Single Noongar appeal – Perth

Bodney v Bennell [2008] FCAFC 63

Finn, Sundberg and Mansfield JJ, 23 April 2008

Issue

This case concerns four appeals against the judgment of Justice Wilcox in *Bennell v Western Australia* [2006] FCA 1243 (*Bennell*), summarised in *Native Title Hot Spots* Issue 21. The main issue before the Full Court was whether the trial judge correctly applied ss. 223(1)(a) and 223(1)(b) of the *Native Title Act 1993* (Cwlth) (NTA). In joint reasons for judgment, the court found, among other things, that the trial judge had incorrectly applied those provisions and so set aside the relevant orders made at first instance. The separate question dealt with in *Bennell* was then remitted to the docket judge to determine the future progress of the matter.

Background

In *Bennell*, pursuant to Order 29, rule 2 of the Federal Court Rules, Wilcox J dealt with a separate question in a separate proceeding (Part A, which is part of the area covered by the Single Noongar claim). Six claimant applications in the south-west of Western Australia were involved. In paraphrase (and putting questions of extinguishment to one side), the separate question was in three parts:

- whether native title existed in the area covered by the separate proceedings (which encompassed parts of the Perth metropolitan area and some surrounding non-urban areas);
- if so, whether native title to Part A was held by the Noongar people as a single communal title;
- what were the nature and extent of the native title rights and interests in relation to Part A?

Wilcox J answered the first two in the affirmative. In relation to the third, his Honour found that certain native title rights and interests exist but left open the question of whether they were held to the exclusion of all others. His Honour also dismissed the five overlapping applications, all made by Christopher (Corrie) Bodney. For further background, see the summary of *Bennell* in *Native Title Hot Spots* Issue 21 and the reasons for judgment in this case at [1] to [38].

The State of Western Australia and the Commonwealth of Australia sought leave to appeal against the judgment in *Bennell*. The Western Australian Fishing Industry Council (WAFIC) sought leave on limited grounds. Mr Bodney sought leave to appeal against the dismissal of his applications and the decision in favour of the Noongar people. The court granted leave to all four appellants.

Issues on the state and Commonwealth appeals

The major issues the state and commonwealth raised on appeal were whether:

- there had been continuity in the acknowledgment of the traditional laws and observance of the traditional customs of the single Noongar society from sovereignty until recent times, as required under s. 223(1)(a) of the NTA;
- a finding of one Noongar society, or community, entailed a finding of one communal native title;

- Wilcox J was wrong in his approach to the issue of connection between the Noongar people and the area covered by Part A under s. 223(1)(b) of the NTA.

In dealing with these grounds of appeal, Justices Finn, Sundberg and Mansfield assumed without deciding that there existed at sovereignty a single Noongar society in the area covered by the Single Noongar claim (as Wilcox J had found)—at [43].

Meaning of traditional under s. 223(1)

The court noted that:

- in relation to s. 223(1)(a), there are three separate, but related, concepts - 'society', 'laws and customs', and 'rights and interests';
- the first, while not mentioned in s. 223(1), is drawn from *Yorta Yorta*, while the second and third are 'related in the manner first explained' in *Mabo (No 2)*;
- laws and customs arise out of and, in important respects, go to define a particular society, with 'society' being understood as a body of persons united in, and by, its acknowledgment and observance of a body of law and customs;
- to speak of rights and interests possessed under an identified body of laws and customs is to speak of rights and interests that are the creatures of the laws and customs of the particular society that acknowledges and observes those laws and customs;
- traditional laws and customs must constitute a normative system with normative rules that give rise to rights and interests in relation to land and water—at [46], referring to, and quoting from, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3) at [49] to [50] and *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo No 2)* at 58.

The court was of the view that:

> Because it is the normative system that is the source of the rights and interests, it is necessary in order to prove native title that the normative system has had a continuous existence and vitality since sovereignty... . It is therefore necessary for native title claimants to show that the normative system that existed at sovereignty is substantially the same as the one that exists today. If it is not, then any rights and interests are not "possessed under the traditional laws acknowledged and traditional customs observed"—at [47].

It was noted that, while the 'connection inquiry' found in s. 223(1)(b) was an 'additional element', it could be proven by demonstrating that, in fact, there had been continued acknowledgment of the relevant traditional laws and observance of the relevant traditional customs—at [48], referring to *Northern Territory v Alyawarr* (2005) 145 FCR 442 (*Alyawarr*, summarised in *Native Title Hot Spots* Issue 16) at [92] and *Western Australia v Ward* (2000) 99 FCR 316 at [243] (Full Court in *Ward*).

