Proposed determination of native title—Timber Creek

Griffiths v Northern Territory [2006] FCA 903

Weinberg J, 28 August 2006

Issue
The question before the Federal Court in this case was whether native title exists over the land and waters in the vicinity of Timber Creek in the Northern Territory. The main area of contention was the evidence of the various anthropologists.

Background
The proceedings before Justice Weinberg involved three separate but related claimant applications brought on behalf of the Ngaliwurru and Nungali Peoples under the *Native Title Act 1993* (Cwlth) (the NTA). The area covered by the applications was the town of Timber Creek in the Northern Territory. The Commonwealth was initially a party but withdrew from proceedings, leaving the Northern Territory (the territory) and the Amateur Fishermen's Association of the Northern Territory (AFANT) as the only respondents. The area covered by the applications had previously been subject to a number of pastoral leases. The town lies along the south bank of the Victoria River and a waterway known as Timber Creek (the creek) flows through the claim area.

Historical evidence
The court had been provided with 'a large folder of what the claimants termed History Documents'. Given the issues in this case, the earliest extant records of European explorers, dating back to 1855, were of 'particular importance' because 'they shed considerable light upon conditions in the area at the time'. While his Honour had regard to all of the historical documents, it was not necessary to refer to them in any detail because: 'The historical record is not, of itself, a focal point of dispute between the parties. Broadly speaking, the history of the area is uncontentious'—at [31] and [39].

Weinberg J noted that the historian who compiled the folder concluded, among other things, that:

- the historical record clearly showed that Aborigines had been associated with the Timber Creek area from the time of the first European explorers and during the entire period of European settlement and there was no reason to believe that the Aboriginal people encountered by the explorers and early settlers were not the ancestors of the Aboriginal people living in the area today;
- those Aboriginal people strongly identified with particular tracts of country and Professor W. E. H. Stanner recorded a long-standing connection between the Nungali and Ngaliwurru peoples with Timber Creek as far back as 1934;

- since the successful land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the Land Rights Act) over Timber Creek in 1985, strong Aboriginal communities had developed in the area;
- despite over 100 years of European settlement, traditional languages were still spoken, ceremonies performed and traditional foods and medicines harvested;
- people knew where the travelling and localised Dreamings were active and had taken steps to map and register sacred sites;
- traditional trade links still operated, people remembered and recounted their history and young men's initiation ceremonies were performed regularly—at [69].

Findings in Land Rights Act matters

The claimants based their case largely upon findings made by various Aboriginal Land Commissioners (the commissioners) under the Land Rights Act between 1985 and 1992 which related to the area surrounding the town of Timber Creek. These were said to be of particular importance because of the proximity of the areas concerned and because they related basically to the same Aboriginal people as those who constituted the native title claim group in this case—at [70].

Weinberg J noted one 'key distinction' between the Land Rights Act and the NTA:

> Under the Land Rights Act, claimants are not required to establish either continuity or historical links with the land .... . [T]he Land Rights Act deals not so much with "traditions", in the sense of immutable customs handed down from ancestors, but rather with the observances, customs and beliefs actually practised by a particular community at the time of the relevant inquiry.
>
> The position under the NT Act stands in sharp contrast. The claimants must show that they are a society united in and by their acknowledgment and observance of a body of laws and customs; that the present day body of accepted laws and customs is, in essence, the same body of laws and customs acknowledged and observed by their ancestors (adapted to modern circumstances); and that the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty in 1825—at [73] to [74] and see also [404] to [405].

Notwithstanding these differences, his Honour admitted four land claim reports pursuant to s. 86 of the NTA. In all four, those claiming under the Land Rights Act were successful.

The key requirements for establishing native title

Weinberg J noted the critical provisions of the NTA were s. 223, which defines both 'native title' and 'native title rights and interests', and s. 225, which states the requirements for a determination of native title—at [125] and [126].

