Determination of native title – Larrakia

Risk v Northern Territory [2006] FCA 404

13 April 2006, Mansfield J

Issues
The case deals with a number of claimant applications made over Darwin and its surrounds. Justice Mansfield noted that the three broad issues for consideration were:

- whether the Larrakia people established that they had native title rights and interests in the claim area as defined in s. 223(1) of the *Native Title Act 1993* (Cwlth) (NTA);
- if such rights existed, the detailed nature of those rights; and
- whether such rights have been extinguished either at common law or by operation of the NTA.

Each issue was 'vigorously' contested by the main respondents, the Northern Territory and Darwin City Council (DCC).

Background
The area dealt with in these proceedings covered parts of metropolitan Darwin and its surrounds on the Darwin Peninsula. It comprised an area of about 30 km2 of land and waters, including mangrove swamps and mostly covered areas of Crown land and some land held by DCC and Palmerston City Council.

The proceedings were a consolidation of 19 applications filed by three different groups of applicants. The applications were filed between 1994 and 2001 by the Larrakia applicants (the first applicants), the Quall applicants (the second applicants) and the Roman applicants (the third applicants).

The orders consolidating the proceedings divided application DG6017/1998 into Parts A and B. The orders also consolidated Part A of DG6017/1998, generally concerned the more urbanised areas in that claim, with 18 other applications into one action (DG6033/2001). The consolidating orders confined the consolidation to those parts of the other 18 claim areas which overlapped with Part A of DG6017/1998.

The hearing proceeded in respect of 216 areas of land and waters in and around Darwin which did not precisely correspond with those areas of land the subject of the consolidated proceeding. On 31 January 2005, Mansfield J varied the original orders so as to clarify the area covered by the proceedings.

Applicants
The Larrakia applicants asserted that their claim group encompassed the Quall applicants and the Roman applicants. Tibby Quall, the applicant in the Danggalaba Clan's claimant application, asserted that the Larrakia people are a language group

and that it is the Danggalaba Clan that should be recognised as holding native title. The Roman applicants discontinued their claim.

Authorisation
Most of the applications dealt with in these proceedings were made under the 'old Act' i.e. before the commencement of the *Native Title Amendment Act 1998* (Cwlth) (amending Act). Under the old Act, authorisation of the application was not required. However, all but one of the applications were either amended or filed after the 'new Act' commenced. Under the new Act, the person or persons making a claimant application must be authorised to do so by the native title claim group: see ss. 61(1) and 251B.

After summarising the authorities on point, his Honour followed the approach in *Quall v Risk* [2001] FCA 378 at [65], where it was held that an old Act application that is amended subsequent to the commencement of the amending Act must comply with the new requirements of s. 61—at [68] and [75].

Compare *Jango v Northern Territory* [2006] FCA 318 at [28], summarised in *Native Title Hot Spots* Issue 19, where Justice Sackville took the opposite view i.e. a claim made before the commencement of the amendment Act does not have to comply with the authorisation requirements introduced by the amendments, 'at least in the absence of a material change to the composition of the compensation claim group'.

After summarising the evidence and the law on authorisation under s. 251B, Mansfield J deferred making a ruling until findings were made about s. 223(1)(a) and (b) as that was likely to 'expose the answer to the competing submissions' on authorisation. As a result of those findings, his Honour decided it had become unnecessary to further address authorisation—at [94].

The law in relation to native title
Mansfield J considered the following matters:

- the definition of native title in s. 223(1);
- what is to be determined when making a determination of native title as defined in s. 225; and
- the case law on ss. 223(1) and 225, particularly *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28, summarised in *Native Title Hot Spots* Issue 1 (*Ward*) and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58, summarised in *Native Title Hots Spots* Issue 3 (*Yorta Yorta*)—at [48] and [58].

The court relied on the majority judgment in *Yorta Yorta*, which stated that the relevant rights and interests for the purposes of s. 223(1) are those which derive from traditional laws and traditional customs forming a body of norms that existed before sovereignty. His Honour noted that this principle affects the construction of the definition of native title in s. 223(1), particularly the meaning of 'traditional'—at [52] and [54].

