Appeal in Larrakia — Full Court

Risk v Northern Territory [2007] FCAFC 46

French, Finn and Sundberg JJ, 5 April 2007

Issue

The main issue in this appeal was whether the primary judge was right in deciding that native title did not exist in relation to areas in and around Darwin. The main ground for that finding was that neither of the groups claiming native title (the Larrakia people or the Danggalaba/Kulumbiringin clan) possessed rights and interests under traditional laws and traditional customs in the sense required by s. 223(1)(a) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

In *Risk v Northern Territory* [2006] FCA 404 (summarised in *Native Title Hot Spots* Issue 19), Justice Mansfield (the primary judge) dismissed claimant applications made on behalf of the Larrakia people and the Danggalaba clan/descendants of Kulumbiringin ancestors. His Honour later made a determination pursuant to s. 225 of the NTA that native title did not exist in the area covered by those applications.

Appeals against the judgment were subsequently filed by William Risk and others on behalf of the Larrakia and Kevin Quall on behalf of the Danggalaba/Kulumbiringin.

The Larrakia decision at first instance

The primary judge found, on the evidence:

- at sovereignty, there was a society of Indigenous persons (the Larrakia) who had rights and interests possessed under traditional laws and traditional customs that gave them a connection to the land and waters of the claim area; and
- that society continued to exist up to the first decade of the 20th century and continued to enjoy rights and interests under either the same or substantially similar traditional laws and customs as those that existed at settlement.

However, the primary judge concluded that Larrakia did not satisfy the requirement that they currently possessed those rights and interests under traditional law custom, as required by s. 223(1)(a), because:

- their current laws and customs were not 'traditional' in the sense explained in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta* , summarised in *Native Title Hot Spots* Issue 3);
- there was both considerable ambiguity and some inconsistency about the current laws and customs of the Larrakia people;
- there were significant changes in those laws and customs as they existed at sovereignty which stemmed from, and were caused by, a combination of the historical events which occurred during the 20th century;
- those events gave rise to a substantial interruption in the practice of the laws and customs of the Larrakia people as they existed at sovereignty;

- the present laws and customs of the Larrakia people were not simply an adaptation or evolution of the traditional laws and customs of the Larrakia people in response to economic, environmental, historical and other changes—at [23].

Mansfield J concluded that the evidence showed that:

> The Larrakia community of today is a vibrant, dynamic society, which embraces its history and traditions. This group of people has shown its strength as a community, able to re-animate its traditions and customs, following a period when, as Justice Gray described it in the Kenbi [land claim] Report, 'government policies and social attitudes dictated the integration of Aboriginal people into non-Aboriginal society'—at [15].

The Larrakia appeal

The three grounds of the Larrakia's appeal were that the primary judge:

- failed to deal with a significant body of oral evidence bearing on whether there had been a substantial interruption in the acknowledgement of traditional laws and the observance of traditional customs;
- misapplied *Yorta Yorta* in finding that the Larrakia's traditional laws and customs had been 'discontinued' at some stage during the 20 th century;
- was wrong in failing to adopt the findings of fact made by the Aboriginal Land Commissioner in the Kenbi land claim—at [25].

Ground 1: treatment of the evidence

According to Justices French, Finn and Sundberg, it was not part of the Larrakia's case on appeal that (on the totality of the evidence) the primary judge could not have come to the conclusion he reached. Rather, this was a 'process-type complaint', i.e. the fact that Mansfield J did not refer to what Larrakia considered to be critical evidence in his reasons for decision showed that he did not either consider it or take it into account—at [68].

Their Honours said it was simply a misreading of the primary judge's reasons to say that he dealt only with the oral evidence as to contemporary society in the last decade because the primary judge made it clear he had regard to all the oral evidence—at [34].

The court was also dismissive of the Larrakia's complaint that the oral evidence to which the primary judge referred was not considered and evaluated. In one particular instance, it was noted that it 'was not much of an example of ... alleged delinquency' since the primary judge referred to that witness's evidence 'on seven occasions'—at [37].

