2006

***Bennell v State of Western Australia* [2006] FCA 1243 (FCA Wilcox J)**
A preliminary determination of fact regarding whether, putting aside the question of extinguishment, native title existed in an area approximately 9000 square kilometres in and around metropolitan Perth. The area formed part of the Single Noongar claim, which encompassed 194,000 square kilometres of land and waters in the southwest of Western Australia. The first issue for determination concerned whether the Noongar people constituted a normative society at sovereignty. Wilcox J held that a society is defined as a body of persons united in and by its acknowledgment and observance of a body of law and customs. It is not necessary that the society constitute a community, in the sense that all its members know each other and live together. Wilcox J concluded that at 1829 the laws and customs governing land throughout the whole claim area were those of a single community with shared language, laws, customs and internal social interaction. Therefore, the Noongar people constituted a society for the purposes of s 223(1) of the NTA. The second issue for determination concerned whether that same society still existed and continued to acknowledge traditional laws and customs. Despite enormous forces that had assailed Noongar society since sovereignty and made it impossible for many of the traditional laws and customs to be maintained, Wilcox J found that the normative system revealed by the evidence was the normative system of traditional Noongar society, not a normative system rooted in some other, different society. Wilcox J also noted that it is unnecessary and inappropriate for the Court to determine intracommunal rights and interests. Such matters are properly subject to the internal mechanisms of law and custom within a native title holding group.

***Griffiths v Northern Territory* [2006] FCA 903 (FCA Weinberg J)**
A shift from patrilineal inheritance to cognation as the basis for taking country did not give rise to a new normative system such as would deny the Ngaliwurru and Nungali people their native title rights in the determination area of Timber Creek.

***Griffiths v Northern Territory of Australia* (No 2) [2006] FCA 1155 (FCA Weinberg J)**
Final determination. (see *Griffiths v Northern Territory* [2006] FCA 903 above).

***Manas v State of Queensland* [2006] FCA 413 (FCA Dowsett J)**
Consent determination recognised that native title exists in the entire determination area of Murrabar Islet, Sarbi Islet, Iem Islet, Zagarsup Islet, Kulbi Islet, Muknab Rock and Kapril Rock in the Torres Strait. The native title holders are the Mualgal people.

***Mundraby v State of Queensland* [2006] FCA 436 (FCA Dowsett J)**
Consent determination recognised that native title exists in parts of the determination area near Yarrabah and around Trinity Inlet and the Mulgrave River in Queensland. The native title holders are the Mandingalbay Yidinji People.

***Nona and Manas v State of Queensland* [2006] FCA 412 (FCA Dowsett J)**

Consent determination recognised that native title exists in the entire determination area in the Torres Strait. The native title holders are the Badualgal and Mualgal peoples

***Riley v State of Queensland* [2006] FCA 72 (FCA Allsop J)**
Consent determination recognised that native title exists in the entire determination area in Cape York Peninsula in Queensland. The native title holders are the Western Yalanji people.

***Risk v Northern Territory of Australia* [2006] FCA 404 (FCA Mansfield J)**
Neither the Larrakia People nor the Danggalaba Clan met the requirements of s 223 of the NTA because they had not maintained a system of traditional laws and customs since sovereignty. A sincere and intense desire to re-establish the laws and customs that had existed at sovereignty was not sufficient for making a determination that native title existed. Mansfield J declined to adopt the findings in a previous ALRA claim relating to the determination area, despite the courts discretion to do so under s 86(a)(v) of the NTA. On the facts, differences in the claim area, witnesses called and legislative requirement of the two Acts made it inappropriate. (See 2007 Appeal).

***Rubibi Community v State of Western Australia* (No 7) [2006] FCA 459 (FCA Merkel J)**
Determination recognised native title exists but is limited to the non-commercial exploitation of resources. The native title holders are the Yawuru community. The special attachment of Walman Yawuru clan members to parts of the claim area does not give rise to native title rights exclusive of other Yawuru community members. The criteria for membership of a native title holding community are:

- Where a person descended from an apical ancestor had two parents who were community members: the criteria of self-identification and general community acceptance are not required.
- Where only one parent of a descendant was a community member: the criterion of self-identification must be satisfied.
- People who were not descendants of an apical ancestor: the criteria of self-identification and general community acceptance must be satisfied. (e.g. via adoption or having a long term physical association and cultural responsibilities).