It was noted that:

- the joint judgment in *Yorta Yorta* imposed a requirement of continuity on both the Aboriginal society and the acknowledgement and observance of the traditional laws and traditional customs which are claimed to give rise to the rights and interests under the NTA;
- the requirement for continuity is not absolute but acknowledgement and observance of traditional laws and customs must have continued 'substantially uninterrupted' since sovereignty—at [55] and [58].

His Honour looked at the evidence for each of three periods of history:

- 1825 to c 1910;
- 1910 to World War II;
- World War II to 1970.

The period 1825 to c 1910

It was agreed between the parties that the Crown acquired sovereignty over the Northern Territory in 1825 and that the first European settlement in the Darwin region was in 1869—at [99].

Mansfield J noted that each of the following questions must be answered in the affirmative if the applications dealt with in this case, or any of them, were to succeed:

- whether at sovereignty in 1825 a society of Aboriginal persons existed with traditional laws and traditional customs that formed a normative system which gave rise to rights and interests in the claim area that were possessed by members of that society under those laws and customs;
- whether at settlement in 1869, such a society of Aboriginal persons existed;
- whether the society at the time of settlement (in, say, the mid 1870s) was the Larrakia people;
- whether that was the same society as that found to exist at the time of sovereignty—at [230], referring to *Yorta Yorta* at [46] to [47], [79] and [86].

His Honour was satisfied about each of those matters and made the following findings:

- within the claim area at sovereignty there existed an Aboriginal society which, by its traditional laws and customs, had a normative system which gave rise to rights and obligations on the part of its members in relation to the land and waters within that area;
- the archaeological evidence pointed to some form of society at that time, albeit directly demonstrating only an 'economic' society;
- the first observations of the area by Europeans were generally consistent with there being then, and there having been, such a society, although such observations were only an indication of such a society—at [232].

The material from the time of European settlement of the Darwin area, covering a period of three decades or so, was found to reveal the existence of a society of Larrakia people who had a close attachment to the land and waters in the area, including in the claim area—at [233].

It was found that, at the time, the Larrakia people had a normative system by reason of their traditional laws and customs which created rights and obligations possessed by them in relation to the land and waters of the claim area. In particular, the Larrakia people:

- identified themselves as a society in that way;
- spoke the Larrakia language; and
- had a complex and sophisticated set of laws and customs which included rules governing their internal societal relationships, the way they dealt with the claim area and the collection and use of its resources, and the ceremonial and spiritual aspects of their relationships with the land and waters of the claim area—at [233].

The court accepted the linguistic evidence given by Dr Paul Black, an 'impartial and dispassionate witness', which was said to be 'of great assistance'—at [139] and [145].

That evidence led Mansfield J to conclude that:

- the Larrakia language had a common ancestry with the Wulna language extending back over many generations;
- that finding, together with the absence of any evidence to suggest that any other language group existed within the claim area and the wider Darwin area at the time of sovereignty, led to the conclusion that, at sovereignty, the Aboriginal society which then existed was in general terms the same as the society which existed at the time of European settlement of the general area—at [236] to [237].

Therefore, Mansfield J concluded that the society which occupied the claim area at sovereignty was the same society, with the same traditional laws and customs (whether adapted by economic or environmental factors or not) as he had found to have been the occupants of the Darwin region including the claim area in the latter decades of the nineteenth century—at [238].

In relation to ethnographic evidence, the court accepted the observations and views of the expert witness but found that they did not take the applicants' case further than the oral evidence—at [117].

In relation to the historical evidence, Mansfield J accepted that:

- an historical source document is only as objective as its author and it is, therefore, reasonable that an expert historian would adopt a methodology requiring a critical reading of source documents;
- it must always be borne in mind that any historical record about Aboriginal people is incomplete and that there are 'silences' in the historical record;
- the nature of these 'silences' and the manner in which they should be addressed are not just of academic interest but bear directly on the approach the court must take in interpreting the evidence and deriving inferences that, of necessity, must be made to decide the issues in contention in native title proceedings;
- this was particularly so where the historical records, such as those of police and pastoralists, were ethnocentric and where, in the absence of anthropological observation, those record did not identify Aboriginal people by tribe or

language—at [135] and [137], referring to Nicholson J in *Daniel v Western Australia* [2003] FCA 666 at [149], summarised in *Native Title Hot Spots* Issue 6.