Their Honours took several 'senior and important witnesses' as examples of the way in which the primary judge dealt with the evidence, an approach exemplified in what was said in relation to one of those witnesses:

> [The primary judge] ... was not obliged to record or summarize everything the witness said. Having read Barbara Raymond's witness statement and the transcript of her evidence, we are in no doubt that his Honour's references to her evidence disclose that he was conversant with the evidence as a whole, and had regard to it. The fact that he

mentioned specific aspects of it does not mean that he did not have regard to the whole of it—at [41].

The court said that:

> On any appeal it is incumbent on the party asserting error to establish it to the satisfaction of the [appellate] court. Where it is claimed that the [primary] judge ignored relevant evidence, that evidence should be identified and its relevance explained...Only then can an appellate court address the ground of appeal. It is not the court's function to attempt to determine from the evidence what the appellant might consider to be relevant, and then determine whether the judge overlooked it...
>
> It is to be remembered that the ground of appeal...is not that the evidence before the primary judge did not entitle him to conclude that there had been an interruption...Rather the ground is a process-type complaint...
>
> There is nothing to indicate that the primary judge failed to consider all the evidence...It is true that his Honour did not record or refer to all of it. But he was not obliged to. He did, however, make copious reference to the essential parts of the evidence of most of the ochre [sic] witnesses, and some reference to the evidence of all of them—at [67] to [69].

It was noted that:

- the primary judge had before him a complex case with 47 Aboriginal witnesses, many expert witnesses, a great deal of documentary material and a hearing which lasted 68 days; and
- in cases such as this, 'considerable caution is appropriate before the Full Court infers that crucial evidence was not evaluated and necessary findings of fact were not made'—at [70] to [71].

However, in this case, the court did not need to resort to 'admonitions of caution' because:

> [W]e are clearly of the view that the primary judge amply discharged his duty to consider all the evidence, and referred in his reasons to such parts of it as were relevant to the resolution of the issues that were before him. He did not ignore evidence crucial to those issues—at [72].

The contention that the primary judge failed to consider and evaluate the evidence was, therefore, rejected.

Ground 2: misapplied *Yorta Yorta*

The Larrakia appellants argued that s. 223(1)(a), as explained by *Yorta Yorta* , was misapplied because Mansfield J:

- failed to consider whether the body of laws and customs currently acknowledged and observed had its origins in the laws and customs that existed at the time of the assertion of sovereignty;
- impermissibly compared the body of laws and customs at sovereignty with those that existed today, determined they were different and, on that basis, concluded that the requirements of s. 223(1)(a) had not been made out (the book-end error);

- found there had been an interruption based, in part, on the disruption in Larrakia's physical presence in the Darwin area when physical presence was not a necessary requirement of s. 223(1)(a);
- relied on the disruption in Larrakia's continued observance and enjoyment of their traditional laws and customs when such continued observance and enjoyment was not a necessary requirement of native title because s. 223(1)(a) is not directed to the enjoyment or exercise of rights and interests but rather to the possession of them;
- required Larrakia to show not only that they observed traditional customs but that the knowledge of those customs was transmitted in the traditional manner.

As to the 'book-end' error, at [81] French, Finn and Sundberg JJ noted that the 'necessary approach' was outlined in *Yorta Yorta* at [56], where the majority said:

> [I]t will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.

Their Honours agreed that a 'book-end approach' would be insufficient and dangerous because:

- it may lead to a conclusion that native title had continued to exist throughout the relevant period, when in fact the claimant group's customs and laws had been discontinued and later revived;
- if the laws and customs of the present day were not the same as at sovereignty, it failed to ask the critical question, which was whether the traditional laws and customs had ceased or whether they had merely been adapted—at [82].

The court also agreed that, if the primary judge had adopted the 'book-end' approach, then he had misunderstood *Yorta Yorta* —at [82].

However, their Honours found the primary judge did not adopt such an approach:

> His Honour's findings that Larrakia did not maintain the acknowledgement of their traditional laws and observance of their traditional customs are based upon evidence, particularly from older members of the Larrakia group, that practices they had engaged in during the first half of the twentieth century did not last into the second half. The submission that his Honour inferred interruption from change is not supported by a close reading of his reasons. No inferences needed to be drawn, since it was apparent to his Honour on the evidence that there had been a substantial interruption—at [83].

