Kurnai claim dismissed

Rose on behalf of the Kurnai Clans v Victoria [2010] FCA 460

North J, 14 May 2010

Issue

The issue in this case was whether the Kurnai Clans should be recognised as holding native title in relation to Gippsland region of south-east Victoria. Their claimant application covered the same area as that covered by a claimant application made on behalf of the Gunai/Kurnai. It was decided that the Kurnai had not proven they held native title to the claimed area and so their application for a determination of native title 'must be refused'—at [208].

Background

The Kurnai Clans' application was filed in 2005. Regina Rose, Dot Mullett, Pauline Mullett, Flo Hood-Finn and Frank Hood comprised the applicant. It was brought on behalf of the descendants of Larry Johnson and Kitty Perry Johnson, a couple who were born and lived in Gippsland in the second half of the 19th century. As Justice North noted, the application was made 'as a result of a long running controversy' between the Kurnai Clans and a larger group of Aboriginal people from the Gippsland area referred to as the Gunai/Kurnai about the appropriate group of people in whose favour a determination of native title in the Gippsland area should be made. This was referred to as the 'group composition' issue—at [5].

The Gunai/Kurnai application was made much earlier, in 1997. At the time of the hearing, it identified the group of people in whose favour a determination of native title should be made as the descendants of a 25 sets of apical ancestors, including Larry and Kitty Johnson, the Kurnai ancestors. The Kurnai did not accept that this was the correct native title claim group, arguing that only the descendants of Larry and Kitty Johnson held native title to the claimed area.

Events leading to trial

Many attempts were made to resolve the issue, including mediation by the National Native Title Tribunal, the production by a court-appointed expert of a report on the laws and customs of the Gippsland Aboriginal society at sovereignty and the identification of the ancestors of the people who constituted that society by that expert. The report and further mediation did not resolve the issue. In a 'final process' to 'attempt to bring the Gunai/Kurnai and the Kurnai together', early and preservation evidence were taken in two separate hearings. While it did not resolve the matter, it did allow some assessment of the evidence by the State of Victoria, which led to the state indicating it was willing to enter into negotiations with the Gunai/Kurnai.

In July 2008, the court acceded to the Kurnai's request that their application be set down for trial. According to his Honour:

> The Kurnai case, at least implicitly, accepted that there were Aboriginal people in Gippsland at sovereignty who, at that time, formed a society of which Larry Johnson and Kitty Perry Johnson were part. The Gunai/Kurnai case is that the members of that society are the descendants of the 25 ancestral sets. The Kurnai case is that none of the descendants of those Aboriginal people, apart from the descendants of Larry Johnson and Kitty Perry Johnson, remain today as part of the continuing society. The Kurnai thus took on the burden of establishing that, apart from the descendants of Larry Johnson and Kitty Perry Johnson, none of the descendants of the 25 ancestral sets are part of the alleged Kurnai society existing today and dating back to sovereignty. If the Kurnai are wrong in relation to the descendants of any of the 25 ancestral sets, save for the descendants of Larry Johnson and Kitty Perry Johnson, their application for a determination of native title must fail because it would omit relevant ancestors. Thus, in the end, there was a particular focus in the evidence on the validity of the ancestral sets—at [15].

In December 2008, the Gunai/Kurnai and the state started negotiations directed to resolving the Gunai/Kurnai application. As those negotiations were proceeding positively, the parties did not wish the court to program a hearing of the Gunai/Kurnai application.

The historical context was relevant to the dispute that has arisen in this case and so his Honour summarised the major events from first contact in 1797 to the handover of the former Lake Tyers mission lands to the Lake Tyers Aboriginal Trust in 1971—at [32] to [47].

The relevant law

North J set out s. 223(1) of the *Native Title Act 1993* (Cwlth), noting it required the applicant to establish that:

- The claimed rights and interests are held under a system of rules which has a normative content;
- the claimants constitute a group bound together by adherence to that system of rules;
- the system of rules and the society which adheres to it existed at the time of acquisition of sovereignty and has had a continuous existence and vitality since that time;
- the claim group have had a connection with the land and/or waters through those laws and customs—at [29], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58.

