessary for the applicants to prove a connection that is 'specific' to the Perth area, distinct from their connection to whole claim area.

Without purporting to specify the final terms of a formal Determination of Native Title, the judge observed what the rights and interests under native title would be (absent of any extinguishing acts). These were said to be non-exclusive communal rights to occupy, use and enjoy the area, including living on the area, conserving and using natural resources, protecting sites, carrying on economic activities education about laws and customs.

Despite the finding that the Noongar have proved that native title has continued in the southwest, the impact of extinguishment would mean that very little remains to be enjoyed. In the area around Perth that is the subject of this decision there are very few parcels of claimable land, and indeed throughout the whole of the Single Noongar Claim area there is little that would not be wholly or substantially impacted. To this end, the judge encouraged the parties to return to the negotiating table to resolve the matter. The State, joined by the Commonwealth, quickly moved to appeal the decision although they have also indicated that they wish to negotiate.

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Australian Anthropological Society Annual Conference and Native Title Colloquium
26-29 September 2006, James Cook University, Cairns
Benjamin Richard Smith

This year's AAS Conference took place at the Cairns campus of James Cook University. Considering the distance from the major cities (but perhaps unsurprisingly given the tropical location) the conference was extremely well attended. Certainly the Conference itself made the trip to Cairns worthwhile. Rosita Henry and the rest of the JCU team put together a stimulating and enjoyable meeting which will take some beating by next year's less exciting location – the 2007 meetings will take place in Canberra!

The Conference began with a Native Title Colloquium and a Post-Graduate Colloquium, which took place in parallel on the day preceding the Conference proper. The Native Title Colloquium, convened by David Martin and David Trigger (who stepped in relatively late to replace Craig Jones), included academics, staff from Native Title Representative Bodies and State Government Native Title Offices, as well as several independent consultants. Most – but not all – of those attending were anthropologists, with a smattering of lawyers also participating.

The Colloquium was split into two sessions, the first dealing with issues pertaining to connection reports and the second addressing 'Anthropology in the future of native title'. Both had good audiences, and useful questions and discussions followed the presentations. The morning session on issues of connection began with my own paper, which dealt with the involvement of 'diaspora' or 'stolen generations' families' in native title claims in northern Queensland. Other presenters included David Thompson, who presented case material outlining the (apparently successful) arguments for a composite argument for connection in a claim that includes members of three distinct 'tribal' groups in north-eastern Cape York Peninsula.

Jodi Neal outlined some of the problems with the concept of 'society' in the native title context, presenting a useful critique of the impractical and conceptually unsustainable definition of 'society' as being identical to the claimant group. Neal's discussion of society echoed David Martin's later discussion of the 'normative system' in accounts of connection, which combined his usual analytic clarity with a number of useful pointers for anthropological practitioners. Peter Blackwood (presenting material from joint work with Paul Memmott) also presented a useful analysis of traditional decision making processes, including case material from the Quandamooka claim. The circulated version of Blackwood and Memmott's work – like Martin's discussion of 'norms' – is likely to inform the writing of connection reports by many of the anthropologists who attended the session.

The second panel on connection included Wendy Ashe's overview of the changes in the ways that anthropologists working for the Northern Land Council have researched and presented anthropological material. Ashe noted the early continuities from Aboriginal Land Rights Act 'claim books' and the increasing sophistication of

[16] Wilcox J [82].
[17] Wilcox J ibid, *Alyawarr*: see [81], [110]-[112] and paras 2 and 6 of the formal determination, which is set out at 504-505. See also *Western Australia v Ward* (2000) 99 FCR 316 (*Ward [FC1])* at [202].