However, based on the cross-examination of Dr Samantha Wells (who prepared a historical report and gave expert evidence in this matter), his Honour formed the view that:

> Dr Wells to a degree adopted a view of historical records which was favourable to the Larrakia claimants. That is not because she was in fact partisan, or was not trying to assist the Court. It was appropriate for her to assess the significance of elements of the historical record ... .[C]ross-examination exposed a number of instances where the historical record was not silent, and where Dr Wells had taken a view as to its significance which appeared not to be justified by its terms or on occasions which appeared to be inconsistent with its terms ... . [T]he primary sources which Dr Wells sought to interpret...were many in number and in a number of instances the reasons for doing so were not persuasive to me ... . [T]hat material on its face was also consistent with (and in some cases indicative of) the alternative thesis that during the middle part of the 1900s the Larrakia people were not consistently as coherent a society as Dr Wells said the record intended to show. I think that alternative thesis in respect of that period was not as fully considered by Dr Wells as it might have been—at [137].

For those reasons, Mansfield J approached Dr Wells' evidence about the state and status of Larrakia people as a communal group during the mid 1900s with some circumspection—at [138].

The period 1910 to WWII

Mansfield J found that accounts of cultural practices of Larrakia people during this period existed but were of a more general nature than earlier ethnographic accounts—at [300].

His Honour relied on the evidence of Baldwin Spencer in his Preliminary Report on Aboriginals of the Northern Territory early in the twentieth century that the practice of Larrakia traditional laws and customs in the Darwin area was waning. Spencer attributed this to the 'racially mixed' community—at [813].

It was held that:

- the contemporary material in the period from about 1910 to the start of World War II did not point clearly to the Larrakia people being a continuing strong community practising their traditional laws and customs in the Darwin area, including the claim area;
- the material did point to some 'elder structure' within the Larrakia community, to the on-going holding of corroborees (apparently in conjunction with other Aboriginal groups) and to the conduct of some ceremonies;
- that said, it 'more strongly' suggested that the conduct of ceremonies had barely persisted and there was no evidence to suggest that all, or most, of the cultural practices of the Larrakia people which were observed during the latter part of the nineteenth century continued to be practised;
- documentary evidence of the two decades before WWII also pointed to the erosion of the practice of those laws and customs, prompted by the removal of

most Aboriginal persons from Darwin during World War II and by the policy of assimilation which was introduced when many of them returned to Darwin—at [339] and [816].

His Honour took the view that a corroboree for tourists did not necessarily constitute a 'ceremony'—at [319].

The period WWII to 1970

Mansfield J considered evidence in relation to the Kulaluk, Gundal, Old Man Rock and Kenbi land claims made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (Land Rights Act).

The documentary material relating to the Larrakia land rights claims, starting with the Kulaluk Land Claim, indicated that, by the 1970s, there was a small group of 'full-descent' people identified as Larrakia pursuing such a claim. According to Mansfield J:

- this did not otherwise indicate the ongoing practice of traditional laws and customs;
- its leader, Bobby Secretary, was reported as saying he did not know of the traditional significance of the site claimed and had to be educated about it by Tommy Lyons from Delissaville on the Cox Peninsula;
- Mr Lyons was reported as saying the area was taboo to women but women clearly now have (and at the time had) ready access to the site in question—at [817].

Mansfield J also considered the Gundal Land Claim material and noted that:

- there were a number of people who identified themselves as Larrakia;
- those people did have knowledge of the ceremonial significance of that area but it ceased to be used as a ceremonial site between 1927 and 1933;
- the exclusion of women from that site in accordance with traditional laws and customs was not insisted on by the 1970s, which was not a mere adaptation of those laws and customs (although it was noted that the contemporary community of Larrakia people are re-asserting the site as taboo for women)—at [818].

In relation to the land claim over Old Man Rock, Dr Wells' evidence was that she could not recall any references in the historical record to Old Man Rock between 1931 and the 1970s—at [426].

In relation to the Kenbi Claim, which related to an extensive area of land on the Cox Peninsula, Mansfield J declined to adopt any of the findings of the Land Rights Commissioner for the following reasons:

- it covered a different claim area to that covered by these proceedings;
- not all of the witnesses who gave evidence were called in these proceedings;
- the expert evidence was in part from different witnesses;
- the expert evidence related to the different issues arising under the Land Rights Act and was given in respect of different land; and

- the matters to which those findings related have also been the subject of additional and, in some instances, different evidence to that brought in these proceedings—at [442].

