# Determination of native title—non-claimant application

## *Worimi Local Aboriginal Land Council v Minister for Lands (NSW) (No 2)* [2008] FCA 1929

**Bennett J, 18 December 2008**

**Issue**

This was the first case where a non-claimant application was actively opposed. The court had to decide whether to make a determination that native title did not exist over an area in Port Stephens, New South Wales. The determination was made. An important feature of the decision is the consideration given to the onus of proof in a case where a non-claimant application is opposed.

Gary Dates (also known as Worimi), who opposed the application, has appealed against the decision.

**Background**

The Worimi Local Aboriginal Land Council (the land council) is the body corporate established under s. 50 of the *Aboriginal Land Rights Act 1983* (NSW) (the NSW Act) for the relevant area. Its non-native title interest arose from the transfer of land in Port Stephens (including Lot 576, the area this case concerns) by the Minister for Lands for New South Wales (the minister) pursuant to s. 36 of the NSW Act in 1998.

The land council held 'an estate in fee simple ... subject to any native title rights and interests existing in relation to the land immediately before the transfer' (s. 36(9) of the NSW Act). Section 40AA of the NSW Act prevented the land council from dealing with the transferred land unless it was the subject of an approved determination of native title. Subsections 13(1) and 61(1) of the *Native Title Act 1993* (Cwlth) (the NTA) permitted the making of a non-claimant application for a determination that native title does not exist over the area concerned.

In October 2004, the land council resolved that Lot 576 was not of cultural significance and then resolved to dispose of the land. It made a non-claimant application over Lot 576 in December 2004. The minister was automatically a party to the proceeding pursuant to s. 84(4) of the NTA. The application was notified in accordance with s. 66 of the NTA.

As a non-claimant application is a 'native title determination application', stringent requirements are placed the applicant. According to her Honour, if the court was not satisfied in this case that native title did not exist, the land council's application should be dismissed—at [43], referring to *Commonwealth v Clifton* (2007) 164 FCR 355; [2007] FCAFC 190 (*Commonwealth v Clifton*, summarised in *Native Title Hots Spots* Issue 27) at [40] to [57].

Worimi did not give notice of his intention to become a party within the notification period specified in s. 66(10)(c) but was joined as a party in March 2007, having made application pursuant to s. 84(5) of the NTA (see *Worimi 2007)*. No other Aboriginal person sought to become a party or opposed the determination sought by the land council. The only Aboriginal people, other than Worimi, to give evidence in this case did so as witnesses for the land council. There was no dispute that the land council wished to sell Lot 576 to pay off debts and to provide housing. The land council's witnesses generally, but not universally, supported the sale. The court acknowledged that Worimi thought he had been badly treated by the land council and was upset that it wished to sell Lot 576 to pay debts and provide housing (which he felt was the government's responsibility) without considering its cultural significance—at [127].

The history of this matter is set out in *Worimi Local Aboriginal Land Council v Minister for Lands (NSW)* [2007] FCA 1357 (*Worimi 2007*, summarised in *Native Title Hot Spots* Issue 26). It includes the striking out of two claimant applications filed by Mr Dates (Worimi) pursuant to s. 84C of the NTA for failure to comply with s. 61—see *Hillig v Minister for Lands (NSW) (No 2*) [2006] FCA 1115 (summarised in *Native Title Hot Spots* Issue 21) and *Worimi v Minister for Lands (NSW)* [2006] FCA 1770 (*Worimi 2006*, summarised in *Native Title Hot Spots* Issue 23).

**The burden of proof**

The parties agreed that:

- the land council carried the burden of proof to satisfy the court that no native title existed in Lot 576 and the applicable standard was the balance of probabilities;
- the court was not required to, and could not, make a determination that native title existed under the NTA on a non-claimant application;
- the court could only grant the declaratory relief sought by the land council if satisfied that Lot 576 was not subject to native title—at [24] to [29]. See also [88].

According to her Honour, 'The real difference between the parties relates to their submissions regarding what evidence is sufficient to establish the negative proposition'—at [42].

Bennett J found (among other things) that:

- the beneficial nature of the NTA does not mean that a different standard applies to the evidentiary burden and the onus of proof;
- a non-applicant claimant (i.e. a respondent) can, by establishing the elements of native title, prevent a determination that native title does not exist but cannot secure a positive determination of native title under the NTA;
- Worimi's evidence might raise a doubt as to the non-existence of native title without amounting to proof necessary for a finding that native title exists;
- after assessing the totality of the evidence, the court must determine whether the land council had established, on the balance of probabilities, that native title did not exist;

- if the land council established sufficient evidence from which an absence of native title might be inferred, Worimi carried an evidential burden to advance evidence of any particular matters going to the existence of native title; and
- the land council was then required to deal with that evidence in the discharge of its overall burden of proof—at [45] to [55], referring to , referring to (among others) *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561 (*Apollo*), *Derschaw v Sutton* (1996) 17 WAR 419, *Kokatha People v South Australia* [2007] FCA 1057 (*Kokatha*, summarised in *Native Title Hot Spots* Issue 25). See also [88].

