Determination of native title

Combined Dulabed Malanbarra Yidinji People v Queensland [2009] FCA 1498

Spender J, 17 December 2009

Issue

The issue in this case was whether the Federal Court should make a determination of native title pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) in terms of proposed consent orders. The court decided to do so. The determination area comprises approximately 166 square kilometres in the Goldsborough Valley in the Wet Tropics World Heritage region of far north Queensland. The determination will become effective if and when four related Indigenous Land Use Agreements (ILUAs) are registered. Objections to the registration of all four ILUAs have been received and are being dealt with by the Registrar's delegate.

Background

The claimant application dealt with in this case was made on behalf of the Combined Dulabed Malanbarra Yidinji People. The respondents included the State of Queensland, the Cairns Regional Council, the Tablelands Regional Council and Ergon Energy Corporation Limited. According to Justice Spender, this application had 'a long and chequered history'. An application was made on behalf of the Malanbarra Yidinji People lodged with the National Native Title Tribunal (the Tribunal) in 1994. An application on behalf of the members of the Dulabed Aboriginal Corporation was lodged with the Tribunal in 1995. In 1996, the Malanbarra Clan of Yidinji People also lodged a third application. As a consequence of amendments to the NTA, all three became proceedings in the court in September 1998. In 2000, the Malanbarra Clan of Yidinji People application was discontinued. In 2001, the Dulabed and Malanbarra Yidinji applications were combined to become the Combined Dulabed Malanbarra Yidinji People's application. The combined application, which was amended four times, was referred for Tribunal mediation in 2004. With the Tribunal's assistance, the parties reached agreement as to the terms of the determination for the purposes of ss. 87 and 94A and the agreed terms were filed in the court late in 2009—at [2] to [7].

Court's power

Spender J was satisfied that the proposed orders that 'have been freely agreed to by all parties on an informed basis are appropriate'. As was noted:

> There are now a number of decisions ... that have considered the requirements of this section of the Act that promotes a resolution of native title applications by way of negotiated agreement. Justice Greenwood, ... [in *Hobson on behalf of the Kuuku Ya'u People v Queensland* [2009] FCA 679] referred to the observations made by Chief Justice French in his paper, *Lifting the Burden of Native Title – Some Modest proposals for Improvement*, that the Court will not lightly second-guess the agreement the parties have reached by requiring formal proof of the content of the subject matter of each proposition contained in the

> proposed orders which in turn must necessarily address the elements of ss. 223 and 225 of the Act. Otherwise the Applicant would be burdened with, in effect, a subset of a trial in establishing the appropriateness of consensual orders—at [11].

Evidence in support of determination

The court had before it a report called 'Summary of Connection Material' by Dr Sandra Pannell which summarised the findings of three earlier anthropological reports by different authors, all of which were prepared prior to the High Court decisions in *Western Australia v Ward* (2002) 213 CLR 1 and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. His Honour also had a document prepared by Jennifer Gabriel entitled 'Executive Summary on the Dulabed/Malanbarra Yidinji Genealogies'. Spender J was of the view that Dr Pannell's summary 'clearly explored the available evidence on the identification of the claim group, continuity of connection and the normative system of traditional law and custom of the claim group'—at [13].

After examining the material provided, his Honour concluded that:

> The Combined Dulabed Malanbarra Yidinji People's traditional entitlement to ownership of the ancestral lands and waters derives from their physical, cultural and spiritual connection to the claim area—at [20].

As a result, his Honour could:

> [I]nfer from the well documented historical and anthropological material that at the time of sovereignty, a society of persons bound together by observance of traditional laws and customs existed—at [20].

In respect of the 'current society', Spender J found 'the wealth of personal information' in affidavits of senior claim group members 'provided a clear picture of the contemporary society that demonstrates' that society's connection to the determination area—at [13].

Decision

After noting that the terms of the proposed order complied with s. 225 (as required by s. 94A) and other matters, Spender J found that:

> [T]he Court has power to make a determination in the terms proposed by the parties by agreement and ... these orders can give effect to the agreement of all the parties. Such orders determine under the laws of Australia that native title exists in the Determination Area according to the traditional laws and customs of the Combined Dulabed Malanbarra Yidinji People. This is recognition of what the people have always understood the position to be—at [35].

Determination

The native title holders were determined to be those people known as the Dulabed and Malanbarra Yidinji People, who are those Aboriginal people that are either descended from certain named ancestors or recruited by adoption in accordance with the traditional laws and customs of the Dulabed and Malanbarra Yidinji People. The native title is not held in trust. The court was satisfied that the nominated Dulabed

Malanbarra and Yidinji Aboriginal Corporation met the requirements of ss. 55 and 57 of the NTA. Therefore, it was determined to be the prescribed body corporate (PBC) for the determination area—at [32] to [33].

In relation to one part of the determination area, where s. 47B applies, the native title holders hold the right to possession, occupation, use and enjoyment to the exclusion of all others, with the exclusion of 'water' as defined in the *Water Act 2000* (Qld). In the remainder of the determination area (and again with the exclusion of 'water'), the native title holders hold non-exclusive native title rights to:

- be present on the area, including by camping, which is defined to exclude permanent residence or the construction of permanent structures (other than grass huts known as bulmba) or fixtures;
- take and use traditional natural resources from the area for personal, domestic or non-commercial communal purposes; and
- perform cultural or spiritual activities on the area.

'Traditional natural resources' are defined to mean 'animals' (excluding fish) and 'plants' as defined in the *Nature Conservation Act 1992* (Qld) and any clay, soil, sand, gravel or rock on or below the surface, that have traditionally been taken and used by the native title holders. In relation to all 'water' in the determination area, the native title holders hold non-exclusive rights to:

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

Other rights and interests in the determination area noted in the determination include:

- the state pursuant to the *Nature Conservation Act 1992* (Qld) and the *Forestry Act 1959* (Qld) and 'subordinate legislation';
- the Wet Tropics Management Authority under the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) and the *Wet Tropics Management Plan 1998* (Qld);
- any existing rights of the public to access and enjoy waterways, beds and banks or foreshores of waterways, coastal waters, beaches, stock routes and areas that were public places at the end of 31 December 1993 'so far as confirmed pursuant to' s. 212(2) of the NTA and s. 18 of the *Native Title (Queensland) Act 1993* (Qld) as at the date of the determination.

Comment on formulaic exclusions from determination area

The determination area is described as being certain identified lots excluding 'any area' within those lots 'on which a public work is, or has been, established' before 24 December 1996 and 'any adjacent land and waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work'. (This last part replicates the extended definition of 'public work' in s. 251D of the NTA.) While it is understandable that the parties wanted to resolve this matter expeditiously by using formulaic exclusions, this does not finally resolve where

native title exists and where it does not. Therefore, it is not possible to map the determination area with any precision, the PBC will not have certainty in relation to the area for which it is determined and the state will not have certainty in relation to those areas to which the NTA's future act regime applies. This may not be significant where the history of works is simple but may be problematic in areas where it is not.