

Determination of native title – Western Yalanji

Riley v Queensland [2006] FCA 72

Allsop J, 17 February 2006

Issue

The issue before the Federal Court was whether to make a determination of native title and other orders pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) over an area of land and inland waters on Cape York Peninsula in Queensland. The determination was to be subject to the registration of three indigenous land use agreements (ILUAs) within six months of the date of the order or such later time as the court may order.

Background

The application for a determination of native title made on behalf of the Western Yalanji was lodged with the National Native Title Tribunal on 22 September 1998 pursuant to s. 61 (1) of the NTA. Leave to amend was granted in 2000 and again in 2002. On 28 September 1998, native title was recognised in an adjacent area in a determination relating to an earlier claimant application brought by the Western Yalanji People.

Mediation

The application was referred to the Tribunal for mediation on 8 August 2000 pursuant to s. 86B of the NTA. While noting it was not appropriate for the court to disclose the conduct of any mediation, Justice Allsop said:

[I]t is not inappropriate to recognise ... the success of the mediation process brought about by the skill of the Tribunal and the goodwill and the skilled and constructive efforts of the parties and their advisers. All are to be congratulated—at [8].

In mediation, the parties had reached agreement upon the terms of a draft determination recognising the existence of non-exclusive native title rights and interests held by the Western Yalanji People in relation to the determination area.

Court's power to make orders - s. 87

Section 87 empowers the court, if it is satisfied that such an order is within its power, to make an order in, or consistent with, the terms of the parties' written agreement without holding a full hearing. Where the court makes an order in which a determination of native title is made, s. 94A requires the court to set out details of the matters mentioned in s. 225 in the order in question—at [12] to [13].

Material before the court

The court had access to an affidavit and anthropological reports dealing with the connection of the Western Yalanji claim group to the determination area based on a genealogical report, consultation with officers of the State of Queensland, consultant anthropologists and elders of the native title claim group—at [15].

Allsop J noted that the anthropological report filed on behalf of the claimants:

- illuminated, 'with some clarity, the existence of organised Aboriginal occupation and possession of the determination area extending back beyond the imposition of British sovereignty over the area'; and
- 'confirmed the continuity of an identifiable society of Aboriginal people having a connection with the lands and waters of the determination area in accordance with traditional laws which they acknowledged and traditional customs which they observed' — at [18].

The report stated (among other things) that:

- the earliest written records (dating from around 1872) showed that, when European explorers arrived in the area, it was 'fully subject to an Aboriginal pattern of occupation and use';
- the early ethnography (dating from the 1880s to the 1930s) confirmed that the occupants of the application area were Kuku Yalanji;
- there had been a 'cognatic reworking' of descent which tended to either 'blur or dissolve the matrilineal-patrilineal distinction and the internal divisions of a country into clan estates';
- the membership of the language-named group now asserts 'relatively undifferentiated joint rights in the group's country as a whole' and in the contemporary Aboriginal law of the region, 'this joint tribal title is conceived as essentially the right to possession inclusive of all beneficial rights and interests';
- the fundamental principle on which the claimants' native title rights and interests are based - traditional ownership of the claim area by a language-named group that is now known as Western Yalanji - is attested to by both the early ethnographic records of the 1880s and 1890s and by the later ethnographic surveys of the 1930s — at [19] to [23].

In considering this report together with the underlying anthropological and genealogical material, the court bore in mind that:

[O]ther learned and experienced anthropologists and historians retained by the State...have been closely involved in the mediation of this application and thus in the bringing forward of this consent determination — at [24].

In that context, and in the absence of contest about the material which has been placed before me, indeed with the expressed views of the State...that I should accept the material that has been placed before me, it is appropriate that I act on the material — at [24] to [25].

Determination made

In the light of the above, the court found that:

- native title exists in relation to the determination area as agreed to by the parties; and
- the Western Yalanji People have a long standing connection to the determination area under traditional laws acknowledged and traditional customs observed by them — at [25] to [26].

The court was satisfied that it was within the power of the Court to make the orders sought and that those orders could appropriately be made to give effect to the parties' agreement without a full hearing of the applicant's claim—at [10].

His Honour noted that:

This is a very significant day for the parties, in particular the applicant and the claim group. The recognition of native title takes place under the Act. It is the recognition by Australia and its laws (through orders made by the judicial arm of the Commonwealth) of the reality of the historical occupation of country by the Western Yalanji People and of the existence of their traditional laws and customs in relation to country long before European settlement. This recognition is not only an event of enduring importance for the Western Yalanji People, the applicant and the claim group, but it is also an event of enduring importance for all Australians. That is so because, one hopes, it is one part of the creation of a new national legacy within the framework of legislation of the Commonwealth of Australia—at [37].

Native title holders

The Western Yalanji People were determined to hold the native title rights and interests in accordance with the traditional laws acknowledged and the traditional customs observed by them. The Western Yalanji People are defined as:

[T]hose Aboriginal people who are descended from certain named ancestors or recruited by adoption into one of those descent groups in accordance with the traditional law and custom of the Western Yalanji People.

Nature and extent of the native title rights and interests

Subject to the qualifications and the other interests noted below, the native title rights and interests recognised in relation to the determination area are non-exclusive rights to:

- be present on, use and enjoy the determination area by:
- hunting, fishing and gathering for personal, domestic or non-commercial communal purposes;
- conducting ceremonies;
- being buried on, and burying native title holders;
- maintaining springs and wells where underground water rises naturally for the sole purpose of ensuring the free flow of water;
- taking, using and enjoying the natural resources for personal, domestic or non-commercial communal purposes;
- maintaining and protecting from physical harm, by lawful means, those places of importance and areas of significance to the native title holders under their traditional laws and customs; and
- inherit and succeed to the native title rights and interests.

Native title rights to water

The native title rights and interests recognised in relation to water are non-exclusive rights to:

- hunt, fish and gather on, in and from water for personal, domestic or non-commercial communal purposes; and

- take, use and enjoy water and natural resources therein for personal, domestic or non-commercial communal purposes.

Qualifications

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

- the laws of the state and the Commonwealth; and
- the native title holders' traditional laws and traditional customs.

The native title rights and interests:

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

There are no native title rights and interests in, or in relation to, minerals and petroleum.

Other interests

The nature and extent of the other rights and interests noted in the determination area were:

- those held under a special lease, an occupation license, various mining leases, exploration permits and fossicking permits;
- those of the parties to various ILUAs;
- the Cook and Mareeba shire councils' rights and interest both as local government and as entities exercising statutory powers; and
- any other rights, interests and powers held by reason of the effect and operation of the laws of the state and the Commonwealth current at the date of the determination.

Prescribed body corporate

Native title is not held in trust. The Western Yalanji Aboriginal Corporation is the prescribed body corporate: see s. 57 of the NTA. After being entered onto the National Native Title Register, it will be a registered native title body corporate.

Determination ineffective until ILUAs registered or further order

The determination will take effect when three related ILUAs are registered on the Register of Indigenous Land Use Agreements. However, if they do not get registered within six months of the date of the determination, or such later time as the court may order, the matter is to be listed for further directions.