Reservation of land for the purpose of a gaol and police station extinguished native title rights amounting to exclusivity but did not extinguish all native title rights and interests. Construction and use of such facilities on part of the reserves extinguished native title rights and interests in the areas on which the gaol and police station were constructed and on areas adjacent thereto that were reasonably necessary for or incidental to the operation or enjoyment of the gaol or police station. However, the construction did not necessarily extinguish native title rights and interests in respect of the remaining areas of the reserves. Consistent with the Full Courts findings in *Alyawarr*, the grant of a pastoral or mining lease does not necessarily conflict with a native title right to live on land the subject of such grant. Traditional use of an area establishes occupation, but where use is not traditional it is a question of fact and degree whether there is sufficient occupation for the purposes of ss 47A and 47B of the NTA.

***Ward v Western Australia (Miriuwung Gajerrong #4 Determination)* [2006] FCA 1848 (FCA North J)**
This case concerned an area approximately 7 square kilometres in the north-east Kimberley region of Western Australia which had initially formed part of the first Miriuwung Gajerrong determination (see 1998). Although Lee Js recognition of native title in that case was subsequently overturned on appeal (see 2000), his findings in relation to this particular area were undisturbed and eventually supported the recognition of native title in this consent determination. The native title holders are the Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija people.

***Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142 (FCA Mansfield J)**
Consent determination recognised that native title exists in parts of the determination area in central northern South Australia. The native title holders are the members of the Western Desert Social and Cultural Bloc and predominantly identify as Yankunytjatjara people.

2007

***Chapman v Queensland* [2007] FCA 597 (FCA Kiefel J)**
An application to remove three of the fifteen people authorised to be the applicant in the Wakka Wakka peoples claimant application. One was dead and the other two had allegedly refused to co-operate. Although s66B of the NTA provides a procedure for replacement of the applicant, it had not been followed and no meeting of the claim group had been held to revoke their authority. Instead, the removal application was made under O 6 r 9(b) of the Federal Court Rules, which provides that the Court may order that a party cease to be a party where they have ceased to be a proper or necessary party. Kiefel J granted the application on the basis that the references in the NTA to the applicant do not prevent the authorisation of persons as applicant being viewed individually. Accordingly, there was no reason why O 6 r 9 should not have operation. The Register can be amended to remove the names of persons person no longer authorised as applicant.

***Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588 (FCA French J)**
Consent determination recognised that native title exists in the entire determination area of just over 1,800 square kilometres in the Kimberley region of Western Australia. The determination included area covered by the Noonkanbah pastoral lease. Rights exercised in relation to the pastoral lease prevail over native title rights to the extent of any inconsistency, but do not extinguish them. The native title holders are the Yungngora people. .

***Doolan v Native Title Registrar* [2007] FCA 192 (FCA Spender J)**
Review of the Native Title Registrars refusal to register a native title determination application because two of the eighteen people authorised to be the applicant had subsequently withdrawn. The main issue was whether the applicant in s 61(2) of the NTA meant all of the persons authorised by the native title claim group and no fewer or all of the persons authorised by the native title claim group who, at any particular time, were willing and able to discharge their representative function. Spender J held

that the proper construction of s 61(2) is the latter, and did not distinguish between a group members capacity to act and that persons willingness to act.

***Eringa No 1 Native Title Claim v South Australia* [2007] FCA 182 (FCA Mansfield J)**
Mansfield J refused to make an order stipulating that if gender restricted preservation evidence was given and the judge then appointed to hear the proceeding was a woman, the applicant would be entitled not to adduce that evidence at trial. His Honour observed that such an order was unnecessary because: (i) the uncontested operation of s 46(d) of the *Federal Court of Australia Act 1976 (Cth)* was that preservation evidence is subject to judicial discretion and does not automatically become evidence in the hearing of the proceeding; and (ii) the discretion under s 46(d) is guided by s 82(2) of the NTA, which provides that the court may take account of the cultural and customary concerns of Indigenous Australians so long as to do so does not unduly prejudice any other party to the proceedings. Mansfield J also noted that parties must appreciate that the judge hearing a matter has a role and presence which is an inevitable part of the exercise of judicial power under Chapter III of the Constitution, regardless of whether the judge is male or female.

