Determination of native title – Mt Dare

Eringa, Eringa No.2, Wangkagurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v South Australia [2008] FCA 1370

Lander J, 11 September 2008

Issue
The main issue for the Federal Court in this case was whether, pursuant to ss. 87 and 87A of the *Native Title Act 1993* (Cwlth) (NTA), three consent determination recognising the existence of native title should be made. It was decided that the determinations should be made.

These are the first determinations recognising the existence of native title over a South Australian national park. They consolidate a co-management arrangement that has existed in the management of the national park for more than 10 years.

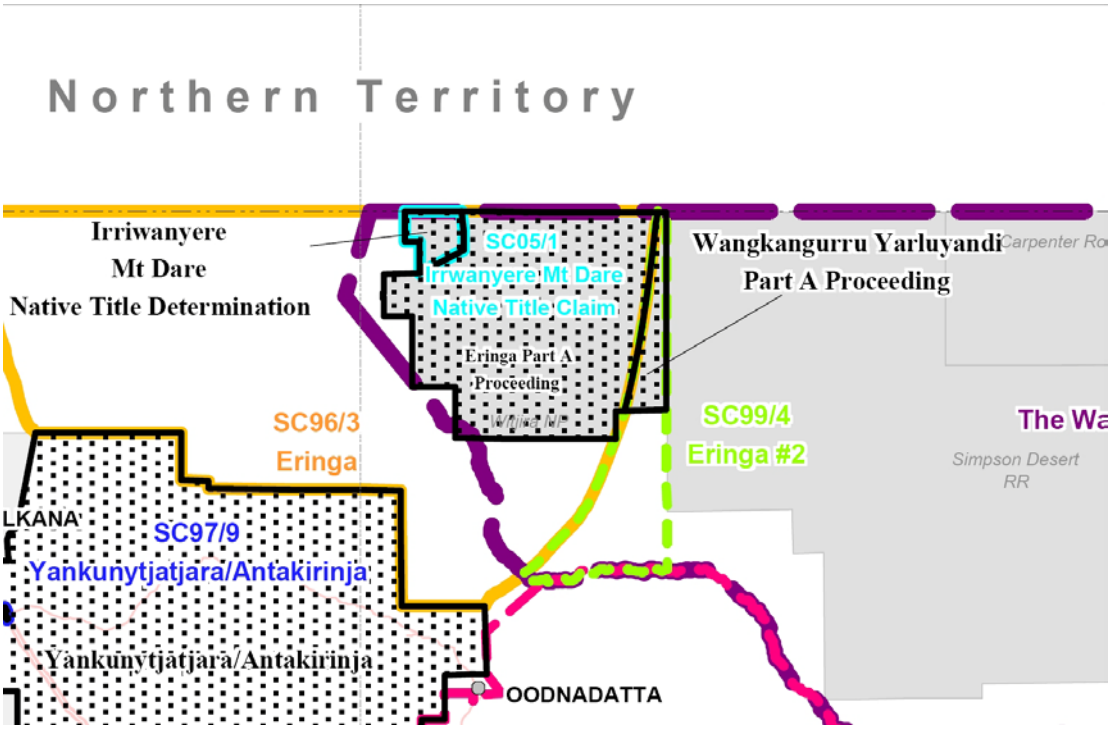
Background
Four separate claimant applications were made over areas along the northern border of South Australia (referred to as the Wangkangurru/Yarluyandi (WY), Eringa, Eringa No. 2 and Irrwanyere Mt Dare applications, with WY also covering part of Queensland). Each claim area included part of the Witjira National Park (the national park) and each also overlapped with area covered by one or more of the other applications.

The national park was subject to a reservation for that purpose. It was vested in the Crown in right of the State of South Australia under the *National Parks and Wildlife Act 1972* (SA) (NPWA). Prior to the creation of the national park in 1985, the whole area was either held under various pastoral leases, pastoral permits, water reserves and miscellaneous leases or was vacant Crown land.

At the time of judgment, the national park was subject to two leases made pursuant to s. 35 of the NPWA. The first was a 99 year lease between the Minister for the Environment and Natural Resources (the minister)and Irrwanyere Aboriginal Corporation (the IAC) for (among others) the purposes of use and occupation by Aboriginal people having traditional association with the national park and the enhancement of their social and cultural aspirations. The IAC lease covered most of the national park. It was dated 5 October 1995 and was 'expressed not to have any extinguishing effect on the native title rights and interests of those Aboriginal peoples'—at [3].