Further (among other things), it was noted that:

- the primary judge's careful setting out of relevant passages from the majority judgment made it impossible to accept that he misunderstood the *Yorta Yorta* test;
- the primary judge found there was evidence of a combination of circumstances that interrupted, or disturbed, the presence of the Larrakia people in the claim area during several decades of the 20th century in such a way as to affect their continued acknowledgement and observance of traditional laws and customs as those laws and customs existed at sovereignty;

It was this that led the primary judge to find that their current laws and customs were not 'traditional' in the sense explained in *Yorta Yorta*—at [87] and [97].

French, Finn and Sundberg JJ found no error in the process by which the primary judge informed himself of the *Yorta Yorta* test and applied it to reach his conclusions—at [98].

In relation to the matters pertaining to physical presence, Larrakia said the primary judge imposed a requirement that they must now have 'substantially uninterrupted possession' of the claim area and exercise of their native title rights, neither of which was mandated by s. 223(1)(a). While the point was not pursued in oral argument, it was not abandoned either and so their Honours dealt with it—at [100].

It was noted that the primary judge referred to *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward* , summarised in *Native Title Hots Spots* Issue 1), where Gleeson CJ, Gaudron, Gummow and Hayne JJ said that the absence of evidence of some recent use of the land or waters did not, of itself, require the conclusion that there can be no relevant connection—at [103].

French, Finn and Sundberg JJ were satisfied that:

- the primary judge was aware that a failure to continue to live on the claimed land or exercise the claimed rights was not necessarily fatal to a native title claim;
- read in totality, it was clear that the primary judge's conclusion on interruption was not based on either the dislocation of the claimants from Darwin or their failure to continue to exercise many of their native title rights;
- rather, the primary judge recognised that these were both evidence and symptoms of a more fundamental discontinuity in the traditional laws acknowledged and the traditional customs observed—at [103] to [104].

The submission that the primary judge found that, if transmission of knowledge of customs was not undertaken in the traditional way, then the customs themselves were no longer traditional was found to be of no assistance to the Larrakia:

> That is because the trial judge's findings about the interruption to the customs observed by Larrakia went far deeper than just the manner of their transmission. His Honour found that the laws acknowledged and customs observed by Larrakia as a whole were interrupted between the [Second World] war and the 1970s. Consequently, even had Larrakia been able to show a continuing tradition of transmission of knowledge of their customs and laws, the interruption to the rest of their practices was fatal to their case.
>
> In any event, this submission is unsound. A tradition of passing on knowledge by word of mouth may in itself constitute a traditional custom. That is what his Honour appears to have found here. Its discontinuance is therefore further evidence of the interruption to Larrakia's society generally. No doubt the failure of a claimant group to continue to pass on knowledge of other customs and laws by word of mouth will not necessarily be fatal to their claim. But it may be evidence of an interruption in customs and laws generally. It is a factor that the trial judge rightly took into account in coming to his conclusion—at [106] to [107].

Ground 3: Kenbi land claim report

Larrakia also complained that, while the Kenbi land claim report and the evidence on which it was based were received into evidence, the primary judge was not prepared to adopt, or have regard to, the land commissioner's findings that Larrakia had, under Aboriginal tradition, attachments to country and, therefore, rights to forage over, occupy and use country associated with those attachments. This was said to be a miscarriage of the exercise of discretion conferred on the primary judge by s. 86 of the NTA.

The primary judge gave the following reasons for declining to adopt the land commissioner's findings:

- the Kenbi land claim covered an area distinct from that involved in the native title proceedings;
- not all of the witnesses who gave evidence in the native title proceedings were called in the land claim proceedings;
- the expert evidence in the Kenbi land claim was, in part, from different witnesses, related to issues which arose under the *Aboriginal Land Rights Act 1976* (Cwlth) that were different from those under the NTA and was in respect of different land;
- the matters to which the land claim findings related were, to varying degrees, the subject of additional (and in some instances different) evidence in the native title proceedings.