Worimi asserted that he and his immediate family may be the only Worimi people who were given native title rights and interests in Lot 576 (and, additionally, in the area from Birubi Beach to Boat Harbour) under traditional laws and customs.

In considering the evidence adduced, Bennett J noted (among other things) that:
- it was relevant that Worimi was able to give evidence of the laws and customs he asserted but he had insufficient resources to present the expert historical and anthropological evidence to substantiate his claims;
- Worimi was not in a position to adduce the historical and anthropological evidence to establish the existence of the Garuahgal clan (of which he claimed to be a member) and the existence of traditional laws and customs over Lot 576;
- while there was an absence of detailed expert evidence, the court must consider such evidence as has been adduced, i.e. the existence (or not) of native title over Lot 576 could only be assessed on the available evidence;
- the land council was not obliged to establish the nature and content of any native title rights and interests at the time of sovereignty and then 'deconstruct' this via admissible evidence, i.e. it was 'contrary to logic to say that a person who wishes to establish that there is no native title must first positively prove that there were laws and customs at any stage'—at [59] to [62] and [88], referring to (among others) *Apollo* and *Ho v Powell* (2001) 51 NSWLR 572.

**No presumption of the existence of native title**

In rejecting Worimi's submissions, Bennett J found (among other things) that:
- there is no presumption of the existence of native title under the NTA, either for a claimant seeking a determination of the existence of native title or for a non-claimant seeking a determination of the absence of native title;
- if it was necessary to prove each of a number of elements to establish native title, and it could be shown that one of those elements was missing, that was sufficient to demonstrate that, presently, there was no native title over particular land;
- the fact that no expert evidence was available in these proceedings did not prevent a decision being reached as to whether the land council had satisfied the burden of establishing the absence of native title on the basis of the evidence adduced;
- there are requirements associated with the concept of native title under the NTA that go beyond identification of land as 'traditional land' or as land associated with the Worimi people;

- the land council was not obliged to demonstrate an absence of native title throughout the Port Stephens area but evidence that relates to an area that goes beyond a recently subdivided lot such as Lot 576 was likely to be relevant;
- the question remained whether there were native title rights and interests over Lot 576—at [69] and [71] to [79] and [88].

**Evidence not required in relation broader Worimi territory**

It was accepted that Lot 576 fell within traditional Worimi country. However, the subject matter of the application was a single lot. Bennett J found that:

- the land council had no obligation to demonstrate the presence or absence of native title throughout the whole of traditional Worimi country;
- moreover, a description of people as 'Worimi' and land as 'traditional Worimi country' was not evidence of a continued association with an identified area of land by an identified Aboriginal society or group from before the acquisition of sovereignty as required under the NTA—at [80] to [88] and [180].

**Admissibility of evidence related to associated claims**

The court admitted material associated with other claims as relevant to the issue of whether the witnesses believed that native title existed in the area and whether there were other Worimi persons who may hold native title but did not accept that the fact of earlier native title applications meant that witnesses were untruthful in their evidence or that they tailored their evidence to suit the present wish to sell Lot 576—at [102], [106] to [107] and [116] to [123].

**Evidence given**

Her Honour set out in some detail the evidence of each witness, noting consistencies and inconsistencies both their testimony, cross-examination and any relevant affidavits. That evidence is not summarised here and is referred to only in so far as it was relevant to the findings of the court. Readers are referred to [90] to [133].

In relation to the land council's evidence, it was found that:

- it established that no Aboriginal person other than Worimi (and some of his immediate family) asserted that native title existed in relation to Lot 576;
- all of the Aboriginal witnesses called by the land council identified as Worimi people, all were aware of the assertions made by Worimi concerning the existence of native title in Lot 576 and all gave evidence generally rejecting those assertions;
- some of those witnesses were parties to claimant applications in respect of land in the Port Stephens area but none had filed a claimant application in relation to, or in the immediate vicinity of, Lot 576;
- the land council called a number of witnesses from different Worimi families, including women who have taken a particular interest in Worimi matters and traditions;
- no other person was called to give evidence in support of Worimi's contentions, despite (among others) the fact that he asserted he held native title as a Worimi man—at [137] to [138].

