

# Determination of native title — Yankunytjatjara/Antakirinja

## *Yankunytjatjara/Antakirinja Native Title Claim Group v South Australia* [2006] FCA 1142

Mansfield J, 28 August 2006

### Issue

The issue was whether the Federal Court should make a determination of native title over part of central northern South Australia in the terms of the consent orders proposed by the parties.

### Background

The claimant application dealt with in this matter was made under the *Native Title Act 1993* (Cwlth) (NTA) in 1997. The claim group, made up of members of the Western Desert social and cultural bloc, was comprised of approximately 1300 people from 19 families. Most identified as Yankunytjatjara but the group included people from other groups who were married to Yankunytjatjara people. None of the claimants lived on the claim area itself, residing primarily in neighbouring towns. The main respondents were the State of South Australia and the owners of several pastoral leases in the area.

### Anthropological report

The applicant's evidence was given in an anthropological report containing detailed genealogical information regarding the families comprising the claim group from the mid-nineteenth century. It also described traditional patterns of migration and noted that the:

[A] relationship of reciprocal benefit developed between pastoralists and claimants and their ancestors. That relationship continues today, with claimants readily acknowledging their friendships with pastoralists and recognising their mutual rights in country.

The members of the claim group were described as a society which continued to observe the fundamentals of traditional life as adapted to meet changing circumstances and challenges. The report noted that:

People express rights with different degrees of authority in differing social and geographic contexts. The strength of that authority is measured in socio-political terms—through age and gender, family connection, ritual and communal status.

Justice Mansfield:

- agreed with the principal parties that the report supported the recognition of native title rights and interests possessed by the claimants;
- accepted that the parties likely to be affected by the proposed determination had had sufficient access to independent legal representation and that the state, in

- consenting to the determination, had given appropriate consideration to the evidence and the interests of the community generally;
- considered the terms of the proposed determination satisfied the requirements of s. 225 of the NTA—at [18] to [20].

His Honour was therefore satisfied that it was within the power of the court to make the determination: see s. 87.

### **Effect of future pastoral improvements**

The parties were unable to agree as to whether future pastoral improvements done after the date of the consent determination would extinguish native title: see *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCAFC 110 at [149] to [158], summarised in *Native Title Hot Spots Issue 15*. They sought to resolve the issue by providing for ‘the possibility of future extinguishment, according to law, of native title’ by the construction of further pastoral improvements.

Mansfield J noted that:

- this left open the possibility of further extinguishing acts in limited circumstances and it was ‘realistic of the parties to have recognised the possibility of such future conduct, whatever its legal effect’;
- it was far better that the parties addressed the legal effect or consequences of such conduct, if it eventuated, than leave the issue unresolved;
- the proposed order reflected the common understanding of past conduct as applied to possible future conduct and provided sufficient certainty to the parties—at [24]

### **Determination over only part of application area**

Despite the fact that the question of native title in relation to part of the area claimed was unresolved, the court was not precluded from making the proposed consent determination because:

- ss. 87(1)(a)(ii) and (3) expressly contemplated resolution by agreement of any part of a proceeding; and
- the remaining part of the proceeding may be dealt with later—at [25].

### **Determination area**

The determination recognised non-exclusive rights to 18,665 sq km of land and waters over Alberga Creek and Neales Creek and the catchment areas of Arkaringa Creek, across the interface of the Simpson Desert and Great Victoria Desert and included Lambina Station, Welbourne Hill Station and Todmorden Station and parts of four other pastoral leases.

### **Native title holders**

Under the relevant traditional laws and customs of the Western Desert Bloc, the native title holders comprise those Aboriginal people who have a spiritual connection to the determination area and the *Tjukurpa* associated with it because:

- that area is their country of birth (also reckoned by the area where their mother lived during the pregnancy); or

- they have had a long-term association with the area such that they have traditional geographical and religious knowledge of that country; or
- they have an affiliation to the area through a parent or grandparent with a connection specified in the two paragraphs above; and
- they are recognised under the relevant Western Desert traditional laws and customs by other members of the native title claim group as having rights and interests in the determination area.

### **Native title rights and interests**

The nature and extent of the native title rights and interests are non-exclusive rights to use and enjoy the determination area in accordance with the native title holders' traditional laws and customs, being rights to:

- access and move about, hunt and fish and gather and use the natural resources such as food, medicinal plants, wild tobacco, timber, stone and resin;
- use the natural water resources;
- live, camp and erect shelters and cook and light fires for all purposes other than the clearance of vegetation;
- engage and participate in cultural activities, including those relating to births and deaths and conduct ceremonies, hold meetings, teach the physical and spiritual attributes of locations and sites within the area;
- maintain and protect sites and places of significance to native title holders under their traditional laws and customs;
- be accompanied on to the area by those people who, though not native title holders, are spouses of native title holders, people required by traditional law and custom for the performance of ceremonies or cultural activities on the area, people who have rights in relation to the area according to the additional laws and customs acknowledged by the native title holders or people required by native title holders to assist in, observe, or record traditional activities on the area; and
- make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders.

### **Qualifications**

The native title rights and interests are for personal, domestic and non-commercial communal use and do not confer possession, occupation, use and enjoyment to the exclusion of others. There is no native title in minerals or petroleum as defined in state legislation. Native title does not exist on certain areas, including areas:

- subject to public works; and
- where an improvement (e.g. a house or any other building, an airstrip or a dam) has been constructed pursuant to one of the pastoral leases noted in the determination, including any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements referred to.

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

- the traditional laws and customs of the native title holders;
- valid laws of the state and Commonwealth, including the common law.

**Other interests**

The nature and extent of other non-native title interests, including those created by pastoral leases or held by telecommunications operators and those of the Crown in right of the state, are recognised in the determination area. The relationship between the native title rights and interests and the non-native title rights and interests is set out in the determination.

**Prescribed body corporate**

The native title rights and interests are not to be held in trust and an Aboriginal corporation must be nominated within six months to be the prescribed body corporate for the purposes of ss. 57(2) and 57(3).