Continuity at first instance

The court canvassed Wilcox's J's findings in relation to substantial continuity of acknowledgment of traditional laws and observance of traditional customs, noting that the questions posed by the primary judge were:

- whether the single Noongar community that existed in 1829 continued to exist over subsequent years, up until recent times, with its members continuing to acknowledge and

observe at least some of the traditional laws and customs relating to land that were acknowledged and observed in 1829;
- whether that community continued to exist today, with members, including at least some of those who made the native title application, who continued to acknowledge and observe at least some of those laws and customs.

Among other things, the court was critical of the fact that Wilcox J made no express findings and (on many topics) 'no concluded or even tentative view' in relation to proof of continuity of acknowledgment and observance of marriage laws and customs, noting that:
- Wilcox J had glossed over evidence that showed there was 'a large degree of inconsistency between the [Aboriginal] witnesses as to the extent to which cousins could marry' and the 'the rules are not followed today'; and
- the fact that the traditional punishment of spearing those who transgressed marriage rules was not still practiced was a 'significant change'—at [54] and [57].

On laws and customs relating to burial practices, the court noted that Wilcox J had found that there were 'significant discrepancies' in the evidence—at [59].

Laws and customs concerning land were of particular significance on the appeals. The evidence indicated that the traditional Noongar land-ownership system (i.e. at sovereignty) consisted of two elements:
- the estate, which was the basic unit of landholding, with an 'estate group' being comprised of several nuclear families, ownership rights being determined by birth and membership of an estate group conferring rights to occupy and use particular areas of land. (It was common ground that estate groups 'have long disappeared');
- the 'run', which was an area in which a person felt at home and had certain rights derived from, for example, marriage.

The evidence showed that the contemporary 'land-ownership rights' recognised by the claimants consisted of areas known as '*boodja*', or 'country', which was an area in which a person felt at home and could move about freely without asking permission.

Continuity under s. 223(1)(a) – wrong question asked

The court accepted that the correct way to approach the issue of continuity was:
- to ask whether acknowledgement of traditional laws and observance of traditional customs had continued substantially uninterrupted since sovereignty;
- to answer that question by ascertaining whether, for each generation of the relevant society since sovereignty, those laws and customs both constituted a normative system giving rise to rights and interests in land and, in fact, regulated and defined the rights and interests which those people had, and could exercise, in relation to the land and waters—at [70] to [72], referring to *Yorta Yorta*, *Risk v Northern Territory* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19) and *Risk v Northern Territory* [2007] FCAFC 46 (summarised in *Native Title Hot Spots* Issue 24).

Their Honours found that Wilcox J 'did not pose the continuity question in the form propounded' by *Yorta Yorta*:

> Instead of enquiring whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty, he asked whether the *community* that existed at sovereignty continued to exist over subsequent years with its members continuing to acknowledge and observe at least some of the traditional 1829 laws and customs relating to land—at [73], emphasis in original.

According to the court:

- the *Yorta Yorta* formulation concentrates on continued acknowledgment and observance of laws and customs because the rights and interests the subject of a determination of native title are the product of the laws and customs of the relevant society;
- proof of the continuity of a society does not necessarily establish that the rights and interests which are the product of the society's normative system are those that existed at sovereignty because those laws and customs may change and adapt;
- change and adaptation will not necessarily be fatal because, so long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional;
- an enquiry into continuity of society, divorced from an inquiry into continuity of the pre-sovereignty normative system, may mask unacceptable change, with the consequence that the current rights and interests are no longer those that existed at sovereignty and so are not traditional;
- Wilcox J's conclusion in the question of continuity was cast in terms of *continuation of a society* rather than continued acknowledgement and observance of laws and customs—at [74].

The court illustrated the approach taken by Wilcox J by referring to (among other things), the way he dealt with the breakdown of the estate system—at [77].

Wilcox J had noted that 'home areas' (occupied by estate groups) seemed to have 'effectively disappeared' and that today's *boodjas* (or country) were 'similar in concept' to the 'runs' of pre-settlement times, which was a significant but 'readily understandable' change because it was 'forced upon the Aboriginal people by white settlement'. While the 'bands' or 'tribes', comprised of several related families, were broken up as a result of being forced off their home areas: 'Surprisingly, the social links between those families seem to have survived, but the related families ceased to be residence groups, together occupying a relatively small area of land'—see *Bennell* at [784] to [785].