Their Honours considered that the primary judge's reasons were 'were apposite and relevant' and found no error that could impugn the exercise of discretion available under s. 86 of the NTA—at [113] and [114].

The Quall appeal

French, Finn and Sundberg JJ noted that the issues in this appeal were of a 'quite different character' to those raised by Larrakia. Mr Quall said the primary judge was wrong in failing to:

- consider the substance of the case advanced by the Danggalaba/Kulumbiringin at trial;
- properly identify the relevant society that was the source of the traditional laws and customs by which, at sovereignty, the Larrakia people had rights and interests in the application area;
- provide proper reasons for his decision, if he did consider the case advanced by the Quall appellants—at [115].

As there was 'sharp disagreement' between the parties as to what the Quall case was at trial, French, Finn and Sundberg JJ found it necessary to consider in some detail both the original native title determination applications and the evidence and submissions made at the trial—at [115].

Underpinning the disagreement was an assertion by counsel for Mr Quall on appeal that, at trial, the Danggalaba/Kulumbiringin claimants based their entitlement to native title on the traditional laws and customs of 'the Aboriginal society in the region stretching from' Cox Peninsula to West Arnhem Land, a society they said

included the Larrakia people and had been referred to variously as the 'Top End society' or 'people of the Top End'—at [115] to [116]. See also [130].

Their Honours began 'with a note on nomenclature'. There were 11 claimant applications for which Mr Quall was the applicant. In two of them, the native title claim group was referred to as 'members of the Danggalaba Clan'. In the remaining nine, the group was referred to as (listed) 'descendants of Kulumbiringin ancestors and constitute the Kulumbiringin according to Aboriginal law and custom [sic]'—at [118].

The submissions by the appellant explained that 'Kulumbiringin' was the term used by the Larrakia people to describe themselves at the time of sovereignty and that the word 'Danggalaba' referred to a clan, or subset, of the Kulumbirigin tribe. (The primary judge found that, though the Larrakia patrilineal clan system had ceased to exist, the Danggalaba was the one clan that continued to exist.) In the material before the appeal court, usage of these descriptors was not consistent and Mr Quall occasionally used the terms 'Danggalaba Larrakia' to refer to the clan—at [118].

Their Honours noted, by way of example, one of the 11 applications made by Mr Quall which referred to the native title claim group as "'Kulumbiringin' (elsewhere referred to as 'Danggalaba clan')"—at [120].

Mr Quall particularly stressed that his claim group was 'local in that our traditional land interests have a firm and fixed focus on and within a limited area of Darwin' and the Cox Peninsula 'and its islands'—at [126] and [129].

The claim groups in the various Quall applications were comprised variously of eight named persons or the family groups of four named elders. Three of those four elders gave evidence in support of the Larrakia case. In his final submissions at trial, Mr Quall confined the claim group to members of the Batcho family, of whom he was one—at [132].

Mr Quall was unrepresented at trial.

Their Honours observed (among other things) that:

- Mr Quall did not indicate, at the opening stage of his evidence, a positive case that derived from the laws and customs of a 'Top End society' but instead focussed on the Danggalaba clan;
- Mr Quall's evidence at trial covered a significant range of detailed matters about sites, customs and practices and the primary judge was impressed by his knowledge of the particular laws and customs of which he spoke;
- in his oral evidence at trial, Mr Quall accepted that, at sovereignty, the Larrakia people had traditional laws and customs under which they occupied the land and, while the others stopped practising the laws and customs which existed in 1825, the Danggalaba people did not—at [134], [137] and[143].

The primary judge characterised the Quall case in this way:

> Mr Quall...submitted that the Larrakia people ought not be awarded native title over the claim area, as the group is simply a language group. He submitted that the members of the Larrakia applicant groups have lost their culture, and that it is the Danggalaba clan (or the Kulumbiringin clan) who have continued to observe and acknowledge traditional laws and customs and to maintain their connection to the relevant land and waters.