Expert anthropological evidence

In relation to the expert anthropological evidence it was noted that:

- it is important that the intellectual processes of the expert can be readily exposed;
- that involves identifying, in a transparent way, what are the primary facts assumed or understood;
- it also involves making the process of reasoning transparent and, where there are premises upon which the reasoning depends, identifying them;
- the premises, whether based on primary facts or on other material, then need to be established;
- at least in the context of expert anthropological reports, the line between an opinion and the fact upon which that opinion is based is not always clear;
- while the clear separation of fact and premise from opinion is clearly desirable, it is necessary to accept that there is sometimes difficulty in discerning between the facts upon which an opinion is based and the opinion itself in an expert anthropology report;
- such a difficulty should not be regarded as a fatal flaw that may render the report or the opinion inadmissible—at [469], [470], [472] and [473].

Clan estates

According to the expert anthropological evidence, there was little material on the status of groups within the Larrakia community prior to the lodgement of the Kenbi Claim. Despite the lack of ethnographical and historical source information, Dr Michael Walsh (who prepared a genealogical report for the Larrakia applicants), Mr Robert Graham (who prepared an anthropological report for the Larrakia applicants) and Professor Kenneth Maddock (who prepared an anthropological report for the territory) all agreed that, at the time of sovereignty, Larrakia country was divided into small territories with each territory being affiliated with a local descent group (i.e. a clan). Each clan would also have its own particular set of Dreamings—at [488].

However, the court was of the view that the evidence pointed to the spread of disease, interaction with other Aboriginal groups, the removal in 1912 of Aboriginal people to the Kahlin Compound north-west of Darwin, and the separation of mixed descent children from their parents which led to the 'ultimate decline' of the clan organisation. It was, according to Mr Graham, replaced by a system of 'families of polity' described as groups composed of the descendants of deceased ancestors known to have been members of the Larrakia language group or 'tribe'. Mr Graham considered that the Danggalaba clan was the sole remaining Larrakia clan—at [489] to [490].

Current Larrakia society

The oral evidence, in Mansfield J's judgment:

- disclosed that the current Larrakia society had not carried forward the traditional laws and customs of the Larrakia people so as to support the conclusion that those

traditional laws and customs have had a continued existence and vitality since sovereignty;
- revealed inconsistencies between members of the present applicants in some respects about what their laws and customs are;
- revealed inconsistencies in the extent to which those laws and customs are practised, at least as apparent from a number of instances where only one or a few witnesses spoke of a law or custom which would have been expected to have been recognised and addressed in the evidence of many of the witnesses;
- revealed in many instances the adoption of knowledge of traditional laws and customs from those learned during the Kenbi Claim hearings, and later from other research, and from direct inquiry of elderly Larrakia people and elderly non-Larrakia people both near to Darwin and remote from it;
- disclosed that certain beliefs now regarded as fundamental were derived only from the Kenbi Claim hearings;
- disclosed a level of generality of knowledge—including the absence of knowledge of particular Dreamings or stories for sites, of site specific ceremonies, and of body adornment—which was not consistent with the acquisition of knowledge in accordance with the traditional laws and customs of the Larrakia people;
- did not reveal the passing on of knowledge of the traditional laws and customs from generation to generation in accordance with those laws and customs during much of the twentieth century—at [820] to [822].

Funeral rites

Mansfield J noted that:
- the current Larrakia people no longer practise traditional bush burials and most Larrakia people are now buried in cemeteries;
- customs such as self-harm as an 'expression of grief' are no longer practised, although it was noted that persons gave evidence as to traditional elements of funeral rites that are practised by members of the Larrakia people—at [543].

Economy and resource use

Evidence was considered in relation to economy and resource use which included:
- hunting, fishing and gathering resources;
- sharing, conserving and not wasting resources;
- restriction on consumption of certain food;
- knowledge about location and use of bush food, craft and medicine; and
- methods for hunting and preparation of food—at [571] to [598].