The court was of the view that Wilcox J took the wrong approach because he:

- failed to consider, as required by *Yorta Yorta*, whether a post-sovereignty *boodja* was 'an acceptable adaptation of the old runs or home areas or an unacceptable change';
- seemed to have rested on the fact that the social links between the several related families survived, which suggested he was again asking whether the community survived, rather than whether the laws and customs in relation to land continued from sovereignty through to the present—at [79] to [80].

According to the court:

- in the absence of any finding of permissible adaptation or change, the 'significant change' brought about by the disappearance of home areas and, apparently, the runs of pre-settlement times was conclusive of discontinuity;

- boodjas are a post-sovereignty phenomenon and the fact that they were 'similar in concept' to the pre-settlement runs did not constitute a finding that a boodja was a permissible adaptation of either a home area or a run;
- in order to have found boodjas were traditional, evidence of the 'continuity of a normative system of land-holding' was required but Wilcox J referred to no such evidence and, indeed, the available evidence pointed 'against continuity with pre-sovereignty runs or home areas';
- any finding of 'conceptual similarity' between a contemporary boodja and a traditional run was not relevant because the question was whether the contemporary boodja system was traditional in the sense understood in *Yorta Yorta*;
- it was not possible for the appellate court to reach any conclusion in the absence of factual findings by Wilcox J as to the content of the run system—at [80] and [82] to [83].

Disregard of continuity evidence

It was found that Wilcox J's failure to address continued acknowledgment and observance of traditional law and custom between sovereignty and the present was 'underlined, and perhaps explained' by his 'disregard' of opinions expressed by the anthropologists who gave evidence in *Bennell* based on the writings of 19th and 20th century anthropologists and observers. The court was careful to note that:

> We use the word "disregard" because, while his Honour said he obtained no benefit or little assistance from this material, he did not positively disallow it, so that it was not part of the evidence before him. It is nevertheless clear that his Honour said he would not take it into account and that he did not do so—at [84].

There were three problems with this aspect of Wilcox J's reasons:

- assuming the basis rule has survived the Evidence Act 1995 (Cwlth) (the court found this was not the case), its application to the relevant material should have led to it being disallowed altogether;
- the evidence that was put aside, or accorded no weight, by Wilcox J was clearly relevant to whether the claimants had established the continued acknowledgment and observance of their law and customs generation by generation between sovereignty and the present time;
- the common law basis rule was not incorporated in s. 79 of the Evidence Act, which meant that, at the stage of admissibility, the fact that an expert anthropologist's opinion was based, in whole or in part, on a fact supported by hearsay was not a ground upon which the opinion must be rejected—at [88] to [91], referring to *Neowarra v Western Australia (No 1)* (2003) 134 FCR 208; [2003] FCA 1399 (*Neowarra*), *Sampi v Western Australia* [2005] FCA 777 (*Sampi*) and *Jango v Northern Territory (No 4)* [2004] FCA 1539, summarised respectively in *Native Title Hot Spots* Issue 8, Issue 15 and Issue 13.

The court also noted (among other things) that:

- nothing in the Evidence Act displaced the body of law that allowed experts to rely on reputable articles, publications and material produced by others (e.g. earlier anthropologists) in the area in which they have expertise as a basis for their opinions, with the weight to be accorded to such evidence being a matter for the court;
- expert evidence was not necessarily opinion evidence and, in the case of anthropologists, it would often be direct evidence of the anthropologist's observations and thus admissible in the ordinary course—at [91] to [94], referring to *Gumana v Northern Territory* (2005) 141 FCR 457 (summarised in *Native Title Hot Spots* Issue 14) and other authorities on point.

Therefore, it was found that:

- Wilcox J committed a 'serious error' by failing to have regard, or attach weight, to expert anthropological evidence on the observance of the laws and customs in the period between sovereignty and the present;
- the finding that this evidence should be rejected because it did not satisfy the basis rule was also wrong;
- these errors led the primary judge to deprive himself of the very evidence he should have used to determine (as he was required to do, following *Yorta Yorta*) whether, for each generation since sovereignty, acknowledgment and observance of the Noongar laws and customs had continued substantially uninterrupted—at [95].