Mr Quall was legally represented on appeal. His counsel submitted that:

- the primary judge had fallen into error in not addressing all of Mr Quall's contentions that his rights and interests came from Aboriginal law;
- specifically, the contention of a Dreaming which stretched from Cox Peninsula to West Arnhem land, and a moiety system which connected the different Aboriginal peoples along that track and gave rise to rights and responsibilities in different families (or clans) for different sites along that track, was not addressed;
- while this case was not put explicitly to the primary judge, it was reasonably apparent, given Mr Quall's submissions at trial—at [158] to [160].

In their consideration of these submissions, their Honours:

- understood the difficulties experienced by a primary judge in divining what actually is the case being advanced by a self-represented litigant;
- acknowledged the distinct advantage the primary judge had in coming to an informed appreciation, over the course of a lengthy hearing, as to what the case being put by a litigant in person was and that, unless a mistake is 'palpable', an appeal court ought be slow to interfere with the views of the primary judge;
- observed that submissions are not evidence, noting that the primary judge was alert to this and indicated that he had regard to Mr Quall's submissions only to the extent that they had a foundation in the evidence;
- stated it was impermissible on appeal to construct a different case to that put at trial by focussing selectively on parts of the evidence that could have lent support to a different case, were it in issue between the parties at trial—at [164] to [166].

French, Finn and Sundberg JJ were, therefore, satisfied that the primary judge neither mischaracterised, nor failed to deal with, Mr Quall's case as advanced in his application and as presented at trial—at [167].

Their Honours concluded:

> Bearing in mind both his Honour's observation that the only evidence directly supporting this claim came in effect from Mr Quall; and the changing composition of the claim group to which we earlier referred in passing, the dismissal of the claim in this manner was unobjectionable. The case was in substance disposed of on the basis of insufficiency of evidence. His Honour's reasons make quite plain where that insufficiency lay—at [178].

Their Honours disposed swiftly of the ground in relation to the adequacy of the reasons:

> Having concluded that his Honour did consider and answer the case put at trial, but that he did not have to consider the case advanced in this Court as being Mr Quall's case, we necessarily must reject this ground of appeal as well. His Honour's reasons for the decision he gave, as we have said, were concise but clear—at [181].

Decision
Both appeals were dismissed.

Attorney-General's intervention
Shortly before the hearing of the appeal, the Attorney-General for the Commonwealth intervened pursuant to s. 84A(1) of the NTA. The reason for intervening was to submit that the course set in Full Court decisions determined since the High Court's decision in *Yorta Yorta* departed from the principles laid down by the majority in that decision.

The Full Court decisions referred to were *De Rose v South Australia* (2003) 133 FCR 325; [2003] FCAFC 286 (summarised in *Native Title Hot Spots* Issue 8), *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCFCA 110 (summarised in *Native Title Hot Spots* Issue 15) and *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135, (summarised in *Native Title Hots Spots* Issue 16).

The Attorney-General also submitted (among other things) that the first instance decisions in *Sampi v Western Australia* [2005] FCA 777, *Rubibi Community (No 5) v Western Australia* [2005] FCA 1025 and *Bennell v Western Australia* [2006] FCA 1243 (summarised in *Native Title Hot Spots* Issue 15, Issue 16 and Issue 21 respectively) departed from what was said in *Yorta Yorta* . These first instance decisions are all currently under appeal—at [4] and [5].

The court noted that, while intervention by the Attorney-General under s. 84(1) was 'as of right', it was a matter for the court to decide the extent of the intervention 'having regard to the issues agitated' by the other parties and 'the matters that actually arise for decision'. After considering all the submissions made on appeal, the court decided it was not necessary to deal with any of the matters raised by the Attorney-General because of the 'limited issues ... that call for decision'—at [8].

Costs of the intervention
Subsection 84A(2) allows the court to make a costs order against the Commonwealth in cases where the Attorney-General intervenes. Their Honours said:

> Given that the matters raised in the Attorney's initial submission did not otherwise arise on the appeals, and that it should have been apparent that the appeals were an inappropriate vehicle in which to raise them, and that the intervention was at a very late stage and must have caused considerable inconvenience to the parties, it is appropriate that the Commonwealth pay the other parties' costs of the intervention—at [182].