Spiritual aspects

Evidence was considered in relation to the following spiritual aspects of Larrakia society:
- Dreamings, including place Dreamings, personal Dreamings and family/clan Dreamings/totems;
- mythical malevolent being;
- ancestors;
- site specific ceremonies and rites including 'calling out'/'singing out' to spirits and washing in salt water or 'giving sweat' to country;

- giving offerings to country;
- involvement in ceremony;
- knowledge about sacred sites;
- dances; and
- songs—at [599] to [678].

Dreamings

There was significant evidence in relation to both place and personal Dreamings, and of family Dreamings and totems. It was accepted by the first applicants that the evidence was not uniform or consistent about those matters. One 'inconsistency' was whether the totemic system of the earlier Larrakia people existed at all—at [826].

The inconsistencies, and to some degree the lack of detailed knowledge of certain witnesses about the source of their Dreamings or their significance, influenced the weight his Honour attached to this evidence in the context of s 223(1) of the NTA:

> I think this evidence is significant to showing that today there is a body of cultural or spiritual laws and customs governing the Larrakia people. It does not point in any real way to that body of cultural or spiritual laws and customs being passed from generation to generation in accordance with traditional laws and customs, so as to support any conclusion that the contemporary laws and customs are themselves 'traditional'—at [826].

Ceremony

There was 'considerable' evidence about certain ceremonies and rituals performed at certain locations or in certain circumstances—at [826].

In respect of the issue of involvement in ceremony, Mansfield J concluded that it was clear from the primary evidence that there were no longer any ceremonies (in the sense of large group gatherings and initiation rites) which take place on the Darwin side of the harbour, including in the claim area. The first applicants accepted that:

- the intensity and consistency of Larrakia involvement in ceremonies had diminished since sovereignty;
- the Larrakia people no longer practise distinctly Larrakia ceremonies; and
- there has been an 'attenuation' of knowledge in relation to, and in the observance of, ceremony—at [664].

This led Mansfield J to conclude that:

- there had been a loss of the function of ceremony which would otherwise provide a process for the transfer and reinforcement of knowledge about Dreamings, sites and laws;
- that means of transmission of knowledge did not now occur and had not occurred for many decades—at [827].

His Honour also noted that there was no evidence of any Larrakia body painting designs, specifically in relation to particular ceremonies or rituals, now said to be possessed by the Larrakia people which might suggest there was no normative

system within which any past cultural practices in that regard were conveyed to the current generation or are to be conveyed to future generations—at [678].

Sites
It was found that:
- the evidence in relation to looking after sites did not demonstrate a general understanding and expression of the knowledge about stories, songs and ceremonies for sites and looking after those sites;
- nor did it demonstrate a particular process of acquisition of knowledge about those matters—at [740].

Language
The fact that the Larrakia language is no longer spoken, except generally by the use of some Larrakia words as a substitute for English words, was not taken to be of any real moment—at [833].

Songs
Mansfield J's view was that:
- there is only a general knowledge of the existence of one or two particular songs and dances previously part of the traditional laws and customs of the Larrakia people;
- the current level of knowledge did not support the conclusion that it has been received by an appreciation of, or transfer of, knowledge within the Larrakia community according to its traditional laws and customs;
- it was consistent with some childhood memories from observation and some individual provision of information from one generation to the next but not in the context of a normative structure—at [677].

Transmission of knowledge
Evidence was considered in relation to the social structure of Larrakia society and particularly in relation to the transmission of knowledge. Mansfield J concluded that the central issue in relation to the transmission of knowledge between generations (putting aside any interruption to the transmission of knowledge) is whether there is a requirement for the current system of transmission of knowledge to be the same as that which existed at the time of sovereignty—at [723].

It was noted that:
- the NTA does not require a specific method for the transmission of knowledge between generations of an Aboriginal society;
- subsection 223(1) requires that the 'rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed' and that the Aboriginal group have a connection with the land or waters 'by those laws and customs';
- 'traditional' as used in s. 223(1) does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the NTA deals as rights and interests rooted in pre-sovereignty traditional laws and customs;

- demonstration of some adaptation or change will not 'necessarily be fatal' to a native title claim, and that the 'key question is whether the law and custom can still be seen to be traditional law and traditional custom'—at [724].