Further, it 'follows from these requirements' that the court must determine who are the parties holding the rights and interests and the nature and extent of those rights and interests when making a determination of native title—at [30], referring to s. 225.

The Kurnai evidence

The early and preservation evidence hearing for the Kurnai application was held at Lake Tyers in December 2007. Pauline Mullett was the first witness. It was noted that: 'She has at all times been the main spokesperson for the Kurnai'. Ms Mullett gave evidence over a period of about 5 days. While she did speak of other matters,

the primary focus of Ms Mullett's evidence was the rules relating to membership of the Kurnai. According to Ms Mullett:

> To be a member of the Kurnai you have to have a blood inheritance on one of the five tribes. Everybody else that – that is not a blood inheritance from one of those five tribes are called strangers, people who are not of our nation. So we identify by – we identify it through our mother who has told us that we're Kurnai, and therefore our elders then recognise that we're Kurnai. We do not recognise any other group outside our nation. ... It's a blood inheritance from Kitty and Larry being one of the – one connected to one of the five tribes. Like I said, Kitty is Brabralung and Larry is Tatungalung. They are the pairing of the – pairing – the pairing of the Kurnai.

It was evident to the court that Ms Mullett has 'a passionate conviction that the only proper people for the Gippsland area are those who have a blood linkage to Larry ... and Kitty ... Johnson'. It was found that she had an impressive knowledge of the history of most of the hundreds of people recorded in the 25 ancestral sets put forward by the Gunai/Kurnai. However, her evidence demonstrated that 'she was not open to any rational persuasion against her view about who was a Kurnai'. Initially, Ms Mullett said that the elders had decided that only she would give evidence on behalf of the Kurnai at the early and preservation evidence hearing. However, after the court indicated it would be useful to hear from other claimants, Ms Mullett's sister (Cheryl Drayton) and aunt (Regina Rose) gave evidence—at [55] to [56].

Cheryl Drayton's evidence was 'markedly different'. She believed people could be Kurnai without being in the Larry Johnson and Kitty Perry Johnson bloodline and the exclusionary rules she knew were 'different and less stringent than those outlined by Ms Mullett'—at [57].

Regina Rose, the sister of Ms Mullett's mother Euphemia, was recognised as an elder of the Kurnai. According to the court:

> Although she did not have much knowledge of Kurnai laws, she thought that a person would not lose Kurnai status by leaving Kurnai country for the purpose of obtaining work, or by calling oneself Gunai. And significantly, for an argument to be addressed later, she recalled being told by her mother that her great grandmother, Kitty Perry Johnson, had a brother called Billy The Bull—at [58].

At the trial in October 2009, Ms Mullett conducted the case for the Kurnai Clans. She called Marion Flo Hood-Finn and Lynette Hayes. She also gave further evidence herself.

Ms Hood-Finn said that a Kurnai person lost membership of the group if they went off country but not if they went off to another place in Victoria. She said two people who have a bloodline linkage to Larry Johnson and Kitty Perry Johnson lost their Kurnai membership because they identified as Gunai by supporting the Gunai/Kurnai claim. She was 'blindly supportive' of Ms Mullett's approach and gave the court the impression that 'her evidence was given solely to back up the case of the Kurnai as conceived by Ms Mullett'—at [60].

Lynette Hayes, (aka Grace) is the daughter of Regina Rose. She regards Ms Mullett as a sister and collaborated with her in preparing the Kurnai case. On the 'basic rule of membership of the Kurnai people', she 'adhered adamantly to the requirement of bloodline connection to Larry Johnson and Kitty Perry Johnson as advocated by Ms Mullett'. Ms Hayes accepted there were other Aboriginal people in Gippsland at the time of Larry Johnson and Kitty Perry Johnson but 'had no coherent explanation why their descendants were not Kurnai'. She said that, if people identified as Gunai, they were no longer part of the Kurnai. While some of her evidence of other rules of exclusion was consistent with Ms Mullett's, at other times it was inconsistent—at [61].