His Honour examined the relevant authorities, noting that:

- the High Court in *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*) stressed the relevant starting point for considering native title is to focus on the 'rights and interests' claimed;
- in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 442; [2002] HCA 58 (*Yorta Yorta*), the High Court made it plain that all elements of the

definition of native title found in s. 223(1) must be given effect—at [133], [136] and [502] to [519]. (*Ward* and *Yorta Yorta* are summarised in *Native Title Hot Spots* Issue 1 and Issue 3 respectively.)

His Honour also examined the background to the NTA and the developing case law in relation to interpreting it—at [519] to [547].

The claimants' evidence

A total of 14 witnesses, mostly elders of the Ngaliwurru and Nungali Peoples, gave evidence on site at Timber Creek. Most of this evidence is set out in some detail by Weinberg J. However, evidence given in a confidential session on a restricted basis is referred to only in very general terms. As 'no real challenge to the credibility' of these witnesses was mounted and the issue was not the evidence itself but how it was to be interpreted, it is not summarised here—see [150] to [256] and [475].

His Honour was of the view that the restricted evidence 'painted a somewhat different picture of the claimants' adherence to ceremonial and ritual practice than had previously been adduced', noting that the witnesses spoke mainly about initiation ceremonies, various Dreamings (knowledge of which was confined to men) and traditional customs such as *Winan*. No objection was taken to any of this evidence—at [462] to [463].

In Dr Kingsley Palmer's opinion (one of the anthropological witnesses called by the claimants), the practices described had not changed significantly since well before the first white men came to the region. By that, Weinberg J understood him to mean that these practices dated back to before sovereignty. No serious challenge was mounted to Dr Palmer's opinions—at [464] to [467].

On the basis of evidence of the Aboriginal witnesses (including the restricted evidence) and supporting documents, Weinberg J was satisfied:

- that the claimants constitute a society bound together by adherence to traditional laws and customs; and
- the members of this claim group are relevantly linked to the claim area through ancestral ties that go back to a named ancestor and well before his time—at [470], [490] to [501] and [560].

It was found as a matter of fact that (among other things) the members of the claim group:

- continue to acknowledge traditional laws and to observe traditional customs in much the same way as their ancestors did over many generations;
- continue to practise important ceremonial rites, including initiation and burial customs, in ways similar to those that were followed long ago;
- follow traditional practices regarding hunting and gathering of food;
- maintain cultural and spiritual beliefs relating to the Dreamings associated with the claim area;
- share a common language (Ngaliwurru) and that Nungali is, and always was, either part of that language or a dialect spoken with a different accent—at [471].

The restricted evidence was found to provide 'powerful support for the claimants' case in almost all its aspects'—at [500].

His Honour observed that: '[T]he real factual dispute in this case turns not upon the primary facts adduced through the indigenous witnesses, but rather upon what interpretation should be placed upon those facts'—at [475].

The claimants' anthropological evidence

A central feature of the claimants' case was the evidence given on their behalf by two anthropologists, Dr Palmer and Ms Wendy Asche, who prepared a joint report. Dr Palmer was acknowledged as both the senior anthropologist and the major contributor to the report and took particular responsibility for collecting data on spiritual life, sites, ritual and belief. He also took the lead role regarding questions of land ownership and the way in which rights to country 'were articulated through social processes'. Ms Asche took primary responsibility for genealogical data and evidence showing maintenance of connection by traditional law and traditional custom. That said, they took 'joint' responsibility for all aspects of the report and agreed on all of its conclusions —at [262] to [264] and [270].

Dr Palmer and Ms Asche were of the view that, among other things:

- rights to country in the Victoria River region were, and had for many years been, inherited cognatically;
- the claimants observed the same, or substantially similar, customs, laws and practices, as did the Indigenous inhabitants of the region at the time of the acquisition of sovereignty—at [288] and [293].

The claimant community

According to the report, there was an 'ideology' that responsibility for, and use of, a grouping of countries was a matter for the members of a social unit consisting of an amalgamation of a number of country groups, described as 'the applicant community'. However, members of that community used a number of different names when referring to themselves, depending upon the circumstances and the context of the discussion. The conclusion that the claimants shared a culture and identified with each other as a community was supported by the claimants' common understandings founded upon a shared spiritual belief. The report noted that the claimants had characteristics that were similar to those of other Aboriginal communities in the Victoria River district and that certain aspects of their beliefs could be found in varying forms throughout Indigenous societies in many parts of Australia—at [300] and [301].