His Honour was of the view that this case presented a situation where:
- there was no documentary or expert evidence of an historical or anthropological nature indicating the existence of any traditional system of transmission of knowledge at the time of sovereignty;
- it was obvious, given the notorious oral nature of historical tradition of all Australian Indigenous societies, that such a system must have existed; and
- the primary evidence indicated that current members of the Larrakia community have obtained knowledge through a variety of methods, including from other Larrakia people, from non-Larrakia people, from books, from courses of study, and from the Kenbi Claim hearings which spanned many years—at [725].

His Honour was of the view that:
- the recent processes for the acquisition and transmission of cultural knowledge were piecemeal because of the history of the Larrakia people during several decades of the twentieth century;
- it could be inferred that the process of knowledge acquisition and transmission which existed at sovereignty (and which was found to have continued to the time of settlement in the 1870s and beyond) was not of the same piecemeal character;
- it was likely to have been a process effected within formal rules of the Larrakia people as to who should hold, and pass on, knowledge, when they should do so and to whom they should do;
- it was unlikely to involve any passing on of knowledge from non-Larrakia people—at [726].

Mansfield J noted that it was also important to consider the content of that knowledge. The question for the court was whether the community has the same set of laws and customs as it did at the time of sovereignty, allowing for any adaptation which may have occurred over the past 180 years. If it is found that the traditional laws and customs which give rise to rights and interests have remained unchanged (again allowing for adaptation), then the fact that the method of transmitting them has been adapted to cope with the exigencies of the past will be less significant—at [727].

Apart from the process of information transference through ceremony, the first applicants accepted that knowledge of traditional laws and customs was passed essentially through family. The senior family members held the knowledge and passed it to the appropriate persons of the next generation at an appropriate time. The acceptance and recognition of elders, their status as decision-makers and their role in passing on knowledge was, on the data relating to earlier periods, an important element of the Larrakia traditional laws and customs—at [830].

However, it was found that the evidence did not show that:
- those cultural principles are, and have continuously been, intact;

- for the generations during the middle decades of the twentieth century, the then elders adopted the process for the transfer of knowledge which was traditional—at [831].

It was noted that much of the contemporary knowledge was accepted as having come from other sources and that many of those now recognised and respected as Larrakia elders do not hold the detailed knowledge which the current generation is seeking, simply because it was not given to them—at [831].

Mansfield J considered that this breakdown was also revealed in the current decision-making structures for the Larrakia people because:
- it was clear that the decision-making process among the Larrakia people had been largely transferred to the Larrakia Nation Aboriginal Corporation, whose composition and decision-making process was not traditional;
- there was no 'superior elder' reflecting the sort of status reported by the 'King' figures referred to in earlier literature;
- there was no evidence of the means of identification of the elders or of them having met as a group to make decisions for the Larrakia people;
- there was no evidence as to how the elders of the Larrakia people as a group (as distinct from individual family practices) would come together and would make decisions for the Larrakia people—at [832].

Quall applicants—Danggalaba clan
Mansfield J was impressed by Tibby Quall's evidence and his knowledge of particular laws and customs. However, it was held that:
- there was uncertainty, or inconsistency, about the composition of the Danggalaba clan and the rules governing its structure;
- there was no satisfactory foundation for finding that the second applicants practised and enjoyed certain rights and interests which arose under laws and customs which they only have inherited from or had passed on to them by their predecessors back to sovereignty;
- there was no satisfactory foundation for concluding that the laws and customs reflected or were derived from the normative system of the Aboriginal society which existed at sovereignty—at [798].

Interruption of traditional law and custom
Mansfield J noted that:
- interruption of the enjoyment or exercise of native title rights and interests in a particular geographical area will not necessarily be fatal to a native title claim;
- nor will change of itself necessarily have that effect;
- the significance of change to, or adaptation of, traditional law or custom in particular circumstances may present difficult questions as to whether the current law and custom is still 'traditional' as that word is used in s. 223(1)(a);
- interruption of use or enjoyment of native title rights or interests may be significant in determining whether those rights and interests now possessed are possessed under 'traditional' laws and customs;

- this is why the observance and acknowledgment of the pre-sovereignty laws and customs should be shown to have continued substantially uninterrupted since sovereignty—at [811], referring to *Yorta Yorta* at [84].

