

Determinations of native title

Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v Queensland [2008] FCA 1855

Spender J, 9 December 2008

Issue

The issue in this case was whether the Federal Court should make a determination of native title under the *Native Title Act 1993* (Cwlth) (NTA) in terms of proposed consent orders. The court decided the determination should be made.

Background

The claimant application in this case covered land and waters above the high water mark on the Wellesley Islands and South Wellesley Islands in the Gulf of Carpentaria (the determination area). This area is bounded by the area where a determination of native title was made in *The Lardil Peoples v Queensland* [2004] FCA 298 (*Lardil*, summarised in *Native Title Hot Spots Issue 9*). The application dealt with in this case was filed on 12 January 2006. Agreement was reached between the parties on the terms of a draft determination, which was filed on 17 November 2008. The court noted that the draft agreement was reached ‘within a very commendable timeframe’ — at [38].

Applicant’s submissions

The applicant submitted (among other things) that:

- eleven descent groups of the Gangalidda People, 20 descent groups of the Lardil People, 5 descent groups of the Yangkaal People and 10 descent groups of the Kaiadilt People had been identified;
- the ‘most significant evidence of occupation’ of the proposed determination area prior to sovereignty was the evidence of the present day claimants themselves, who gave evidence before Justice Cooper in *Lardil* which demonstrated the pre-contact connection with the determination area in this case;
- a number of significant individuals within the claim group identified their ancestors as Lardil, Yangkaal, Gangalidda or Kaiadilt People, were spoken to in the traditional languages of those peoples, grew up on the proposed determination area and were shown its places and told the names of those places by their ancestors, all of whom asserted they were the traditional owners of the area and were, in many instances, alive before contact with white people;
- there was little reason to doubt the oral tradition of the claim group that it was comprised of the descendants of the people in occupation of the proposed determination area at sovereignty — at [17] to [19].

Power of court to make the determination

In considering the proposed determination, Justice Spender had the ‘great benefit’ of the decision in *Lardil*, including a body of evidence in the form of expert reports and

affidavits, very significant portions of which were relevant to this application given that the claim groups were the same. In those circumstances, Spender J considered it appropriate to have regard to that evidence pursuant to s. 86, which (among other things) gives the court power to take into account evidence in other proceedings. His Honour noted that it was found in *Lardil* that, at and since sovereignty, the Lardil, Yangkaal, Kaiadilt and Gangalidda people had existed as culturally separate groups of Indigenous people who were direct descendants of the original people who had inhabited the determination area—at [12] to [16].

Having regard to both the evidence provided by the ‘eminent’ anthropological experts and the findings of Cooper J in *Lardil*, the court was satisfied that the Lardil, Yangkaal, Gangalidda and Kaiadilt People:

- were descended from indigenous people who were in occupation of the determination area at sovereignty;
- had maintained a connection with the proposed determination area; and
- had a body of traditional laws and customs that supported the rights and interests recognised in the proposed determination;
- had maintained a system of laws and customs over the proposed determination area sufficient to satisfy the requirements of the NTA—at [20] to [25].

His Honour was, therefore, satisfied that native title exists in the proposed determination area and went on to find that all of the matters in s. 225 of the NTA had been appropriately addressed—at [25] and [28] to [33].

Decision

Spender J decided that a determination in the terms sought should be made and commented that:

This is a day of great significance for the Lardil, Yangkaal, Gangalidda and Kaiadilt People. Today, the ongoing relationship of the people with their country is recognised by Australia and its laws, although this is a relationship that has been known and acknowledged by the people long before European settlement. It gives me great pleasure to be able to make these orders, and in particular to be able to make them by consent following the successful negotiations between all of the parties—at [39].

Determination

The court ordered, declared and determined that native title existed in relation to the determination area. Native title is held by:

- Lardil people in that part of the determination area in Schedule 4(a);
- Yangkaal people in that part of the determination area in Schedule 4(b);
- Yangkaal and Gangalidda peoples in that part of the Determination Area in Schedule 4(c);
- Kaiadilt people in that part of the determination area in Schedule 4(d);
- Kaiadilt, Yangkaal and Gangalidda peoples in that part of the determination area in Schedule 4(e).

The Lardil, Yangkaal, Gangalidda and Kaiadilt peoples (the native title holders) are those people described in Schedule 5(a)–(d) of the determination. The Gulf Region Aboriginal Corporation is to be the prescribed body corporate. It will not hold the native title in trust.

The right to possession, occupation, use and enjoyment to the exclusion of all others was recognised in the part of the determination area described in Schedule 1, Schedule 1A and Schedule 1B, other than in relation to water and subject to paragraphs [12], [14] and [15] of the determination. Non-exclusive rights and interests in relation to that part of the determination area described in Schedule 2, other than in relation to water and subject to paragraphs [12], [14] and [15] of the determination, being the right to:

- access, be present on and traverse the area;
- hunt, fish and gather on the area for personal, domestic, and non commercial communal purposes;
- camp on the area, but not to reside permanently or erect permanent structures or fixtures;
- light fires on the area for domestic purposes (including cooking) but not for the purposes of hunting or clearing vegetation;
- conduct religious, spiritual, and ceremonial activities on the area;
- maintain, in the area, places and areas of importance or 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
- take and use natural resources (as defined in the determination) from the area for personal, domestic, and non-commercial, communal purposes;
- share or exchange natural resources from the area for personal, domestic and non-commercial, communal purposes.

Subject to paragraphs [12], [14] and [15] of the determination, rights in relation to water are non-exclusive rights to:

- hunt and fish in and on and gather from the Water for personal, domestic, and non-commercial, communal purposes; and
- take, use and enjoy the water for personal, domestic and non-commercial, communal purposes.

The native title rights and interests are subject to, and exercisable in accordance with, the laws of the state and the Commonwealth and the traditional laws acknowledged and traditional customs observed by the native title holders.

Other interests in the determination area recognised in the determination include those of Ergon Energy Corporation Limited, the Mornington Shire Council, the Ngaarrkinaba/Mildiji Land Trust and the Kaiadilt Aboriginal Land Trust. The relationship between native title and other rights and interests is that:

- other rights and interests continue to have effect;
- in areas where ss. 47A or 47B of the NTA applies, the non-extinguishment principle found in s. 238 applies in accordance with ss. 47A(3)(b) and 47B(3)(b); and

- all other interests, and any activity that is required or permitted by or under and done in accordance with the other interests, prevails over the native title rights and interests and any exercise of those rights and interests but does not extinguish them except in accordance with law.