There were various features said to link the claimants both to each other and to various places and things, including:

- identification typically by reference to one of several named areas of country or 'estates', commonly called *Yakpali* ;
- that a person is linked to a particular country by descent and those who trace common descent and common affiliation to the same country together comprise 'descent groups';

- a descent group member at Timber Creek generally cites both matrifiliation and patrifiliation as a source of spiritual attachment to country (therefore, a 'cognatic descent system');
- an association with country could be reinforced by reference to spiritual beings of the Dreaming thought to be connected with the country in question who perform actions that result in both physical and spiritual modification to the countryside;
- a member of a country group will have a special spiritual tie with that country's Dreaming and, since some Dreamings range widely over the landscape, their spirituality can encompass more than one country;
- exchange relationships have developed through the practice of a ritualised trade known as *Winan* , which creates a particular relationship between trading partners, often of neighbouring countries, characterised by reciprocal obligations;
- at Timber Creek, the concept of the Dreaming is expressed by the term *puwaraj* , which is manifest not only at sites in the landscape but also through the reproduction of certain designs used in ritual;
- the system of rights relating to *puwaraj* indicates that, within the cognatic descent system, there is (at least in ritual dealings) a priority accorded to country claimed through patrifiliation (whether father's father or mother's father);
- the claimants all regard themselves as having inherited from their fathers, and from their father's fathers, a *kuning* (a personal Dreaming or affiliation, such as goanna or sugarbag);
- while all the claimants spoke a form of English, indigenous languages that were typically associated with a particular area or region were an important means of establishing an identity. Earlier research identified the local Indigenous community as speaking one or more of the Jaminjung, Ngaliwurru and Nungali languages and, according to the claimants, all three languages were brought to the area by Dreaming beings—at [296] to [309].

Taking country—ancestral and genealogical ties

His Honour observed that: '[T]he most important aspect of the evidence of Dr Palmer and Ms Asche ... is their discussion of ancestral and genealogical ties'. The anthropologists identified a recognised system of kinship or shared ancestry, involving eight subsections (the skin system), under which people were expected to act towards particular kin in specific ways. This system, they said, consolidated the homogeneity of the community—at [316] to [318].

The *Winan*

Another unifying characteristic relied on by the claimant group was that Timber Creek was also the centre of the ritual trade system known as *Winan* and movement of goods along the '*Winan* road' was said not to be a matter of traversing distance but of cementing relationships. His Honour noted that, while much more could be said about the *Winan*, most of it was the subject of restricted evidence to which the court could not refer—at [319] to [321].

Countries and members of the claimant group

According to the joint report, the claimants listed five 'countries' and their constituent country groups when they identified their rights to the Timber Creek

town site and adjacent areas. As a consequence, they identified the members of these five country groups as, together, making up the native title claim group—at [326].

Among other things, Dr Palmer and Ms Asche:

- rejected any notion of a collapse of an earlier traditional system where country groups operated independently into some different, more cohesive, social group, operating under a new normative system;
- reiterated their belief that the society was, and still is, essentially cognatic in terms of affiliation with country;
- were of the view that such a system, though likely to be more flexible than a patrilineal system, would not be entirely open ended—at [354] to [356].

Rights and duties of members of country groups

From an anthropological perspective, Dr Palmer and Ms Asche said that the members of the various country groups had various gradations of rights of ownership, including access rights, rights to exclude others, rights relating to intellectual property, and 'use and benefit' rights. The authors identified various duties as well, including to protect and care for country and to care for visitors—at [361].