Patrilineal/matrilineal shift

The evidence was that, at sovereignty, rights to country were acquired principally through patrilineal descent but, in the present day, Noongar people could obtain rights through matrilineal descent, birth or marriage. The state argued, essentially, that this was a 'radical departure' from the situation at sovereignty and could not be regarded as traditional. It also submitted that Wilcox J had found there was agreement between the expert anthropologists on this issue when there was not.

The court found that Wilcox J was entitled to find that this did not mean that the descent rules were no longer traditional, noting (among other things) that:

- Wilcox J described the pre-settlement position as 'a general rule of patrilineal descent, subject to exceptions', with a 'widening of the exception' coming as a result of colonisation and a 'move away from a relatively strict patrilineal system to a mixed patrilineal/matrilineal or cognative system';
- his Honour's belief that the anthropologists called to give expert evidence were in agreement on 'a general rule of patrilineal descent, subject to exceptions' was based on 'what was common ground between the experts' rather than any 'positive accord' between the parties;
- based on this understanding of the expert evidence, Wilcox J found that the instances in which rights were obtained by matrilineal affiliation, rather than patriliny, had increased i.e. there was merely an expansion of reliance upon the exceptions to the general rule, not a change from patriliny to patriliny/matriliny or cognation;
- on the expert evidence alone, it was open for Wilcox J to come to the conclusion he did—at [106] and [114] to [116], referring to *Griffiths v Northern Territory* (2007) 243 ALR 72 (summarised in *Native Title Hot Spots* Issue 27).

Reasons for change are irrelevant

At several points, Wilcox J referred to changes in law and custom being 'inevitable' or 'readily understandable' because those changes were forced on Aboriginal people by white settlement. The court pointed out that it was clear from *Yorta Yorta* that the reasons for such 'important' changes are irrelevant—at [81] and [82].

Later in the reasons for judgment, the court elaborated on this point:

> There could not be a more important law or custom for the identification of rights and interests in land than that by which Aboriginal people are related to tracts of land. At settlement the tracts were the home areas and the runs. They ceased to exist after settlement and Aboriginal people instead claimed

> boodjas or country. Understandably, the primary judge treated the change as significant. However his Honour thought the effects of change could be mitigated by reference to white settlement. That is not a process contemplated by *Yorta Yorta … .* European settlement is what justifies the expression "substantially uninterrupted" rather than "uninterrupted". It explains why it is that the common law will recognise traditional laws and customs that are not exactly the same as they were at settlement. But if, as would appear to be the case here, there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped. If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional. *Yorta Yorta …* would have been decided differently, since the primary judge in that case found that it was European settlement that had caused the forebears of the claimants to leave their traditional lands and cease acknowledgement and observance of their traditional laws and customs. What we have said about the primary judge's treatment of European settlement is applicable also to his observation … that changes to the descent rules "must have been inevitable" if the Noongar community was to survive white settlement. It follows that in reaching his conclusion that Noongar laws and customs of today are traditional, his Honour's reasoning was infected by an erroneous belief that the effects of European settlement were to be taken in account – in the claimants' favour – by way of mitigating the effect of change—at [97], emphasis in original.

No new rights

The state's argument that there had been an unacceptable shift post-sovereignty away from patrilineal descent was also used to support its argument that 'a new right is never permissible under *Yorta Yorta*' on the basis that (among other things):

- any change in the distribution of rights (e.g. to a wider class of people or over an expanded geographical area) was a change in the rights themselves;
- *Yorta Yorta* intended not only to preclude the creation of any new *class* of rights but also any new right, including the extension of an old right to a new class of persons.

The court noted (among other things) that:

- the proper way to determine whether rights and interests are traditional is to ask whether they *find their origin in* pre-sovereignty law and custom, not whether they are *the same as* those that existed at sovereignty;
- 'clearly', laws and customs could change and develop post-sovereignty, 'perhaps significantly', and still be traditional and, since rights and interests are the product of those laws and customs, they may also change without necessarily losing the capacity to be recognised as native title rights and interests;
- it may be that what cannot be created post-sovereignty are rights that impose a greater burden on the Crown's radical title—at [120] to [121].

However, because the state's submission that pre-sovereignty descent was exclusively patrilineal was not made out, the court did not need to pursue this issue.

