

# Determination of native title – Barron George

## *Djabugay v Queensland* [2004] FCA 1652

Spender J, 17 December 2004

### Issue

This case deals with whether the Federal Court should make a determination recognising the existence of native title over Barron Gorge National Park in north Queensland as proposed in draft determinations filed by consent.

### Background

A claimant application for a determination of native title was lodged on behalf of the Djabugay People in May 1994. The respondents were the State of Queensland and the Cairns City Council. The agreement reached between the parties recognised that the Djabugay People have non-exclusive native title rights to use and enjoy the land and waters in the determination area.

### Power of the court—s. 87

His Honour Justice Spender noted that the parties had reached agreement as to the terms of a proposed consent determination recognising the existence of native title, going on to point out the requirements of ss. 87, 94A and 225 of the *Native Title Act 1993* (Cwlth) (NTA), summarised in this issue in relation to the Torres Strait determinations.

### Evidence before the court

The evidence provided to assist the court to determine whether or not s. 87 was satisfied included:

- affidavits of claimants deposing to their connection to the claim area according to the traditional laws and customs of their people;
- an anthropological report by Dr Sandra Pannell which stated (among other things) that the traditional entitlement to ownership of the Djabugay People's ancestral lands and waters derived from the charter of Bulurru, which is regarded by the Djabugay People as the source of customary beliefs and practices, jural protocols and procedures, and traditional interests and rights. It also noted that the Djabugay People's entitlement to possession of the claim area was recognised by senior members of neighbouring Aboriginal groups and senior members of non-neighbouring Aboriginal groups that had had association with the area through their residence at the Mona Mona mission;
- the anthropological reports of Norman Tindale in 1938, based on the information contained in reports of Meston (1889), McConnel (1931 and 1939–40), Davidson (1938) and Sharp (1938–9), which identified Djabugay territory as including the Barron Gorge and the surrounding area. The description of the traditional territory given by Tindale was generally affirmed by R.M.W Dixon, a linguist with more than three decades of research experience in north Queensland.

### **Appropriate to make determination**

Based on the evidence provided, Spender J was satisfied that the Djabugay People have a 'long-standing strong connection to the determination area under traditional laws acknowledged and traditional laws observed by them'. Therefore, his Honour was satisfied that the court had the power to make a determination in the terms proposed by the parties.

It was noted that:

It is a cause of great satisfaction when native title claims are settled through agreement rather than through litigation. The number of native title determinations...reached by consent, has dramatically increased...This suggests that...parties are increasingly aware of the benefits of negotiated settlements of native title claims, which otherwise have the potential to be lengthy, costly and divisive in the community—at [24].

### **Conditional on ILUA registration**

The determination of native title will take effect if and when an ILUA is registered on the Register of Indigenous Land Use Agreements. The matter will be listed for further directions if the ILUA is not registered within eight months of the date of the determination (or such later time as the court orders).

### **Determination area**

Native title was recognised over the area known as the Barron Gorge National Park. However, a number of areas within the boundaries of the national park are not included in the determination area, for example:

- areas currently or formerly subject to various special or term leases;
- the airspace above a term lease for a sky rail;
- areas on which any public work has been constructed, established or situated, including the boardwalk that links the Barron Gorge train station with the Barron Gorge National Park car park off Barron Falls Road and the part of the Cairns Kuranda railway corridor that traverses the Barron Gorge National Park: order 1 and Schedule 1. 'Public work' is defined to include any adjacent area the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work—see s. 251D of the NTA.

Minerals and petroleum are also expressly excluded from the determination.

### **Common law holders**

The common law holders of native title are the Djabugay People, defined as the persons descended from certain named apical ancestors.

### **Nature and extent of native title rights and interests recognised**

Subject to the qualifications noted below, the native title rights and interests recognised in relation to the determination area are non-exclusive rights to use and enjoy the land and waters being to:

- be physically present;
- camp (defined to exclude the right to permanently reside or build permanent structures or fixtures);

- hunt, fish and gather on, and take the natural resources for the purpose of satisfying the native title holders' personal, domestic, social, cultural, religious, spiritual, ceremonial, and communal needs for non-commercial purposes. 'Natural resources' is defined as animal, plant, fish and bird life found on or in the determination area from time to time and all water, clays and soils found on or below the surface of the determination area. 'Water' in this context means water as defined in the Water Act 2000 (Qld) and tidal water as defined in the Land Act 1994 (Qld);
- maintain and protect by lawful means places of importance to the Djabugay People;
- perform social, cultural, religious, spiritual or ceremonial activities and invite others to participate in those activities;
- make decisions about the use and enjoyment of the determination area by Aboriginal people who are governed by the traditional laws acknowledged and traditional customs observed by the Djabugay People.

### **Qualifications**

It is expressly stated that the native title rights and interests recognised in relation to the determination area:

- do not confer possession, occupation, use and enjoyment of the determination area on the Djabugay People to the exclusion of all others; and
- do not extend to a right to control access to, or a right to control the use of, the determination area.

The native title rights and interests are subject to and exercisable in accordance with:

- the laws of the Commonwealth and the state; and
- the traditional laws acknowledged and traditional customs observed by the Djabugay People.

They are also subject to the *Nature Conservation Act 1992* (Qld) and the operation of s. 24JA of the NTA (which deals with the doing of certain future acts on reserved lands), such that some existing native title rights might be extinguished in the future.

### **Other rights and interests recognised**

The other interests recognised in the determination area, as required by s. 225(c), included those of:

- the state;
- the public to access the national park for recreation purposes in accordance with the *Nature Conservation Act 1992* (Qld);
- permittees or licensees pursuant to the *Nature Conservation Act 1992* (Qld);
- the Wet Tropics Management Authority and permittees;
- the Cairns City Council and Mareeba Shire Council;
- Queensland Electricity Transmission Co Ltd and Ergon Energy Co Ltd;
- proprietors of certain lots and people authorised by them to access those areas;
- Skyrail Pty Ltd;
- people accredited under the *Transport Infrastructure Act 1994* (Qld) to enter and carry out railway works; and

- other interests that may be held by reason of the effect and operation of the laws of the Commonwealth and the state: order 7.

### **Relationship between native title and non-native title interests**

The relationship between the native title rights and interests and the other, non-native title interests recognised in the determination is that:

- those other interests continue to have effect;
- the rights conferred by or held under the other interests may be exercised notwithstanding the existence of the native title rights and interests; and
- the other interests and any activity that is required or permitted by or under, and done in accordance with, the other interests prevail over the native title rights and interests and any exercise of the native title rights and interests.

### **Prescribed body corporate-agent/representative**

The native title is not to be held in trust: see ss. 56 and 57 of the NTA. Once the determination becomes effective, the Djabugay Native Title Aboriginal Corporation will be the prescribed body corporate, acting as agent/representative for the native title holders, the Djabugay People: see s. 224(b).