Continuity of connection to country

The anthropologists concluded (among other things) that:

- the claimants have had a continuous and ongoing relationship with *Makalamayi* (a 'focal site' in the north-east corner of the town area) that long predated sovereignty;
- a very important part of the claimant community's culture continued to be a belief in the manifestation of Dreaming spirituality related to sites, many of which were recorded by earlier researchers;
- the claimants shared a belief in the spirituality of the Dreaming and had traditional beliefs, practices, concepts and ways of doing things that rendered them both a distinctive culture and a homogenous community and, given the complexity and rich nature of their social relationships, it was unlikely that these emerged in recent times;
- descent is the primary principle for reckoning membership of country groups, this had been so since before European contact and descent at Timber Creek was cognatic but with some preference for claiming country through patrifiliation;
- although the earliest literature available for the area did not demonstrate conclusively that the system of laws and cultural rules that applied today would have been found at the time of first contact, still less in 1825, the claimants' culture and the rules that mould it are, in all probability, based upon a traditional system that predates sovereignty—at [371] to [372] and [378].

The territory's anthropological evidence

The territory relied upon Professor Basil Sansom, 'a distinguished anthropologist', to rebut the joint report and the oral evidence given by Dr Palmer and Ms Asche—at [380].

Essentially, Professor Sansom felt the opinion expressed by Dr Palmer and Ms Asche that the claimants' culture and the rules that mould it are, in all probability, based upon a system that predates sovereignty was 'little more than a restatement of an "ideological" position'—at [386].

According to his Honour, Professor Samson took Dr Palmer and Ms Asche to task for:

> [G]lossing over the shift from a patrilineal system to a cognatic system, which they acknowledge has occurred, but regard as nothing more than an adaptation of an existing normative system. Professor Sansom strongly disagrees. He sees that shift as reflecting a quite fundamental change to an entirely different normative system. In other words, he sees the shift as revolutionary, rather than evolutionary, and as involving a change from one operating principle to another—at [387].

Professor Sansom identified two 'far-reaching' and 'radical' shifts that he argued had significant legal implications in a native title context, namely:

- a shift from patrilineal inheritance to cognation as the basis for 'taking country'; and
- a shift from the position whereby each separate language group (or 'tribe') was associated with a distinct territory of its own to a position where two language groups merged which provided 'a new and inclusive social and political identity'—at [392] to [393] and [406] to [409].

Professor Sansom cautioned against use of the 'ethnographic present', i.e. a tendency to assume that what is observed at any given time can readily be translated back, and projected forward, even if there is no empirical basis for doing so, arguing that:

- this approach would lead to 'major' normative shifts being 'suppressed and denied' by the community through the operation of 'the myth of eternal recurrence';
- Aboriginal genealogies based on recall were 'shallow' and Aboriginal cultural conceptions yield an historical present of about 100 years, with anything before that being allocated to the time of the Dreamings;
- things that were probably new developments would be characterised by Indigenous witnesses as realities that have existed 'from time immemorial'— at [398], [403], [429] to [437].

His Honour noted that:

> [Professor Sansom's] thesis is that anything that does not fit within the template of traditional lore regarding continuity and uniformity of custom and practice...will be expunged from the record of oral history ... . [P]resent day indigenous persons will assert that what is in fact a reformed kinship system is no new creation, but simply an eternal endowment of law ordained in the Dreaming—at [435].

Dr Palmer, who was given the opportunity to rebut Professor Sansom's report, took strong exception to, among other things, Professor Sansom's view that oral traditions are inherently suspect—at [451] to [456].

Findings on anthropological evidence

His Honour accepted the evidence of Dr Palmer and Ms Asche in preference to that of Professor Sansom for the following reasons:

- the formers' extensive involvement with the members of the claimant group over many years;
- Dr Palmer speaks Ngaliwurru, which Professor Sansom does not;
- Dr Palmer and Ms Asche gave evidence that was 'intelligent, and cogent', they 'withstood cross-examination well', and were 'well aware of their duties to the court'—at [475] to [478].

Professor Sansom's evidence troubled his Honour with because (among other things) of his 'undue deference' to earlier anthropological works and his repeated reference to work previously carried out in parts of Australia 'far removed from Timber Creek'—at [480] to [485].

Weinberg J was particularly concerned by Professor Sansom's contention that oral history is 'essentially worthless':

> If that contention were to be accepted, there would be little point in bringing native title determination applications in the Northern Territory. Paradoxically, it is in the Northern Territory ... that the prospects of claimants being able to establish a continuous connection with the land, of the kind required by the NT Act, ought to be greatest—at [483].