Ms Mullett's further evidence was then given and she was further cross examined.

The state's case

The state called historian Dr Sue Wesson, an expert in archival information on the Aboriginal occupation of eastern Victoria. In her Doctorate of Philosophy, she examined the impact of European land use on traditional patterns of movement of South-East Australian Aborigines and, as part of her research, developed a genealogical database of information concerning the historical movement and key ancestors of Aboriginal people in south-eastern Australia. Her report first gave her assessment of the historical source material on which the 25 Gunai/Kurnai ancestral sets were based. Then she addressed specific questions relating to the ancestral sets which called for expertise in historical research.

In Dr Wesson's opinion, the records kept by John Bulmer, who was the reserve manager at Lake Tyers and spent 46 years living amongst the Gippsland Aboriginal people, were 'as good as could be achieved in the historical and social context'. Later mission managers' records were not accorded the same status.

Among the many other sources she drew on were two works co-authored by Phillip Pepper. He was an Aboriginal man born in Gippsland in 1907 who wanted to record his family history and the stories and legends passed down to him so his descendents would know how his ancestors had lived. The first work was both a personal history of the Pepper family and an account of rural life in Gippsland for Aboriginal people from 1842 to the mid 20th century. The second work had 41 chapters covering consecutive periods of the history of the Kurnai people from pre-contact times (before the 1840s) to 1958. Dr Wesson said:

> I find Pepper['s] ... books to be invaluable on a number of counts. They are well written and engaging, the supporting public documents are relevant and appropriately referenced. And the text is complemented and supported by photographs from both private and public collections. The books provide not only the first in depth expositions of Gippsland Aboriginal history but also the first Victorian Aboriginal histories from an Aboriginal perspective supported by the public record. ... In my opinion *The Kurnai of Gippsland* is an exceptionally valuable work and can be generally relied upon to provide the perspective of a well informed local Aboriginal man and his oral tradition, a fresh

analysis of Victorian Aboriginal affairs and supporting factual information from private and public records.

The Gunai/Kurnai's case

The Gunai/Kurnai called Belinda Burbidge, an anthropologist employed by Native Title Services Victoria, and Dr John Morton, the court-appointed expert.

Ms Burbidge filed an affidavit exhibiting the 25 ancestral sets relied upon by the Gunai/Kurnai and another that recorded some amendments to those sets as a result of further research. She explained that the ancestral sets were compiled from the genealogical database held by Native Title Services Victoria. She also explained the process of checking and cross-checking the ancestral sets against the sources, indicating it was unlikely there were any additional sources that would result in significant changes to the genealogies. In cross-examination, she said (among other things) that:

- the process of compiling the ancestral sets had occurred over a period of ten years and oral histories of some Gippsland Aboriginal people had been taken into account in compiling them;
- the ancestral sets had been refined to the point that she thought that she could not improve upon them;
- the ancestral sets were 'truncated at the lower levels, going only as far as to show the older living descendants of apical ancestors' because extending them to all living descendants would be 'unwieldy and unnecessary for the purposes of showing that there were people alive today descended from the apical ancestors'—at [83].

Dr Morton had filed two anthropological reports. One was provided to the court in 2006 as part of the process of mediation. It was directed to answering specific questions delineated in the contract between the court and Dr Morton. One of those questions concerned the name of the Aboriginal society in Gippsland at sovereignty. The Kurnai contended that it was Kurnai and that 'Gunai' referred to Aboriginal people generally and so those who identified as Gunai were not claiming to be descendants of the Aboriginal society of Gippsland at sovereignty.

After researching the question, Dr Morton concluded that:

- the name of the group at sovereignty was Ganai, although there were many different spellings of that name in the literature;
- 'Gunai' and 'Kurnai' are variants of the same word, that is to say, they stem from the word Ganai, a word that meant 'man' in the ethnocentric sense of 'us familiars' as distinct from 'those strangers';
- over time with the influx of white people and other Aboriginal people, Ganai was transformed into Gunai and Kurnai; and
- Gunai took up the meaning of 'all Aboriginal people' as opposed to 'all white people'—at [86].