The second lease, between the minister and Driveline Pty Ltd, dated 1 July 1989 (the Mount Dare homestead lease), was for the purpose of a tourist facility.

While the native title claim group for each application was different, the proposed native title holders for each of the proposed determinations were identical, i.e. those Lower Southern Arrernte and Wangkangurru people who have a traditional connection to the determination area as described in Schedule 2 of each proposed determination. The proposed determination areas covered the whole of the national park, the whole of the Irrwanyere Mt Dare application and part of the other two applications—see the map below.



The original WY, Eringa and Eringa No. 2 applications were filed between August 1997 and May 1998. In March 2002, the WY claim was referred to the National Native Title Tribunal (NNTT) for mediation, with the Eringa and Eringa No.2 claimants being entitled to participate.

The overlap between the three claims, primarily over the national park, was one of the issues dealt with in mediation. As the lease to the IAC covered most of that area, and IAC was comprised of members of each of the claim groups with a claim over the national park, it was agreed that the IAC would assume responsibility for each of the claims in the overlap area.

With the overlap issue resolved, the NNTT facilitated further negotiations with the state and the representative body for the area. As a result, it was agreed (among other things) that the Irrwanyere Mt Dare application should be made over the Mt Dare homestead lease, specifically for the purposes of attracting the application of s. 47A because the lease was, at that time, held by the Indigenous Land Corporation. (At the time of the making of the other three applications, it was held by Driveline Pty Ltd and so s. 47A did not apply.) Further, an indigenous land use agreement and a co-management agreement relating to the national park were executed in August

2007. The ILUA sets out how rights are exercised in the national park and acknowledges the separate co- management agreement (CMA) for the park between the State and the IAC.

Following the completion of the negotiations facilitated by the NNTT, the parties sought orders:

- to ensure that the overlapping portions of each of the claim areas were dealt with in the same proceeding, effectively splitting the determination area into three, non-overlapping proceedings, pursuant to s. 67;
- for a determination of native title under s. 87 in relation to the area covered by the Irrwanyere Mt Dare application and determinations over parts of the area covered by the other applications under s. 87A.

Should the determinations be made?

Justice Lander determined that:

- it was appropriate to make the order sought under s. 67;
- the requirements for orders making the proposed consent determinations were met and so the court was empowered to make them;
- it was appropriate for the court to do so in the light of the state's submissions and the attached summary of the evidence in support of the determinations (filed by the state on behalf of all of the principal parties)—at [14] and [16] to [19].

The court noted that:

- the Lower Southern Arrernte and Wangkangurru are two 'closely interrelated and interpenetrating yet distinct societies', with the link of the claimants to the area covered by the national park at sovereignty being 'evidenced by numerous ancestors of the contemporary claimants who were born at various places in the area during the late nineteenth century';
- the continued existence and vitality of the societies' traditional laws and customs was said to have traditionally been passed down through patrifilial association, which more recently evolved into a cognatic form, though with an emphasis in the Lower Southern Arrernte claimants on patrifilial association where that can be established;
- accordingly, the manner in which the claimants have gained rights and interests is systematic and traditional;
- that the two individual societies were 'united in their acknowledgment and observance of traditional laws and customs' was demonstrated by contemporary evidence of how that was achieved;
- for the Lower Southern Arrernte, this included evidence from claimants about an age-based hierarchy, the visiting and cleaning sacred sites, that children are taught about bush tucker in the national park, the gender and other restrictions placed on ritual and religious information and behaviour and the handing down of names, initiation ceremonies, particular kinship terms, songs and stories;
- for the Wangkangurru claimants, the evidence concerned a regional system of authority, an age-based hierarchy, belief in spiritual sanctions, the handing down of names and kinship terms, the passing down of knowledge, stories and the use of bush tucker—at [28] to [30].

As to connection, this Honour noted that this was maintained 'by the inheritance of rights from an ancestor', with other forms of physical connection existing:

> [T]hrough members visiting and cleaning sacred sites, teaching children about bush tucker in the Park, a claimant acting as a park ranger, and regular camping trips in the Park for the purpose of teaching dreaming stories to children. A number of claimants have also played an important role in the Park's land management—at [31].