Appeals upheld in relation to continuity errors

The court held that the Commonwealth succeeded in proving the 'continuity' errors it alleged on its appeal and that the state succeeded on the ground that Wilcox J applied the wrong test in determining whether the claimants had continued to acknowledge and observe traditional laws and customs from sovereignty to the present.

Communal title

According to the court, the issues raised on appeal in relation to Wilcox J's use of the notion of communal native title were:

- what is the character of communal native title rights and interests;
- what is the relationship, if any, of group and individual rights and interests to communal rights and interests?

In their Honours' view, these questions brought into play factors drawn from the case law, including:

- the so-called 'fundamental principle' that native title rights and interests are ordinarily communal in character;
- that communal native title holders do not necessarily possess, or need to possess, rights and interests uniformly over the entire native title determination area;
- if communal native title is established, the intramural (or intra-communal) allocation of special rights to particular areas is a matter for the community itself to determine in accordance with its traditional laws and customs;
- 'relatedly', in a communal native title claim, the level of intersection both at which common law recognition of native title rights and interests is to occur (if at all) and at which a s. 225 determination is to be made, is at that of communal rights and interests;
- group and individual rights and interests are dependent upon, and are 'carved out of', the communal native title—at [147], referring to the Full Court in *Ward*, *De Rose v South Australia (No 2)* (2005) 145 FCR 209; [2005] FCAFC 110 (*De Rose No 2*, summarised in *Native Title Hot Spots* Issue 16), *Neowarra*, *Mabo (No 2)*, *Sampi* and *Alyawarr*.

Before dealing with these factors, it was noted that:

> With all depending upon the content of [the traditional laws and customs of the community in question] ... there is ... reason for pause in the too ready embrace of a priori generalisations both as to the ordinary character and locus of native title rights and interests and as to the nature of the interconnectedness of communal rights and interests on the one hand and group or individual rights on the other. While we acknowledge that such generalisations have been made in High Court decisions and, notably, in *Mabo (No 2)*, we are conscious that they may lead in a given case to assumptions being made about that which, in fact, is required to be demonstrated under the NTA. ...
>
> A claim by a community to all of the native title in a particular area can properly be described as a communal *claim*. But is it for that reason properly to be characterised as a claim for communal rights and interests (ie communal native title) irrespective of whether group or individual rights are held under that community's traditional laws and customs? Or is to describe it as a communal claim to do no more than state that, as between themselves, the members of the claimant community hold all of the rights in the claim area albeit they may hold them differentially, ie [as was said in *Mabo (No 2)*] "there is no other proprietor", so that (absent dispute over those rights) it is superfluous and unnecessary to differentiate them?
>
> It is clear that in *Mabo (No 2)*, Brennan J ... [and] ... Deane and Gaudron JJ ... characterised native title "as communal title" that enured for the benefit of the community as a whole and for the groups and individuals within it who have particular rights and interests in the land. While the text and structure of s 223(1), with its typology of "native titles" [i.e. 'communal, group or individual'], would not necessarily suggest that the NTA regime reflected such a characterisation, recent decisions of this Court at trial and appellate level have construed s 223(1) under the shadow of *Mabo (No 2)*. ...

> Communal native title claims, we would note, have been made with some regularity. ...
>
> This Court, though, has refrained from turning the "fundamental principle" of *Mabo (No 2)* into an inveterate rule, acknowledging in this that each case will depend on its own facts—at [148] to [151], emphasis in original.

In relation to the notion of communal native title, the court was of the view that:

- the evidence must be capable of supporting an inference of communal ownership of native title derived from the community's laws and customs, with the approach taken in *Neowarra* illustrating the application of this approach;
- while Wilcox J accepted that the *claim* as made in this matter was for a communal title, it was not apparent that he considered whether the evidence was capable of supporting an inference of communal ownership of native title derived from the community's laws and customs;
- if his Honour had not merely considered the question of 'what was the society?' but also asked whether those laws and customs supported an inference of communal title, or only group titles, 'a potentially different inquiry may well have been set in train' which would have required a closer analysis of:
    - the coherence of the 'Noongar society' (having regard to the area it occupied and the dispersal of its members);
    - the character of its laws and customs; and
    - how those laws and customs allocated rights, interests and responsibilities across the lands and waters the subject of the claim;
- a determination of communal native title does not necessarily result in the communal rights and interests themselves being held *in common* by the members of the community;
- if there is no fundamental controversy in a communal title claim as to alleged group rights and interests, but there is serious controversy as to whether there is a community having communal title, and that controversy is decided favourably to the claimant community, it is 'understandable' that the native title determination would recognise communal rights and interests;
- but where (as in this case) the existence of group rights is put in issue in a communal native title claim, 'somewhat different considerations may well obtain'—at [152] to [156], referring to *Neowarra*, the Full Court in *Ward*, *Alyawarr*, *De Rose (No 2)* and *Harrington-Smith v Western Australia (No 9)* (2007) 238 ALR 1, summarised in *Native Title Hot Spots* Issue 24.