***Gumana v Northern Territory of Australia* [2007] FCAFC 23 (FCA French, Finn and Sundberg JJ)**
A fee simple grant in the inter-tidal zone made under the *Aboriginal Land Rights Act 1976* (ALRA) conferred an exclusive right over the waters which flowed onto the inter-tidal zone, including a right to exclude those seeking to exercise a public right to fish or to navigate. In consequence, the Fisheries Act cannot authorise entry by the public or the issue of permits or licences to fish in that water. The contrary finding in *Yarmirr* was plainly wrong in relation to ALRA grants. However, the *Yarmirr* principle continues to apply in relation to native title. As the native title rights and interests were held communally by the native title holders, it was not necessary to enquire whether there was a connection between a clan members spouse and the determination area.

***Harrington-Smith v Native Title Registrar* [2007] FCA 414 (FCA Lindgren J)**
An injunction was sought to prevent the removal of an entry from the Register of Native Title Claims after the claim was dismissed at first instance by the Federal Court. Under s 190(4) of the NTA, an entry must be removed from the Register as soon as practicable after the application has been dismissed. The applicants argued that a claim is not dismissed until any appeal proceedings are heard and determined. This argument was rejected by the court. Lindgren J held that dismissed bears its natural meaning, and is satisfied by the dismissal of an application at first instance following a trial.

***Harrington-Smith v Western Australia* (No 9) [2007] FCA 31 (FCA Lindgren J)**
Eight overlapping applications for a determination of native title were before the court, all concerning semi-nomadic peoples alleged to constitute a normative society known as the Western Desert cultural bloc (WDCB). The lead application was made by the Wongatha people over an area of approximately 160,000 square kilometres in the Western Australian Goldfields. Lindgren J found that none of the claims that required authorisation under the 1998 amendments were in fact authorised. In consequence, he did not have jurisdiction to make a determination. However, in light

of the importance of the matter and the likelihood that it would be the subject of appeal, His Honour made a series of other findings which also led him to conclude that the appropriate outcome was to dismiss all eight applications. The major issue was whether the claims constituted group claims for the purposes of s 223(1) of the NTA. Each group claim arose out of an artificial aggregation of the rights and interests claimed by individuals over particular places within the claim area with which they had a personal my country relationship. Lindgren J held that this artificial aggregation of my country areas was fatal. First, such an aggregation of interests was simply alien to traditional WDCB laws and customs. Second, a group claim presupposes that all members have at least nominal rights and interests in the whole area by reason of nothing more than their membership of the group. The crux of Lindgren Js findings was that competition between overlapping claims and disagreement over what principles should apply to resolve them were evidence of the lack of an overriding normative system constitutive of a society. In consequence, internal disputes amongst claim groups and overlapping claims will not be overlooked by the court merely by presenting them as one claim without further evidence of unified or common traditional laws and customs.

***Hughes (on behalf of the Eastern Guruma People) v State of Western Australia* [2007] FCA 365 (FCA Bennett J)**

First native title claim settled by consent in central Pilbara. Determination recognised that native title exists in the entire determination area.

***Lovett on behalf of The Gunditjmara People v State of Victoria* [2007] FCA 474 (FCA North J)**

Australias 100th native title determination. Consent determination recognised that native title exists in parts of the determination area in Victoria. The native title holders are the Gunditjmara people.

***Risk v Northern Territory* [2007] FCAFC 46 (FCA French, Finn and Sundberg JJ)**

Appeal against a decision that neither the Larrakia people nor the Danggalaba clan possessed rights and interests under traditional laws and customs. In determining whether the laws and customs were traditional, the Court endorsed the *Yorta Yorta* test. Accordingly, a court must examine the course of the claimant groups observance of traditional laws and customs to determine whether continuity can be established from sovereignty to the present, notwithstanding that some change, adaption, or interruption may have occurred. In contrast, the book-end error is impermissible (to merely compare the body of laws and customs at sovereignty with those that exist today). However, on the facts, the appeal was dismissed because the primary judge did not misapply the *Yorta Yorta* test.