Worimi's daughter Priscilla gave evidence for the land council that was contrary to her father's case. In accepting her evidence, Bennett J noted that Pricilla:

- was in an advanced state of pregnancy with her tenth child when she gave her evidence and it was clear that doing so caused her 'great personal distress';
- explained that, while she had previously affirmed two affidavits supporting her father's assertions as to the significance of Lot 576 as a woman's site, she expressly recanted those statements, had given them when she was intoxicated and did so because she loved her father;
- gave clear evidence that she has never been taught about Aboriginal law or custom and knew nothing about Lot 576 or Boat Harbour until a few years ago, when her father first told her that women had their babies there;
- said her upbringing did not involve the passing on to her of any traditional knowledge, laws or customs associated with the Boat Harbour area or Lot 576;
- 'remained consistent' on the key questions of her knowledge of traditional laws and customs and her knowledge of Lot 576—at [139] to [140].

Her Honour found the evidence of the other land council witnesses was 'persuasive', going on to say that:

- while they were under the pressure of the debts owed by the land council, this did not derogate from their sworn evidence but did explain why they may be more ready to sell Lot 576;
- while they might be 'loath to part with any part of the land that has been granted to them under the NSW Act, they were ready to sell land' that did not otherwise have 'importance in terms of traditional laws and customs' to ensure the debts of the land council were paid;
- the issue of the debts, and the provision of housing, did not 'of themselves impact on the question' of whether there was native title in Lot 576—at [141] to [142].

**Relevance of other claimant applications**

Some of the land council's witnesses were claimants in applications made over Bagnalls Beach and Stockton Bight. Worimi asserted that both areas were Garuahgal land but did seek to be joined to those applications or make an independent claim over either area. However, he contended that the existence of those claims was inconsistent with the denial of native title over Lot 576 (and the adjacent area at Kingsley Beach), arguing that:

- the phrase 'in relation to' in s. 36(9) of the NSW Act necessitated a consideration of native title rights and interests over the whole of the land held by the land council under the NSW Act;
- it was relevant that the land council witnesses asserted that they were descendants of people from Port Stephens whom they considered were native title holders.

The court disagreed, concluding that:

- the issue was native title under the NTA, the evidence must be looked at as a whole and an assertion of native title was not sufficient;
- there must be some evidence of connection with Lot 576 and the laws acknowledged and customs observed in connection with it;

- there was no inconsistency between the assertions of native title over other areas by land council witnesses and denial of its existence over Lot 576—at [126].

Worimi also asserted that Lot 576 was the traditional country of the Garuahgal clan of the Worimi people and that more than one clan could have guardianship of a particular area. All the land council's witnesses gave evidence:

- either that they had never heard of such a clan or that there was no such a clan;
- that Lot 576 fell within the Maaiangal clan area and there could be only one clan claiming any particular land.

On the evidence, her Honour was not satisfied that there was no such thing as the Garuahgal clan or that only one clan could claim a particular area. However, Worimi argued it was not the Maaiangal clan, but the Garuahgal clan, that exercised the relevant native title rights over Lot 576, which meant that the asserted existence of traditional laws and customs observed by the Maaiangal clan over other areas (i.e. Stockton Bight and Bagnalls Beach) was not relevant to Worimi's claim of a Garuahgal women's site on Lot 576.

**Significance of the area**

There was no dispute that Worimi was a Worimi person, or that his ancestors were Worimi. His father was Leonard Dates, son of Ellen and Freddie Dates and his mother was Yorta Yorta. However, the other Aboriginal witnesses knew him as Gary Dates. He, like most of the land council witnesses, grew up on the Karauh Mission and had lived in the area most of his life. What was in dispute was the extent to which he had done so at any time following any form of traditional lifestyle. The land council witnesses agreed Lot 576 was within Worimi country but said it did not have any particular significance. Many had visited the area but did not use it for traditional purposes—at [90], [102], [106] to [108] and [156]

Worimi's testimony that he was taught by his grandmother, father and father's brothers was not directly disputed. He said his father followed Worimi law and custom and told him he was the custodian of all Worimi land. He said that only he could bring a claim over Lot 576 because of his knowledge as an elder. However, in cross examination, he accepted that he was not old enough to be an elder saying, rather, he was the custodian of the land—at [128], [132] and [148].