His Honour concluded that:

> [T]he crucial point is that rights to 'country' in Timber Creek are and always have been based upon principles of descent. The shift to cognation is one of emphasis and degree. It is not a revolutionary change, giving rise to a new normative system—at [501].

AFANT's evidence

AFANT, whose only real interest was to ensure that its members maintained their access to the waters of the Victoria River and the creek, led evidence from a number of people concerning fishing in these waterways and the tidal areas of the creek—at [457].

Were the elements of s. 223(1) met?

His Honour was satisfied that the claimants established they possess native title rights and interests in the claim area as defined in s. 223(1) of the NTA—at [564].

The final questions to be determined were whether:

- the acknowledgment and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty in 1825; and
- the society has continued to exist throughout that period as a body united in and by its acknowledgment and observance of those laws and customs—at [565].

Observing that 'native title cases are almost always fact specific', Weinberg J was satisfied that the evidence established these things—at [566] to [573].

In discussing the lack of direct evidence linking the date of sovereignty (in this instance, 1825), first European contact (1839) and settlement (the 1880s), his Honour pointed out that:

> [I] is easily forgotten that the elderly, when they recall the events of their childhood, and what they may have been told by their grandparents, are in effect, recounting events that go back perhaps as far as a century and a half—at [572] and [573].

Weinberg J felt that the evidence was sufficient to allow the finding that:

> [T]he senior claimants in these proceedings have established that they are the direct descendants of a group of indigenous inhabitants of the area around Timber Creek, and that they observe essentially the same rituals and ceremonies as were practised by their ancestors more than a century ago. I infer that those same rituals and ceremonies have been followed by indigenous people who are the direct ancestors of the claimants since before sovereignty. The rights and interests that have passed on through this system of descent are ... recognised by the common law of Australia, and are therefore properly to be characterised as native title—at [584].

The native title rights and interests—exclusive?

In relation to this, Weinberg J said:

> The question to be determined ... is whether the native title rights and interests ... that have been established rise significantly above the level of usufructuary rights ... . [T]hat question should be answered both 'yes' and 'no'. The evidence ... establishes both usufructuary and proprietary rights. However, it falls short of establishing native title rights and interests ... 'to the exclusion of all others'. It also falls short of establishing an unfettered right ... to control others' access to that area, or to control others' use and enjoyment of the resources of that area—at [614].

His Honour acknowledged that:

- there was some evidence that the claimants expected outsiders to ask permission before going on land or regarded themselves as 'entitled' to fish, camp, hunt, take ochre and induct strangers;
- one witness regarded seeking permission as irrelevant because, in practice, no Indigenous person would wander about on the land without the guidance of a member of that community because to do so would be to 'court disaster'.
- there were 'scattered references in some of the anthropological material which hint at the need to obtain permission before going onto the land'—at [615] to [619], [714] to [716].

That said, his Honour was of the view that:

> [T]hese few ... suggest that there is an ingrained belief on the part of the claimants that those who come to Timber Creek will, without anything having to be said, respect the claimants' 'rights to country'. It is almost as if 'permission' will be sought as a matter of courtesy, or form, because this is expected when a stranger passes through someone else's land. If for some reason permission is not sought, then guidance at least will be requested—at [619].

Weinberg J considered the evidence supporting the claimants' right to exclude others from using the waters of Timber Creek 'even weaker than that in relation to land' in that there was:

- very little evidence directed to that issue;
- nothing to suggest that any attempt had ever been made to restrict access to the creek by fishermen;
- little, if any, evidence to suggest that traditional law and custom, as acknowledged and observed, would operate to restrict such access—at [620].

It followed that any native title rights that exist in relation to those waters were non-exclusive. This conclusion precluded the need to consider what effect, if any, the so-called 'public right to fish' might have upon native title rights—at [620].

It was noted that there had been evidence of some 'modification of laws' but this did not necessarily mean the loss of native title:

> As long as the claimants continue to observe their traditions and customs, and maintain their links with and use of the land, and waters, native title will continue to exist. It is only if the society as a whole ceases to adhere to that traditional law, particularly in relation to the use or occupation of the land, that native title will be lost—at [639].

