

# Determination of native title - Birriliburu People

## *Patch v Western Australia* [2008] FCA 944

French J, 20 June 2008

### **Issue**

The issue before the Federal Court was whether to make a determination recognising the existence of native title under the *Native Title Act 1993* (Cwlth) (NTA) in relation to the majority of the area covered by the Birriliburu People's claimant application. It was decided that the determination should be made in accordance with s. 87A.

### **Background**

The Birriliburu People's application, made in relation to approximately 66,700 km<sup>2</sup> of the Western Desert in Western Australia, was lodged in September 1998. It was accepted for registration in September 1999 and referred to the National Native Title Tribunal for mediation by the court in July 2000.

The applicant and the State of Western Australia (the only parties to the application) agreed on the terms of the consent determination in relation to more than 99 per cent of the area covered by the application. As to the balance, it was agreed the application should remain on foot and be adjourned because a new claimant application had been filed over that area asserting that s. 47B applies and mediation in relation to that area is ongoing.

Several areas where it was agreed native title had been extinguished by previous exclusive possession acts (as defined in s. 23B of the NTA) were excluded from the determination area because they were not included in the area covered by the application—see Schedule 2 of the determination.

### **Power of the court**

The court accepted the parties' submission that, in circumstances where it is technically possible to make a consent determination under either ss. 87 or 87A (as in this case), it was preferable for the determination to be made under s. 87A. This was because the balance of the application would be deemed to be amended to remove the areas covered by the determination, it would be exempt from the reapplication of the registration test and the entry on the Register of Native Title Claims in relation to the application would be updated to reflect the amendment—at [7] and see ss. 64(1B), 190(3)(a) and 190A(1A).

### **Description of native title holders – application v determination**

The description of the native title holders in the proposed consent determination was not identical to the description of the native title claim group in the application. The court accepted the parties' contentions that:

- the court could proceed to make a determination in such form as it saw fit, based on the evidence, so long as the application was ‘valid’;
- the court was not limited to making a determination in the form sought in the application;
- in circumstances in which the group of proposed native title holders was, in substance, the same group as the native title claim group, an amendment to the application was unnecessary—at [17] to [18].

**Comment – ss. 47A(3) & 47B(3)**

While it appears to be of no relevance in this case because there was no difference ‘in substance’, there may be cases where the description of the native title claim group in the application would need to be amended to match the description of the native title holders in the determination in order to ensure the effect of the determination is as described in ss. 47A(3) or 47B(3). This is because the chapeau to both ss. 47A(3) and 47B(3) states that: ‘If the determination on the application is that the *native title claim group* [i.e. as described in the application] hold the native title rights and interests claimed’, then the effect of determination recognising native title is as prescribed in ss. 47A(3) and 47B(3) e.g. the non-extinguishment principle applies to the creation of certain prior interests.

**Appropriateness of proposed determination**

French J commented that:

The appropriateness of the proposed determination does not require that the Court undertake an inquiry into the merits of the claim made in the application. The State, which has its own competent and well-resourced legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely...

The connection report was assessed by...the Office of Native Title [ONT]...during the period September 2006 to May 2007...[which] conducted a preliminary internal review..., engaged an independent expert anthropologist to assess the material and obtained legal advice on the merits of the application...[ONT] was satisfied that the information contained in the connection material met its guidelines and on that basis the Deputy Premier accepted the...recommendation of the...[ONT] that the State should enter into negotiations toward an agreed determination of native title—at [13] to [14].

The court then briefly referred to the matters set out in the parties’ joint submission, noting (among other things) that:

- the native title holders were said to be members of the broader Western Desert cultural bloc, which was the relevant ‘society’ for the purposes of the determination;
- Birriliburu, the soak after which the application was named, was ‘mix-up country’ where the three Western Desert dialects associated with the area overlapped;
- most of the claimants resided close to, but not inside, the determination area;
- together with people from other parts of the Western Desert, they describe themselves as Martu;
- while some claimants were recognised as native title holders in neighbouring Western Desert areas, the parties agreed they are an identifiable subset of the

wider Western Desert society, being members of 17 family groups and other individuals recognised as custodians with rights and responsibilities in relation to the determination area in accordance with Western Desert laws and customs;

- it was common ground that, although the applicants did not live on the determination area, they continued to assert their rights, and carried out their responsibilities, in accordance with their laws and customs—at [16] to [17] and [23].

The material before the court showed (among other things) that:

- the *Tjukurrpa* (the dreaming or the law), which was the source of traditional laws and traditional customs to which the members of the native title holding group adhered, governed their religious practices, social rules, system of land tenure and other aspects of their life;
- the association of individuals and groups with particular areas of country came about through a variety of mechanisms, including conception, birth, growing up or initiation on the country, acquisition of knowledge through long residence or descent from a person who has had such a connection;
- landholding groups are not patrilineally-patrilocally structured;
- rather, members of the land holding groups were landholders through their shared association with, and to, the land;
- the land holding groups were open and inclusive so people had potential access to a number of areas;
- as a result of European settlement, and the subsequent movement away from the determination area, group membership and rights were asserted primarily through descent from a parent or grandparents associated with the country and there are now more fixed family group associations with country;
- the parties agreed that the narrowing of pathways to group membership and rights in land did not represent an interruption in the acknowledgment and observance of traditional laws and traditional customs and that descent remained the means by which people acquired rights—at [19] to [22].

### **Decision**

The court, being satisfied that the procedural and substantive requirements of s. 87A had been met (i.e. that the proposed determination was both within power and appropriate), made a determination in the terms proposed by the parties—at [9] to [12] and [24].

### **Determination— s. 225**

The determination recognised the existence of native title in the determination area. The native title holders are the Birriliburu People descended from certain named ancestors and persons generally acknowledged by them as having rights in part, or all, of the determination area through kinship, marriage, conception, birth, high ritual knowledge or responsibility for sites, including certain named persons.

The nature and extent of native title in the determination area is the right to possession, occupation, use and enjoyment to the exclusion of all others except in relation to flowing and subterranean water. The native title right to take flowing and

subterranean water is a non-exclusive right for personal, domestic, or non-commercial communal purposes.

Section 47A applies to two reserves and one general purpose lease for the 'use and benefit of Aboriginal inhabitants'. Section 47B applies in relation to areas formerly subject to a reserve for the purpose of camping, several pastoral leases and two exploration permits. (Note there seems to be a typographical error in [2] of Schedule 4 of the determination i.e. given the context, all of the references there should be to s. 47B.)

Other rights and interests recognised in relation to the determination area include:

- those held under several mining and petroleum tenements;
- any existing public access to, and enjoyment of, waterways, beds and banks or foreshores of waterways, and stock routes including the Canning Stock Route;
- the rights and interests of Telstra Corporation Limited.

### **Prescribed body corporate**

Within six months of the date of the determination, the native title holders must nominate a prescribed body corporate. There will then be a determination that the nominated prescribed body corporate is to hold the native title rights and interests the subject of the determination in trust for the common law holders in accordance with s. 56(2)(b) without the need for a further order. If no nomination is made within the period specified, or any further period the court may order, the matter is to be listed for further directions.