In his Honour's opinion, a combination of circumstances had, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the twentieth century in a way that has affected their continued acknowledgement and observance of the traditional laws and customs of the Larrakia people that existed at sovereignty. One 'significant' circumstance was the development of Darwin into a substantial community following European settlement because that process involved many other Aboriginal people who were not Larrakia moving into the Darwin area. Other circumstances related to natural or external events and some were the consequence of government policy—at [812].

Mansfield J accepted that:

- there is, and has been, a continuous recognition in the Darwin area of certain persons as Larrakia, both by self-identification and by community recognition. However, the process for doing so had not remained constant;
- it was originally a patrilineal descent system, and it is now a cognate descent system;
- there are some intra-Larrakia disputes as to who are now within the compass of the Larrakia people;
- there has been, so far as circumstances allowed, a practice among the Larrakia people of hunting, fishing and foraging for food in the Darwin area which has continued through the nineteenth century to the present time;
- there had been a practice of using bush foods as medicines and for craft works and similar evidence was given about food preparation and cooking—at [825].

However, according to Mansfield J:

- the evidence did not suggest specifically Larrakia techniques for those practices, nor did it indicate that the knowledge relating to them has come from other Larrakia people in any traditional way;
- while some of the knowledge had come from particular older Larrakia people, the evidence did not show a picture of the inter-generational transmission of such knowledge according to traditional laws and customs—at [825].

Conclusion

The court concluded that the present society comprising Larrakia people does not now have rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by the Larrakia people at sovereignty. That is because their current laws and customs are not 'traditional' in the sense explained in *Yorta Yorta*—at [834].

In Mansfield J's view:

- there was considerable ambiguity, and some inconsistency, about the current laws and customs of the Larrakia people and significant changes in those laws and customs from those which existed at sovereignty;

- those differences and changes stem from, and were caused by, a combination of the historical events which occurred during the twentieth century that gave rise to a substantial interruption in the practice of the traditional laws and customs of the Larrakia people as they existed at sovereignty and at settlement, so that their practise and enjoyment has not continued since sovereignty;
- the present laws and customs of the Larrakia people are not simply an adaptation or evolution of the traditional laws and customs of the Larrakia people in response to economic, environmental and historical and other changes—at [835].

Accordingly, the application was dismissed.

Extinguishment

Given the conclusions set out above, there was no need to address the question of extinguishment of native title. However, Mansfield J was of the view that it may be 'helpful to the parties to address certain matters of principle which were the subject of detailed submissions'—at [845].

Section 44H

Mansfield J came to the view that s. 44H provides that any extinguishment of native title rights and interests occurs by reason of the relevant 'tenure' grant of rights, rather than by the exercise of the rights under it. Accordingly, any inconsistency arises at the time of the grant and results in extinguishment of native title rights and interests by reason of the inconsistency at that time—at [872].

Although it is not mentioned in the judgment, this seems to accord with what was said by the Full Court about the operation of s. 44H in *De Rose v South Australia (No 2)* 145 FCR 290; [2005] FCFCA 110 at [159] to [165], summarised in *Native Title Hot Spots* Issue 15.

Section 47A and 47B

In Mansfield J's view, the requirement in s. 47A that the area be held 'expressly' for the benefit of Aboriginal peoples does not require that the instrument granting the freehold or lease of the particular area contain that explicit condition. The requirement for the grant is contained in s. 47A(1)(b)(i) and it is that legislation under which the grant of the freehold or leasehold interest have a particular character. The separate condition imposed by s. 47A(1)(b)(ii) that the area be held expressly for the benefit of Aboriginal people may be shown either by the terms of the grant or by the terms of the legislation under which the grant is made—at [879].

His Honour considered a situation where neither the enabling legislation nor the lease indicated that the area was to be held expressly for the benefit of Aboriginal people. The lease in question was held by Gwala Dariniki Association Inc. Mansfield J doubted that the composition of the grantee of a freehold or leasehold entity can itself be sufficient because it may change and its purpose may change—at [880].

Mansfield J noted the requirement in ss. 47A(1)(c) and 47B(1)(c) that, at the time the claimant application is made, one or more of the members of the native title claim

group must occupy the area. The submissions about the measure by which occupation is to be determined related to two issues:

- the identification of the 'area' which is so occupied; and
- what is required in fact to constitute occupation—at [883] and [884].