The court went on to say that:

> Unless…[the relevant] society has, and acknowledges and observes, laws and customs under which native title rights and interests are possessed, there can be no native title rights whether communal, group or individual … . What ... is not so obvious is that such rights ordinarily are dependent as well on, and are carved out of, the society's (or communal) title. Acceptance of that proposition has had the effect in what have been called "multiple group" cases ... that where the question is whether what are discernible groups in fact constitute a "society" which acknowledges traditional laws and observes traditional customs under which communal title is possessed, the issue of whether there is communal title collapses into the issue of whether there is a society. The judgment under appeal is a very obvious illustration of this—at [157].

Their Honours were of the view that:

> Given the course of authority in this Court to which we have referred and which we are not prepared to say is clearly wrong (notwithstanding the reservations we have expressed), we consider we are obliged

> to adhere to the approach taken to communal title in *Ward* FC and *Alyawarr* FC and in the cases which have followed them ... . If the "fundamental principle" that, ordinarily, native title is communal is to be called into question, it will be in another place. We would, though, comment that, notwithstanding common law principles relied upon ... in *Mabo (No 2)*, the terms and tenor of the NTA may well be capable of implementation without resort either to a "fundamental principle" of community title or to some degree of approximation of native title rights and interests with concepts drawn from Anglo-Australian property law—at [158].

Therefore, the state and the Commonwealth challenges to Wilcox J's reliance upon 'communal title' were rejected. The issue of proof of communal native title is also discussed in *Western Australia v Sebastian* [2008] FCAFC 65, summarised in *Native Title Hot Spots* Issue 27.

Connection — s. 223(1)(b)

The court found that Wilcox J was wrong to 'simply subsume the connection issue in relation to [the Perth metropolitan area] within a finding of connection to the whole [Single Noongar] claim area' i.e. there should have been an inquiry into the connection, by traditional laws and customs, of the claimants to Part A—at [181] and [190].

On this point, it was noted that:

- the term 'connection' found in s. 223(1)(b) had its genesis in *Mabo (No 2)*, which was relevant both because it highlighted the 'opaque' drafting of s. 223(1)(b) and it had influence in shaping aspects of the content of the connection requirement;
- the earlier decisions on point clearly demonstrated that the 'connection concept' was 'multifaceted, with differing aspects of it being emphasised in differing factual contexts'—at [163] and [164].

The court made five points in relation to the connection inquiry, firstly that:

- despite the occasional propensity 'both to fuse and to confuse' the inquiries raised by ss. 223(1)(a) and (b), it was indisputable that they were distinct;
- connection was not simply an incident of native title rights and interests as such because the required connection was not by the rights and interests claimed but by the traditional laws and customs of the claimants;
- in a communal title claim, it was no doubt a 'convenient shorthand' to observe that connection with the claim area had to be established at the communal level;
- if rights and interests can be regarded as being held by the community as a whole, proof of connection does not depend upon the precise locus, within that community, of native title rights and interests intramurally allocated;
- however, where (as in this case) it was contended that connection to a particular part of the claim area (i.e. the Perth metropolitan area) had not been substantially maintained, the connection inquiry itself must address that contention and, if it is established, its significance for the communal claim to that part of the area must also be assessed—at [165] and [167].

The second issue was (among other things) that:

- the laws and customs by which connection is asserted must be 'traditional' i.e. laws and customs that have been acknowledged and observed in a 'substantially uninterrupted' way from the time of sovereignty to the present;
- the connection itself must have been 'substantially maintained' over the same period;

- the requirements of continuity of observance and connection assume no little significance when one comes to consider whether observance and/or connection has been established sufficiently or at all in relation to the Perth metropolitan area—at [168].

