

# Determination of native title – Mandingalbay Yidinji

## *Mundraby v Queensland* [2006] FCA 436

Dowsett J, 24 April 2006

### **Issue**

The issue here was whether the court should exercise the discretion available under s. 87 of the *Native Title Act 1993* (Cwlth) (NTA) to make a determination of native title that reflected an agreement reached by the parties to the proceedings in mediation.

### **Background**

In April 1995, a claimant application was made under the NTA on behalf of Mandingalbay Yidinji People for a determination recognising that native title exists over an area around Trinity Inlet and the Mulgrave River in Queensland. In 1999, the application was combined with another claimant application and, in October 2004, the combined application was amended to remove certain areas. As a result, the area covered by the application comprised six separate lots, divided into Parts A ('unassigned' Crown land) and Part B (areas appropriated for purposes not inconsistent with non-exclusive native title rights and interests).

It was noted that the applicant claimed the Mandingalbay Yidinji People traditionally owned a much larger area but, because native title was extinguished over some parts and because others were subject to joint claims by the Mandingalbay Yidinji people and the Gunggandji people, the boundaries of the area covered by this application were drawn to exclude those parts.

The State of Queensland, the Cairns City Council, Cairns Port Authority, Ergon Energy Corporation Limited and Telstra Corporation Limited were the respondents to the application. (An additional 139 respondents categorised as Indigenous people, professional fishers, irrigation and water supply recipients and tourist operators had been parties but all subsequently withdrew from the proceedings.)

The application was referred to the National Native Title Tribunal for mediation pursuant to s. 86B of the NTA in 1998 and the parties eventually reached agreement upon the terms of a draft determination. An application for a consent determination recognising the existence of native title was then filed with the court. Pursuant to s. 87, the court must be satisfied the determination sought by the parties is within power and that it is otherwise appropriate to make it. Justice Dowsett looked to the materials provided by the parties in order to determine those matters.

### **Evidence of continuation of traditional law and custom**

The court examined an anthropological and genealogical report prepared by Professor Bruce Rigsby, a consultant anthropologist, and a 'helpful summary' of

Professor Rigsby's report contained in several affidavits sworn by Michael Hugh Southon, Director of Research-Anthropology with the North Queensland Land Council Native Title Representative Body, the claimant's legal representative—at [10].

It was noted that this material indicated (among other things) that:

- the Mandingalbay Yidinji claimant group represented the continuation of an older clan group, namely, the Yidinyji clan group sometimes called the Manggarra Yidinyji, who were and are the immediate western neighbours of Gungganyji people;
- their system of tenure and ownership is based on cognatic descent, where membership in the group is traced through both men and women from one or more apical ancestors;
- many of the Gungganyji and Mandingalbay Yidinji claimants reside on their homelands and others visit on a regular basis;
- although the claimants no longer meet all their sustenance and other needs from their own land, hunting, fishing and gathering remain important and meaningful pursuits;
- parents and grandparents pass on knowledge of traditional resources, and techniques of taking or manufacturing are passed on to children and grandchildren;
- the majority of members of the claimant group in each generation have lived continuously within the claim area since its inception in 1892 as an Aboriginal mission—at [14].

His Honour noted:

- the respondents had 'taken such expert advice as they deemed appropriate' in relation to this material;
- there were no conflicting native title claims over the subject areas;
- the history of all the applications in the area demonstrated that both the Gunggandji and the Mandingalbay Yidinji peoples have carefully identified the land with which they traditionally relate;
- both groups were in the area in 1892 when a mission was established and have maintained contact with the area ever since—at [17].

Therefore, the question of what was the position between the establishment of British sovereignty in 1788 and 1892 remained. On this point, Dowsett J concluded that the evidence was sufficient to identify an apparently permanent occupation of the region by Aboriginal peoples as far back as 1770 continuing until about 1858:

There is every reason to assume that occupation continued thereafter and until 1892 when the mission was founded. By that time there were clearly two distinct groups, the Gunggandji people and the Yidinji people, of which latter group the Mandingalbay Yidinji people are part. There is no reason to conclude that the division was recent ... . It seems more likely that it was an established fact of life as far as the Aboriginal people were concerned ... . This is their own traditional understanding of their history. There is no reason to doubt it—at [22].

Therefore, it was found that:

It is an available inference that the Mandingalbay Yidinji people have occupied the determination area continuously since prior to 1770... I am now satisfied in that regard and that it is appropriate to make the consent determination sought by the parties—at [27].

### **Determination**

The determination recognised that native title exists in relation to the determination area, subject to the qualifications noted below.

The native title holders are those people known as the Mandingalbay Yidinji People being those Aboriginal people who are:

- the descendants of a named ancestor; or
- recruited by adoption, in accordance with the traditional laws and customs of the Mandingalbay Yidinji People.

Except in relation to ‘water’ as defined in the *Water Act (2000)* (Qld), and subject to the qualifications noted below, ‘exclusive’ native title was found in relation to part of the determination area, i.e. the nature and extent of native title rights and interests in relation to that part is possession, occupation, use and enjoyment of land and waters to the exclusion of all others.

In relation to the remainder, non-exclusive native title was recognised, including the non-exclusive right to use and enjoyment of the area. Many of the specific rights constituting this general right (e.g. the right to take, use and enjoy natural resources) are expressly limited to satisfying personal domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs. They are also all subject to the qualifications noted below.

Other non-exclusive native title rights and interests recognised (subject to the qualifications) included the right to:

- pass on native title in accordance with traditional laws and customs;
- make decisions in accordance with traditional laws and customs about access, use and enjoyment of the area by Aboriginal people governed by the traditional laws acknowledged and traditional customs observed by the native title holders; and
- determine membership and filiation to the native title holders in accordance with traditional laws and customs.

### **Rights to water**

In relation to all water in the determination area, the nature and extent of native title is the non-exclusive right to use, enjoy, hunt on, fish in and gather from the water and to take and use the water for non-commercial, personal domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

### **Qualifications**

All of the native title rights and interests are subject to, and exercisable in accordance with:

- the laws of the Commonwealth of Australia and the State of Queensland;
- the traditional laws acknowledged and traditional customs observed by the native title holders; and
- ‘other interests’ in relation to the determination area, which are set out in the determination.

**No native title to minerals or petroleum**

There is no native title to minerals or petroleum as defined in the relevant Queensland legislation.

**Prescribed body corporate**

The native title is not to be held in trust. The Mandingalbay Yidinji Aboriginal Corporation is the prescribed body corporate for the purposes of s. 57(2) of the NTA.

**Determination conditional in part**

The determination will not take effect in relation to two of the six lots unless and until an indigenous land use agreement is registered on the Register of Indigenous Land Use Agreements. If it is not registered within six months of the making of the native title determination, the matter will be listed for further directions.