

Determination of native title

Walker on behalf of the Eastern Kuku Yalanji People v Queensland [2007] FCA 1907

Allsop J, 9 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 Eastern Kuku Yalanji People's claimant application. It was decided that the determination should be made.

Background

The determination area covers approximately 144,000 hectares of unallocated state land and timber reserve in far north Queensland and incorporates an area of tropical rain forests, beaches, reefs and mountain ranges between Mossman in the south, the Annan River (south of Cooktown) in the north and the Great Dividing Range to the west. It includes Yalanji communities at Wujal Wujal and Mossman. It also includes the Daintree, Cape Tribulation, Black Mountain and Cedar Bay national parks. It falls within the Wet Tropics Bioregion, which is of international significance due to its outstanding natural and cultural values—at [2].

The Eastern Kuku Yalanji People's application was lodged with the National Native Title Tribunal (the Tribunal) in December 1994, pursuant to s. 61(1) of the NTA. The Tribunal's mediation process was supplemented with case management by court registrars. As a result, the parties agreed upon the terms of a draft determination and sought orders in, or consistent with, the terms of that agreement pursuant to s. 87.

Material before the court

An anthropological report by Peter Blackwood, a consultant for the Cape York Land Council, was before the court in which Mr Blackwood 'addressed the evidentiary requirements' of s. 225 and provided 'a comprehensive summary of anthropological research undertaken' relevant to the connection of the Eastern Kuku Yalanji claim group to the determination area. Justice Allsop noted that the report:

- illustrated, 'with some clarity', the existence of organised Aboriginal occupation and possession of the determination area extending back beyond the imposition of British sovereignty over the area;
- confirmed the continuity of an identifiable society of Aboriginal people, primarily identified by the principle of cognatic descent with an emphasis on patrilineal descent, having a connection with the determination area in accordance with traditional laws which they acknowledged and traditional customs which they observed;
- indicated that descent was traced from persons and groups recognised in the regional Aboriginal community as associated with Eastern Kuku Yalanji identity, and with the claim area, soon after European occupation—at [15] to [18].

In examining the anthropologist's report, the court was:

- 'conscious' that other experienced lawyers, anthropologists and historians retained by the State of Queensland had been closely involved in the mediation of the application and, therefore, in 'bringing forward' the consent determination;
- aware that other respondents had participated closely, as evidenced by the 15 indigenous land use agreements related to the determination area made with various respondents—at [24].

In the light of these matters, and 'in the absence of contest about the material which has been placed before me', his Honour decided it was 'appropriate' to act on the anthropological report and the anthropological and genealogical material it summarised. According to the court, the historical context in which the anthropologist's report sat 'revealed the forces against which the traditional laws, customs and organisation have had to struggle to maintain the connection of the Yalanji people with country'. European intrusion into Kuku Yalanji land 'caused deep resentment and violence' which led to government policies to manage hostilities, including the forced relocation of families, a practice that 'continued well into the modern era' and touched members of the claim group—at [19] to [22] and [25].

Allsop J noted that:

Through all this buffeting by others, the evidence makes clear that Yalanji law, including land law and Yalanji custom, survived, underpinning the continued connection of the Yalanji people with country—at [23].

Power of court

After reviewing the relevant provisions of the NTA, Allsop J was satisfied that, pursuant to s. 87, the court had power, and it was appropriate, to make orders in, or consistent with, the terms of the parties' written agreement without holding a full hearing—at [27] to [38].

Comments by the court

The court noted that this was a very significant day for the parties and that the recognition of native title is:

[C]lear, solemn and final recognition by Australia and its laws of the reality of historical occupation of country by the Kuku Yalanji people and of the existence of their laws and customs long, long before European settlement—at [39].

It was also an event of 'enduring importance for all Australians' because it was part of the creation of a new national legacy within the framework of the laws of Australia—at [40].

Determination — s. 225

The court made a determination that native title exists in relation to the determination area. It is held by the Eastern Kuku Yalanji People, defined in the determination as people descended from certain named ancestors or recruited by adoption in accordance with the traditional laws and customs of the Eastern Kuku Yalanji People.

In relation to part of the determination area, the native title rights and interests (other than in relation to water) are rights to possession, occupation, use and enjoyment to the exclusion of all

others and rights to inherit and succeed to those rights. In the remainder of the determination area, the native title rights and interests are non-exclusive rights to:

- be present on the determination area, including by accessing, traversing and camping (with camping defined to exclude permanent residence or the construction of permanent structures or fixtures);
- hunt animals, gather plants and take natural resources from the determination area, but not for the purposes of trade or commerce (with natural resources defined to mean any clays, soil, sand, gravel and rock on or below the surface of the determination area but excluding minerals and petroleum);
- conduct ceremonies on the determination area;
- be buried and to bury native title holders, by interment in the ground, within the determination area;
- maintain springs and wells in the determination area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;
- maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas, by lawful means, from physical harm; and
- the right to inherit and succeed to the native title rights and interests referred to above.

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

- hunt and fish in or on, and gather from, the water for personal, domestic and non-commercial communal purposes;
- take, use and enjoy the water for the purposes of satisfying personal, domestic and non-commercial communal needs; and
- inherit and succeed to the native title rights and interests referred to above. '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:

- to gather plants in relation to certain parts of the determination area that are below the highest astronomical tide, as defined by the *Marine Parks Regulation 1990* (Qld), and above the high water mark, as defined in the determination;
- 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:

- state and Commonwealth laws; and
- the traditional laws acknowledged and traditional customs observed by the native title holders.

The other interests recognised in relation to the determination area include those of the local shire councils, the Wet Tropics Management Authority and the holders of various permits and authorities. The public rights to fish in any tidal waters and to navigate in any tidal navigable river within the determination area were also noted. The relationship between the native title rights and interests and the other rights and interests is set out in detail in the determination.

The native title is held in trust by the Jabalbina Yalanji Aboriginal Corporation, which was determined to be the prescribed body corporate for the purpose of ss. 56 and 57.