Dr Morton was also asked to identify the laws and customs concerning group membership at sovereignty of the Gippsland Aboriginal society. At the time the

report was written, the Kurnai had not given evidence of the exclusionary rules. The section on group membership in the report explained that:

- the Ganai at sovereignty was a group united by a common language, albeit with dialectical differences;
- they occupied the five geographical divisions of the region and different dialects were spoken in each division;
- land ownership was at the regional level but there was a degree of local governance;
- while there was a unity at the regional level there were different degrees of rights and duties attributable to each of the smaller units down to the level of family networks—at [87].

Dr Morton also addressed the identification of the people who are the ancestors of the Aborigines of the Gippsland region. After considering the source material, Dr Morton said (among other things) that:

- the ancestral sets were unchallengeable and accurate as a record of the objective historical ancestry of the Gippsland Aborigines;
- the ancestral sets establish the biological descent which might demonstrate the continuity of a society which is required by the concept of native title but do not demonstrate the requirements of cultural and social anthropology which begins by an understanding of the categories by which people define themselves – the 'emic view'
- genealogical charts are not emic accounts, although they may fairly be used in reconstructing a past social or cultural situation out of which another has grown—at [88].

His second report was provided to Native Title Services Victoria in June 2009. Again, it answered specific questions. After clarifying his previous explanations of the system of local organisation, Dr Moreton elaborated on the issue of governance of the society, outlining a detailed and extensive model of governance of Ganai society at the time of sovereignty. He then considered in detail the evidence given by Ms Mullett in the early and preservation evidence about certain exclusionary rules.

According to North J:

> In view of his opinion that the original people of Gippsland were called Ganai, there was no basis for Ms Mullett's conclusion that people who identify as Gunai did not identify as descendants of the original Gippsland Aborigines. Dr Morton also disputed Ms Mullett's evidence that a Kurnai person, using Charles Hammond as an example, lost their status as a Kurnai by living off country, for instance, on his wife's country. Then, Dr Morton contested Ms Mullett's evidence concerning that non-Kurnai adopted children had no rights in Ganai society—at [90].

The constitution of the GunaiKurnai Land and Waters Aboriginal Corporation was also in evidence. One of its objectives is that it be the peak body representing the Gunaikurnai people's interests, including in any native title negotiations. The Gunai/Kurnai said that the fact that many members of the Kurnai claim group are also members of the corporation was significant.

Potential native title holding group

As noted earlier, to succeed on their application, the Kurnai Clan had to show that the only people constituting the native title holding group are the descendants of Larry Johnson and Kitty Perry Johnson. This in turn meant showing that none of the living descendants of the other 24 ancestral sets formed part of the potential native title holding group. His Honour conducted a detailed analysis of two of the 24 ancestral sets. This was all that was required to show:

> [T]he significant body of evidence drawn upon by the Gunai/Kurnai in establishing the ancestral sets, the lack of expert evidence in favour of the Kurnai propositions and the inconsistent and generally illogical nature of that evidence which the Kurnai did provide—at [95].

Ancestral Set 2

Ancestral Set 2 showed the lines of descent from Jemmy Bull and Mary. The Kurnai contended they were not Kurnai. His Honour found on the evidence that:

- 'the sources relied upon to construct AS2 are reliable';
- AS2 reflected 'the historical descent from Mary and Jemmy Bull'—at [146].

Therefore, the Kurnai's basis for rejecting the living descendants represented in AS2 as Kurnai was not made out—at [146].