The third issue was (among other things) that:
- the 'connection inquiry' requires both the identification of the content of the traditional laws and customs and the characterisation of the effect of those laws as constituting a connection of the people with the area concerned;
- Wilcox J did not undertake any inquiry into whether or not the evidence disclosed the requisite connection by traditional laws and customs, either at a communal or group level, as those laws and customs related to either the Single Noongar claim area generally or the area covered by the separate proceeding i.e. the Perth metropolitan area—at [170].

The fourth issue was (among other things) that:
- the connection inquiry required demonstration that, by their actions and acknowledgement, the claimants had asserted the reality of the connection to their land or waters so made by their laws and customs;
- while absence of physical presence was not a matter of concern in this case, the authorities on 'presence' illuminated that the requisite connection must have 'a continuing reality' to the claimants and that the evidence of how this was manifest was of 'no little importance' in establishing present connection;
- it could properly be said that s. 223(1)(b) involved proof of the continuing internal and external assertion by the claimants of their traditional relationship to country defined by their laws and customs, which may be expressed by physical presence or otherwise—at [171] to [174].

Finally, their Honours noted (among other things) that:
- the connection inquiry can have a 'particular topographic focus' e.g. in cases where the question was whether claimants had lost, or maintained, their connection with particular parts of the claim area;
- the topographic focus of connection was critical to this appeal, given that the separate question related only to Part A i.e. the Perth metropolitan area;
- where what was in issue was whether connection had been maintained to a particular part of a claim area, it was critical that the traditional laws and customs be examined 'as they relate to that area' and that the evidence demonstrated that connection to that area had, 'in reality', been substantially maintained since the time of sovereignty;
- Wilcox J adopted a quite different course in establishing connection to Part A i.e. he simply asserted that he was satisfied that the applicants had succeeded in demonstrating the necessary connection between themselves and most of the Single Noongar claim area and so decided the claimants had established a connection with Part A—at [175] to [180].

Connection to the whole claim area did not establish connection with Part A

The court noted that, whether connection had been substantially maintained to all (or any other) parts of the claim area was not in issue on the appeals. Therefore, there was no need for any conclusions on that issue. However, their Honours did say (among other things) that:
- Wilcox J's reasons did not 'betray how, if at all, he undertook the separate inquiry posed by s 223(1)(b)' in circumstances where the issue of connection 'loomed large';

- Wilcox J did not use any of the evidence that may have been relevant to connection in relation to any area of the Single Noongar claim, let alone Part A but, rather, marshalled it to inform his findings on the continuity of the Noongar community and the continued observance of at least some traditional laws and customs;
- integral to the laws and customs, both at sovereignty and at present, were Wilcox J's findings that groups of Noongar people had their own particular country for which they could speak, of which they had spiritual knowledge, in relation to which permission to enter had to be obtained and over which rights were acquired by descent rules;
- what needed to be emphasised was that, if those persons whom the laws and customs connect to a particular part of the claim area have not continued to observe without substantial interruption the laws and customs in relation to their country, they could not succeed in a claim for native title rights and interests;
- this was so even if it had been shown (which it had not) that other Noongar peoples had continued to acknowledge and observe the traditional laws and customs of the Noongar;
- continuity of observance of laws that connect is itself a manifestation of connection and a substantial absence of any real acknowledgement of traditional law and observance of traditional custom, as these related to the Perth metropolitan area, would occasion a substantial failure to maintain connection with that area which could not later be revived for contemporary recognition;
- if native title was to be found to exist in relation to the Perth metropolitan area, it would have to be proved that the laws and customs that related to that area had continued to be acknowledged and observed without substantial interruption and that connection likewise had been substantially maintained;
- this would require a consideration and evaluation of the considerable body of evidence before Wilcox J (historical and contemporary) that related to that area from sovereignty to the present—at [181] to [187].

Connection via descent from Noongar people who lived in Part A at sovereignty

Wilcox J found that, while there was no evidence to demonstrate an irrefutable line of descent from a Noongar person living in Part A at sovereignty to any particular member of the claimant group (i.e. the claim group *as a whole*), it seemed 'most unlikely' that the present wider Noongar community contained no descendant of any of them. The court found that:

- even if this so called statistical probability was accepted, it would not provide any evidence of the descendant's present connection to Part A;
- Wilcox J inferred a connection from the descendant's membership of the single Noongar community, irrespective of whether that unknown person (or persons) claimed rights and interests in Part A or, indeed, presently observed and acknowledged that community's laws and customs;
- as the rights and interests in question related only to Part A, and as the acquisition of rights over land and interests in that area was tied, *by the community's laws and customs*, to descent rules, proof of continuing connection to that area would have to track the continuing operation and vitality of those descent rules as they related to that area—at [189].

