

Determination of native title

Ngadjon-Jii People v Queensland [2007] FCA 1937 (Ngadjon-Jii People)

Spender J, 12 December 2007

Issue

The issue before the Federal Court was whether, pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (NTA), a determination recognising the existence of native title should be made in relation to the Ngadjon-Jii People's claimant application. It was decided that the determination should be made.

Background

The proceeding arose out of a claimant application made by the Ngadjon-Jii People in October 1999. The claim area comprised approximately 13,287 hectares within various reserves and parks around Atherton, Mareeba and Cairns in far north Queensland. An agreement recognising that various exclusive and non-exclusive native title rights and interests are held by the Ngadjon-Jii People was filed with the court on 14 November 2007. In considering whether to make a determination reflecting the terms of that agreement, his Honour Justice Spender referred to the relevant provisions of NTA—at [6] to [8].

Material before the court

A summary of connection material provided by anthropologist Dr Sandra Pannell (the connection report) was before the court. Spender J noted that:

- in order to establish that native title holders existed today, it had to first be established that, at the time of sovereignty, a society of persons bound together by observance of traditional laws and customs existed;
- the connection report described the clan structure of the Ngadjon-Jii People and their traditional entitlement to ownership of the ancestral lands and waters;
- in relation to the general physical connection of the Ngadjon-Jii People to the claimed areas, Dr Pannell's report referred to fieldwork with Ngadjon-Jii informants conducted in the 1930s and 1970s, including that of Norman Tindale, who recorded that 'Ngatjan territory was virtually all in rainforest extending from Atherton in the west to near Innisfail on the coastal plains'—at [10] and [11].

His Honour also referred to parts of the connection report which identified language, cultural and spiritual connection. It contained 'many examples' that showed the Ngadjon-Jii People had maintained their connection to the determination area, including:

[O]ccupying the remnant forests or otherwise utilizing them to avoid being taken to missions that operated during the first half of the twentieth-century; working on local farms whilst occupying traditional dwellings; engaging in occupations carried out on the country, such as timber cutting or fossicking; and in some cases, returning to Ngadjon-Jii country upon release from government missions—at [16].

Spender J was satisfied, based upon all the information before the court, that the Ngadjon-Jii People have a long-standing and continuing connection to the determination area under traditional laws acknowledged and traditional laws observed by them—at [18].

The court noted that:

[T]he number of native title determinations..., which have been reached by consent, has dramatically increased in recent years. This suggests that governments and other parties are increasingly aware of the benefits of negotiated settlements of native title claims, which otherwise have the potential to be lengthy, costly and divisive in the community—at [21].

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His Honour concluded that it was within the court's power to make the order sought and that it was proper to do so. Accordingly, a determination was made recognising that native title exists in relation to the determination area and is held by the Ngadjon-Jii People.

In relation to part of the determination area (other than in relation to water), the native title is a right, in accordance with traditional laws and customs, to possession, occupation, use and enjoyment to the exclusion of all others. In the remainder of the determination area, the native title rights and interests are non-exclusive rights to:

- access and be physically present on the determination area in accordance with traditional laws and customs;
- hunt, fish, gather on the determination area for the purpose of satisfying personal domestic, social, cultural, religious, spiritual, ceremonial and non-commercial needs in accordance with traditional laws and customs;
- take, use and enjoy the natural resources of the determination area for the purpose of satisfying personal, domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs in accordance with traditional laws and customs;
- maintain and protect from physical harm, places within the determination area of importance to native title holders in accordance with traditional laws and customs;
- perform social, cultural, religious, spiritual or ceremonial activities on the determination area and invite others to participate in those activities in accordance with traditional laws and customs;
- pass on native title rights and interests in relation to the determination area in accordance with traditional laws and customs; and
- camp in accordance with traditional laws and customs (defined so as not to include the right to permanently reside or build permanent structures or fixtures).

In relation to one part of the determination area, the right to make decisions in accordance with traditional laws and customs about the use and enjoyment of the determination area by Aboriginal people who are governed by the traditional laws acknowledged and traditional customs observed by the native title holders was recognised.

The native title rights and interests in relation to water are non-exclusive rights to:

- use, enjoy, hunt on and fish in and gather from the water for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes; and
- take and use the water and its resources for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes; provided that in all such cases, the purpose is

non-commercial and that any such right does not confer any right to possession, occupation, use or enjoyment of the water to the exclusion of others. 'Water' means water as defined by the *Water Act 2000* (Qld) and tidal water as defined in the *Land Act 1994* (Qld).

There are no native title rights in, or in relation to, minerals and petroleum as defined by the relevant Queensland legislation. The native title rights and interests are subject to and exercisable in accordance with the Laws of Queensland and the Commonwealth.

The nature and extent of other interests in relation to the determination area include those of:

- various permittees and licensees, as well as members of the public, relating to the use and management of the Wooroonooran National Park, the Topaz Road National Park and the Malanda Conservation Park;
- the West Tropics Management Authority;
- the local shire councils;
- Ergon Energy Corporation Limited and Telstra Corporation Limited;
- the public in relation to accessing and enjoying waterways, beds and banks and foreshores of waterways which were public places as at 31 December 1993, as well as in accordance with rights and interests held generally under the laws of Queensland and the Commonwealth.

The relationship between native title and other rights and interests is set out in detail in the determination.

The native title is not to be held in trust. An Aboriginal corporation, to be nominated in writing within 12 months, is to be the prescribed body corporate for the purposes of s. 57. Other conditions for the nomination are set out in the determination.