It was also noted that the evidence showed:

- 'core' rights, including rights to claim country as one's own, acquire ownership and authority over knowledge and songs associated with the country, speak for country, be asked for permission to access country by 'non-owners' and make decisions about country;
- 'contingent' rights, including rights to access and occupy the country and to use the resources of the country—at [32].

Consent determination v contested determination

His Honour was careful to note that:

> The purpose of ss 87 and 87A of the Act is to facilitate and encourage the resolution of native title claims by agreement between the parties. Necessarily, the Court adopts a different approach to the task of deciding whether it is appropriate to enter a determination reached by agreement than it brings to the task of deciding whether native title should be recognised in a contested matter. ... Although there needs to be some foundation upon which the Court can exercise its jurisdiction, in matters in which the parties have reached agreement ... the Court will have particular interest in whether the agreement has been freely entered into and on an informed basis .... If that question is answered in the affirmative, the Court will consider the fact that an agreement has been reached as weighing in favour of the making of a determination of native title—at [33] referring to *Nangkiriny v Western Australia* (2002) 117 FCR 6; *Ward v Western Australia* [2006] FCA 1848; *Lovett v Victoria* [2007] FCA 474 and *James v Western Australia* [2002] FCA 1208.

Decision

Lander J was satisfied consider that it was appropriate to make orders sought in the terms proposed because:

- the evidence provided supported 'the claimed connection of the claimants to their country';
- the determination sought did not appear in any way to be unfair or unjust;
- all parties to the agreement were legally represented; and
- there was no suggestion that any party entered the agreement otherwise than by their own free will—at [34].

Determination – s.225

The court made three determinations recognising that native title exists in relation to each determination area. The native title rights and interests are held in each case by the Lower Southern Arrernte and Wangkangurru People as described in schedule 2 of each of the determinations and defined as people, which is primarily through patrifilial association. Section 47A applies to almost all of the determination area (i.e.

all but two small areas of the national park that have been 'fenced out' to the adjoining pastoral leases). The native title rights and interests are non-exclusive, with the exception of order 9(l) which is:

> The right to speak for and make decisions in relation to the Determination Area about the use and enjoyment of the Determination Area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the Native Title Holders.

The non-exclusive native title rights recognised are rights to:

- access and move about the area;
- live, camp and erect shelters;
- hunt, gather and use the natural resources of the area such as food, plants, timber, ochre and feathers;
- cook and light fires for cooking and camping purposes;
- use the natural water resources;
- distribute, trade or exchange the natural resources;
- conduct ceremonies and hold meetings;
- engage and participate in cultural activities on the area including those relating to births and deaths;
- teach on the area the physical and spiritual attributes of locations and sites within the area;
- visit, maintain and protect sites and places of cultural and religious significance to native title holders under their traditional laws and customs;
- be accompanied on the area by those people who, though not native title holders, are spouses or people required by traditional law and custom for the performance of ceremonies.

The native title rights are for personal, domestic or communal use and must be exercised in accordance with traditional laws and customs and state and Commonwealth laws, including the common law.

Other interests in relation to the determination area include:

- rights exercisable under the ILUA and CMA in accordance with their terms;
- interests created under the IAC Lease;
- interests of the Crown in right of South Australia;
- rights of the public to use and enjoy the area in accordance with the provisions of the NPWA and associated regulations (subject to the IAC Lease);
- rights to access land by an employee or agent or instrumentality of the state, Commonwealth or other statutory authority as required in the performance of statutory or common law duties;
- rights relating to those parts of the Park fenced into Macumba Station and Hamilton Station and habitually used by the pastoral lessees of those Stations.

These rights and interests co-exist with the native title rights and interests and prevail over them but do not extinguish them.

There are no native title rights in:

- minerals and petroleum as defined by the relevant South Australian legislation;
- areas covered by public works constructed, established or situated prior to 23 December 1996 or that commenced on or before that date.

Prescribed body corporate

Within six months of the date of the determination, the native title holders must nominate a prescribed body corporate for the purpose of s. 57(2) to perform the functions mentioned in s. 57(3).