Conclusion on connection — s. 223(1)(b)

It was found that Wilcox J misapplied s. 223(1)(b) of the NTA and, in so doing, failed to answer a question necessary to be answered in deciding the separate question. Therefore, on this ground alone, the state and the Commonwealth appeals succeeded—at [190].

Rights and interests — WAFIC's appeal

WAFIC's grounds were that, because Wilcox J failed to give effect to a concession made by the claimants in their closing submissions which limited the rights and interests claimed in relation to the intertidal zone and (arguably) navigable, non-tidal waters, it had not addressed submissions to the wider rights in relation to waters that were claimed and so was denied procedural fairness. The court agreed—at [201].

WAFIC's interest was limited to areas where commercial fisheries existed i.e. in intertidal waters and navigable waters. Wilcox J's orders did not discriminate between rights in relation to land and rights relating to waters. The court considered that, while it was likely this was an oversight:

- the orders made were 'clearly open to an interpretation' that gave the claimants 'greater rights to the tidal waters than those actually sought' but this would depend on what was mandated by the relevant traditional laws and customs and their content was not before the court;
- WAFIC acted on the concession made and so was denied the important opportunity to make submissions 'both on the uncertain content and reach of...[the] orders and on the sufficiency of the evidence to establish the rights themselves';
- while the success of the other *Bennell* appeals had, in a sense, obviated the need for any order to be made, WAFIC's appeal did not depend on that fact and so it was appropriate to make orders reflecting its success;
- WAFIC's appeal should be allowed and the relevant part of the orders set aside and remitted to the docket judge, with it being noted that these orders were 'subordinate to the more comprehensive orders' made in the state and Commonwealth appeals—at [205] to [206].

Rights and interests - state and Commonwealth appeals

The state and Commonwealth took issue with Wilcox J's failure to finally determine the third part of the separate question i.e. what was the nature and extent of the native title rights and interests in relation to Part A. The court was of the view that it did not need to express any concluded view on this:

> [H]is Honour … left a significant but uncertain area of latitude to the docket judge … . It is not at all clear to us whether it was envisaged that that process would involve the taking of further evidence and the making of further submissions ... . Short of this Court actually making the determination that the primary judge refrained from making – a course which it would be quite inappropriate for us to embark upon given the state of the evidence and the submissions before us – little purpose would be served by our entering into the debate about what the final terms of a determination should or should not include—at [207].

Conclusion on the appeals against the decision in *Bennell*

It was found that:

- as the Commonwealth, WAFIC and the state had all succeeded on their appeals, the relevant orders made by Wilcox J should be set aside;
- it was not appropriate for the appellate court to answer to question as to the existence of native title in Part A in the negative because of the inquiries it would entail and the manner in which both the trial and the appeal were conducted;

- because the separate question arose in what was 'part of a larger matter', the proper future management of the entire Single Noongar claim may be compromised by a requirement that the separate question remain on foot and be answered;
- therefore, the separate question should be remitted to the docket judge to determine whether, if at all, the separate question, or some other separate question, should be heard and determined and whether or not the separate proceeding (Part A) should be consolidated with the Part B of the Single Noongar claim;
- no order as to costs should be made, subject to any party making written submissions within 21 days from the publication of the reasons for judgment—at [209] to [214].

Bodney appeal

While their reasons for judgment were somewhat different to those of Wilcox J, the court was of the view that (among other things):

- his Honour made no error in concluding that, contrary to Mr Bodney's claims, there was no recognised community or group identified as 'Ballaruk' or 'Ballaruk and Didjarruk' which held rights and interests in relation to Part A;
- on the evidence, those terms described two of four 'semi-moiety' names in use over an area much larger than the Perth metropolitan area;
- this conclusion was sufficient to dispose of Mr Bodney's appeal—at [234] and [236].

Therefore, the court dismissed Mr Bodney's appeal, noting that:

> [I]nsofar as Mr Bodney's grounds of appeal relate to findings made in the single Noongar appeal,...it is unnecessary for us to deal with them in light of our conclusions in the ... in the *Bennell* matter. In particular it is unnecessary for us to express a view on the correctness or otherwise of his Honour's finding that a single Noongar society existed at sovereignty—at [237] to [238].