His younger brother, Kelvin Dates, and his sister, Jaye Quinlan, gave evidence that their father and mother did not live a traditional lifestyle or pass on any knowledge of traditional laws and customs to them. In the court's view, this did not necessarily contradict Worimi's evidence that such information was passed to him as the eldest son. However, all the land council witnesses denied that a person became a traditional elder merely because they were the eldest son. In any event, Worimi conceded that land did not pass to particular people as custodians and that it was contrary to traditional law and custom for Worimi's father to give him the Boat Harbour area as he initially asserted because all the Worimi people were traditional owners—at [106] to [109], [128], [156] and [160].

Worimi gave evidence that his father, uncles and grandmother spoke 'Worimi lingo'. He knew a little and was teaching his children. His daughter denied ever hearing him speak or being taught it. Other witnesses gave evidence that only English was spoken at the Karauh mission—at [97], [107], [110] and [128].

His sister denied being taught any traditional laws and customs by her grandmother, with whom she lived, or her father. Her grandmother, Ellen Dates, was a devout Christian who did not live according to any traditional law and custom. She had not been to Lot 576 and had no knowledge of it as a women's site. The court concluded that it would be expected that information concerning a women's site would have been passed to Ms Quinlan if Ellen Dates had been aware of such a site and continued to observe law and custom—at [161].

Worimi gave evidence that Big Bill Ridgeway told him about Aboriginal ways but Mr Ridgeway's son described his father as more or less living in a white society. The court found it unlikely that Mr Ridgeway was a major source of Aboriginal custom for Worimi, who (in any case) changed his evidence in this regard during cross-examination—at [107], [128] and [150].

No other witness was called to corroborate Worimi's evidence. All of the land council witnesses contradicted his evidence that:

- there was a guardian tree or a rock formation in the shape of a goanna on Bulahdelah mountain;
- Kooragang Island was a sacred site;
- it was Worimi law to be buried in trees, near your mother, to return to your country to die or to visit graves; and
- the Hunter River was formed by the rainbow Serpent—at [93] to [98] and [106] to [108].

Individual witnesses disputed Worimi's evidence that:

- Worimi people are all spirits of their totems but take on human form;
- when a woman married she took on the law and custom of her husband's clan but lost all rights if he pre-deceased her;
- Worimi would have had so much information passed to him by 12 years of age when his grandmother died—at [94] to [95], [107], [131] and [148].

The court found that fact that Worimi's description of practices such as hunting and fishing differed from that of other witnesses did not necessarily derogate from his evidence, since there could be different ways of observing traditions. However, Worimi had not adduced sufficient evidence in relation to such activities said to have been carried out on or near Lot 576—at [97], [106] to [108] and [157].

The court made particular mention of the fact that Worimi had not brought any evidence to support his claim of a women's site on or near Lot 576 and that, while he expected other Worimi women to know of the relevant laws and customs, he accepted that they did not. No other Aboriginal witness gave evidence of a women's

site on or near Lot 576 or between Birubi Beach and Boat Harbour. The court concluded there was no evidence to support:

- the existence of a site at Kingsley Beach or of any practice associated with birth or baptism in the area between Birubi Beach and Boat Harbour or on Lot 576;
- the existence of a 'billabong' or 'namby' on, or in the vicinity of, Lot 576 or that it was used for washing saltwater off babies after they had been baptised;
- the giving of totems to babies on or near Kingsley Beach or the burying of afterbirth on or near Lot 576;
- the existence of an avoidance obligation on men relating to Lot 576 or Kingsley Beach or any other land in the vicinity of Boat Harbour—at [106] to [108] and [158] to [159].

**Who held native title rights and interests?**

The court found Worimi's evidence on this question inconsistent. He varyingly asserted that he was bringing the claim on behalf of himself, the Garuahgal women, his family and all Worimi people. It was noted that:

- native title may be held communally, by a sub-group or by an individual, depending on the nature of the society said to be the repository of the traditional laws and customs that give rise to the native title claimed;
- individual native title rights arise out of, and depend upon, the traditional laws and customs of the community in question;
- in the present case, if native title rights existed over a women's site, they would be held by Worimi women, who denied that such rights existed—at [117].

Worimi's asserted individual rights appeared to be based on information he received as the eldest son. In affidavits in 2005 and 2007, he claimed they were held by his immediate family and possibly only he and his children. However, in cross-examination (and in a later affidavit), he claimed that all Worimi people held native title in the area. While his brother, sister and daughter did not support his assertions, other family members did—[132], [175] to [178] and [185].

It was found that irrespective of the group said to hold native title over Lot 576, the requirements of s. 223 were not satisfied—see [31] to [44], [175] to [179] and [185].