In conclusion, his Honour was satisfied the claimants had established a connection with the claim area, and some, but not all, of the native title rights and interests they claimed could be 'recognised' by Australian common law. Any that were not so recognised would be excluded from any native title determination as a matter of course—at [652] to [655].

Extinguishment by pastoral lease

It was common ground between the parties that the claim area was, at one time entirely the subject of pastoral leases. His Honour observed that:

> [I]f pastoral leases do not extinguish native title completely, they may nonetheless impair any native title rights that would otherwise amount to incidents of full ownership. They may thereby abrogate any 'exclusive' native title rights and interests—at [631], referring to *Ward*.

Did s. 47B apply?

If s. 47B applies to an area, then all extinguishment brought about by the 'creation of any prior interest ... must be disregarded' for all purposes under the NTA. Three conditions must be fulfilled to attract this provision, with the relevant ones in this case being that:

- the area concerned must not be 'covered' by (among other things) a 'proclamation' that was 'made by the Crown in any capacity under which the whole or a part of the ... area is to be used for public purposes or for a particular purpose'; and
- one or more of the members of the native title claim group must 'occupy' the area when the claimant application is made—at [660] and [661].

A proclamation constituting the town boundaries of Timber Creek was made in 1975 under s. 111 of the *Crown Lands Ordinance 1931—1952*. A similar proclamation was considered by the Full Court of the Federal Court in *Northern Territory v Alyawarr*

(2005) 145 FCR 135; [2005] FCAFC 135 (*Alyawarr*), summarised in *Native Title Hot Spots* Issue 16.

After rehearsing the arguments put to the court, his Honour noted that the decision in *Alyawarr* was binding on him. Therefore, the proclamation of the town of Timber Creek was not a 'proclamation ... under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose' and so it was arguable that s. 47B applied—at [673] to [675], [677] and [700].

In relation to the second issue, Weinberg J found that the claimants had clearly established that, when the applications were made, one or more members of the native title claim group 'occupied' the claim area. Accordingly, s. 47B(1)(c) was satisfied—at [702].

It followed that, with the exception of certain lots, s. 47B applied and so any extinguishment brought about by pastoral leases in relation to the claim area must be disregarded for all purposes under the NTA—at [705] and [706] and [784].

Nature and extent of native title rights and interests

In accordance with the requirements of s. 225, Weinberg J noted that the claimants had clearly established:

> [T]hat they are entitled to a determination of native title that specifies rights of a usufructuary nature. These include the right to hunt and forage in or on the land, and the right to fish in the waters of the Creek ... [,] the right to engage in rituals and ceremonies upon the land, and to be appropriately consulted about, and protect particular sites located within the claim area. These rights do not operate 'to the exclusion of all others'—at [717].

The special position of the waters of Timber Creek

There was considerable dispute as to the claimants' precise position on claiming native title rights over the waters of Timber Creek. After careful study of both the oral and written submissions, his Honour concluded that the evidence supported a finding that:

- the claimants had native title which allowed them the right to fish, and to gather and take resources from, the waters of the creek;
- insofar as those waters are tidal, those rights go no further than would be encompassed by the public right to fish in such waters;
- insofar as those waters are non-tidal, the rights are non-exclusive, just as they are in relation to the land component of the claim area;
- the claimants had no right to prevent others from exercising similar rights in those waters—at [775] and [776].

Decision

Weinberg J found that (subject to hearing further argument in relation to five lots) there should be a determination of native title in favour of the claimants since: 'All of the elements necessary to ground such a determination have been established'—at [785].

The parties were directed to file contentions regarding the orders that should be made to give effect to the reasons for judgment. The determination subsequently made is summarised in *Native Title Hot Spots* Issue 21: see *Griffiths v Northern Territory (No 2)* [2006] FCA 1155.

Appeal

On 18 September 2006, those found to hold native title filed an appeal against the decision that their native title rights and interests did not confer a right to exclusive possession.