His Honour was of the view that:

- the area required to be occupied must be the area held expressly for the benefit of the particular Aboriginal group under the relevant grant;
- at least in respect of s. 47A, this accords with the observations of Sundberg J in Neowarra v Western Australia [2003] FCA 1402 at [686], summarised in *Native Title Hot Spots* Issue 8;
- it is the nature of the extinguishing act or acts which informs the identification of the area or areas within the claim area upon which s. 47B (if otherwise applicable) may operate;
- it is not the claim area itself, although in certain circumstances the claim area and the 'area' to which s. 47B refers may entirely overlap;
- the finding about whether that 'area' was occupied at the time of the relevant application then becomes a matter of fact to be determined upon the whole of the evidence—at [885], [887] and [892].

On the application of ss. 47A or 47B, see also *Risk v Northern Territory* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19) at [879] to [903].

Old Act applications and ss. 47A and 47B

The DCC submitted that neither s. 47A nor s. 47B applied to claimant applications made under the old Act. The argument was that when the old Act applications were made, ss. 47A and 47B did not exist and so could not be relied on by the applicants. The first applicants disputed this, contending that the sections generally applied whenever the applications were made. The territory also disputed this, contending they applied to applications whenever made but with effect only from 30 September 1998. It submitted that 'there appears to be little doubt' that ss. 47A and 47B can operate in respect of the native title determination applications made prior to the commencement of the new NTA but only from that date.

Mansfield J took the view that it was a matter of deliberate drafting that the transitional provisions found in Schedule 5 of the *Native Title Amendment Act 1998* (Cwlth) did not deem the applications made under the old Act to be taken as having been made to the court as having been so made at 30 September 1998, when most of the amendments commenced. The intention of s. 47B, if it applies, is to require that the extinguishing effect brought about by the creation of 'prior' interests to be disregarded for all purposes under the NTA.

His Honour found that:

- a prior interest must be one created before the application was made;
- if s. 47B deemed the application (at least for its purposes) to have been made at 30 September 1998, then intermediate grants would have given rise to prior interests;

- the alternative, which has been adopted, is to deem the application to have been made to the court but not to affect the date it was made;
- accordingly, there is no special category of intermediate grants which fall between the arms of operation of s. 47B—at [903].

Whether s. 47A applies to land within the Municipality of Darwin
The DCC contended that s. 47B did not apply within its municipal area because (among other things) it was subject to a proclamation, namely the proclamation of the Town of Darwin.

His Honour accepted the submission of the first applicants that the 'purpose' required by s 47B(1)(b)(ii) applied to any form of instrument by which the area was set aside—at [914].

Mansfield J found that s. 47B(1)(b)(ii) did not require the proposed use to be dictated by the terms of the relevant instrument. Nevertheless, according to his Honour, it was 'plain' that s. 47B was intended to apply except where the proposed use, which fell within its terms, involved a permanent or long-term element. It was not intended to apply in circumstances where, at the option of the beneficiary of the instrument, the use of the relevant area may be readily altered.

Consequently, his Honour found that the qualifying purpose must clearly emerge from either the relevant instrument or from the legislative or regulatory structure under which the relevant instrument was made—at [915] to [916].

The issue, in this case, concerned whether the proclamation of parts of the claim area, by which they were 'set apart for towns', brought those areas within s.47B(1)(b)(ii) so that s. 47B would not apply.

Mansfield J referred to the Full Court decision in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 at [187] (summarised in *Native Title Hot Spots* Issue 16) to the effect that the mere proclamation of a town site, which might comprise largely private property holdings by lease or otherwise, does not define a 'public' purpose or a 'particular' purpose within the meaning of s. 47B(1)(b)(ii)—at [919].

DCC is not a statutory authority for the purposes of s. 23B(9C)
In his Honour's opinion, the DCC was not a statutory authority as defined in s. 253 of the NTA as it was not constituted as a body corporate established by the *Local Government Ordinance 1954* (NT) but rather, as the territory submitted, under it. The use of the word 'established' points to the need for the enactment itself to create the statutory authority—at [925].