**Worimi's evidence**

The court noted (among other things) that:

- Worimi had called no other person to support his contentions and it was particularly telling that no women supported his evidence about women's site;
- the only other evidence in support of his claims was from his mother, who was Yorta Yorta, and his wife, sister and daughters, who said little more than that they took their information from Worimi and supported his assertions;
- the failure on Worimi's part to call corroborative evidence lessened the burden of proof on the land council to establish the negative proposition;
- Worimi's case was that, apart from family members to whom he had passed it on, only he had the requisite knowledge and, accordingly, it was hard to see what further evidence the land council could have called;

- the land council witnesses included representatives of families long associated with the area and they gave evidence not only of their own understanding but they also that of their parents and, indeed, Worimi's grandmother and father—[102], [139], [175] to [178] and [187] to [188].

**Continuity of law and custom**

Bennett J noted that:

- deciding whether claimants have a present connection with land, some interruption to enjoyment of native title rights and interests is allowed;
- however, the assertion of native title rights and interests requires more than a 'vague claim' to membership of a group of people and of 'custodianship' of land;
- Worimi had comprehensively failed to establish the elements of native title in that he had not identified either the content of the normative body of laws and customs acknowledged and observed by the pre-sovereignty society or how those laws and customs had continued to be acknowledged and observed substantially uninterrupted;
- while he was not required positively to establish native title in order to resist the land council's application, he was required to present evidence which was sufficiently cogent with respect to those elements that it casted doubt on the assertion that native title did not exist—at [151] to [154] and [167].

Worimi asserted that the laws and customs he acknowledged were not observed by other Worimi people and this was consistent with their evidence. However, it was found that:

- Worimi, and those of his family who supported his claims, did not constitute a society that observed traditional laws and customs in respect of Lot 576;
- even if the area was associated with the birth of children of the Garuahgal people, the present observance by Worimi and one of his daughters was 'at best an attempted re-creation of a society which may well have had native title rights and interests';
- even assuming that information had been passed down from father to the eldest son since pre-sovereignty, the evidence from all witnesses (including Worimi) was that any laws and customs with respect to the birth of children had ceased to be observed until Worimi recently sought to reinvigorate them;
- even accepting the existence of a normative system of laws acknowledged and customs observed in connection with the area, there was no evidence relating to the period of the between 1788 and the time the stories were said to have been told to Worimi, who seemed to rely on a presumption of continuity;
- the evidence was that Aboriginal people lived as part of the non-Aboriginal community around Port Stephens or on the Karuah Mission but there was no basis on which to infer the continuity of the observance of laws and customs, the use and enjoyment of rights and interests in connection with Lot 576—at [168], [172] to [173] and [181].

Her Honour held that:

- if native title existed pre-sovereignty, it had ceased to exist for the purposes of the NTA when the society (whether the Worimi people, the Maaiangal clan or the Garuahgal clan) ceased to acknowledge and observe their laws and customs;
- therefore, the rights and interests to which those laws and customs gave rise were no longer possessed under traditional laws acknowledged and traditional customs observed and so they ceased to exist;
- the later adoption of the laws and customs does not give rise to rights and interests rooted in pre-sovereignty traditional law and custom—at [184]

The court concluded that:

- there was not the requisite continuous connection with the people, whether Worimi, Maaiangal or Garuahgal, with Lot 576 or the observance of traditional laws and customs since sovereignty as required by s. 223(1) because the practices Worimi said were associated with it had not been observed at least from the time of his grandmother until his daughter in 2006;
- there was no evidence (other than Worimi's) of a birthing site or use of a waterhole for Garuahgal, Maaiangal or Worimi women generally on or near Lot 576 and, if there ever had been a site, it had long since ceased to be used;
- while Worimi claimed that the site was sacred to all Worimi women, no woman supported this claim, apart from some members of his immediate family;
- while Worimi felt strongly about his Aboriginal heritage, he acknowledged he had taken some of the Dunghutti customs observed by his wife in practising with his daughter the customs connected with birth and baptism that he said were carried out on Lot 576;
- Worimi had made some effort to revive observation of traditional use in the area but there had been no such connection for at least two generations;
- even accepting that there were laws acknowledged and customs observed in connection with the area pre-sovereignty, there had been no continuity of that observance;
- the evidence was not of adaptation of traditional laws and customs but of substantial interruption, amounting to cessation observance;
- the lack of continuity in the laws acknowledged and customs observed in connection with the area was sufficient to establish a prima facie case of no native title—at [129], [162] to [164], [182] to [189] and [193].

**Decision**

It was found that:

- the land council had presented sufficient evidence from which the absence of native title over the area could be inferred;
- Worimi's evidence was insufficient to cast doubt on the council's case;
- therefore, the land council was entitled to a determination that there was no native title over Lot 576—at [194].