Ancestral Set Six (AS6)

AS6 illustrated the descendants of the apical ancestor Bungil Tay-a-bung. A number of them are living today and they all form part of the Gunai/Kurnai native title claim group. The Kurnai accepted that Bungil Tay-a-bung was Kurnai. The disagreement regarding AS6 related to the second line of descent, through Bealmaring. The Kurnai did not accept that Harry Stephens was a Kurnai and, therefore, did not accept that those people represented on AS6 were Kurnai. After a lengthy consideration of the evidence, North J found that the submission that Harry Stephens was not Kurnai could not reasonably be sustained:

> Whilst some of the Kurnai submissions had a basis in certain inconsistencies in the public records, when those records are examined as a whole there is no real doubt that Harry Stephens' father was a Kurnai—at [183].

This meant that the living descendants (Albert Mullett, Edward Foster and Margaret Donnelly) could not be excluded from the native title holding group 'if one accepts the laws and customs asserted by the Kurnai'. According to his Honour:

> The fact that the Kurnai application does exclude these ancestors means that, for that reason alone, the application by the Kurnai for a determination on the basis sought cannot succeed—at [183].

Further considerations

While the conclusions reached on AS2 or AS6 were 'sufficient to determine the application', North J thought it desirable to record briefly some other reasons why the Kurnai application must be dismissed, which included that:

- the evidence that links to Kurnai ancestors were broken by operation of certain exclusionary traditional rules was 'in such disarray that it cannot be relied upon' and so the attempt by the Kurnai to exclude certain ancestors by operation of these alleged rules failed;
- the difference between the words 'Gunai' and 'Kurnai' stemmed from the same root and later usages did not provide a basis to exclude the Gunai/Kurnai as the proper people for Gippsland;
- all of the Kurnai witnesses claimed that they were linked by a common bloodline 'identifier' that was concerned their family affiliation' but this 'was not the level at which the relevant native title holding group is ascertained';
- family identification was akin to the local governance units referred to by Dr Morton in his evidence about the traditional structure of the society of Gippsland Aborigines;
- indeed, Dr Morton said conflict between groups within that society was a characteristic of its history and that the present day disharmony between the Kurnai and the Gunai/Kurnai is a reflection of that same characteristic of the particular society—at [184] to [189].

North J accepted in Dr Morton's opinion that 'the traditional land holding group was at the level of the conglomeration of the types of local group typified by the Kurnai people', based as it was 'on a considerable body of public records and respected anthropological, ethnographical and historical writings'—at [188].

As his Honour saw it, this case was largely focused on 'upholding the separate identity' of Ms Mullett's family (the Hood family). As a result:

> The elements which need to be established in an application for a determination of native title were left largely unaddressed. There was thus no cohesive body of evidence which sought to establish a society existing at sovereignty or to establish a present day society with the necessary continuity. There was almost no evidence about laws and customs which linked people with the land and waters. Whilst this application was not the vehicle for the Gunai/Kurnai to prove their entitlement to a determination of native title in favour of the wider Aboriginal society of Gippsland, the evidence, particularly from the voluminous historical and anthropological sources gave a clear indication of a strong basis for such an entitlement—at [189].

Decision

It was found that, because the Kurnai had not established an entitlement to a determination of native title, their application should be dismissed—at [208].

Intent of s. 67

The state and the Gunai/Kurnai drew the court's attention to s. 67(1), which provides that:

> If 2 or more proceedings before the Federal Court relate to native title determination applications that cover (in whole or in part) the same area, the Court *must make such order as it considers appropriate* to ensure that, to the extent that the applications cover the same area, they are *dealt with in the same proceeding* (emphasis added).

They contended that, in order to comply with s. 67(1), the court should:

- consolidate the Kurnai application with the Gunai/Kurnai application under O 29 r 5(a) of the Federal Court Rules (FCR);
- dismiss so much of the consolidated application as represented the issues determined in the Kurnai application, relying on O 29 r 2 of the FCR.

North J thought there were 'difficulties with this proposed course' because:

- it was 'not appropriate to consolidate two proceedings where they are at completely different stages of progress';
- there was no separate question raised for determination in this case and so O 29 r 2 did not apply;
- it seemed directed to 'providing an appearance of having the two applications dealt with in the same proceeding when in substance they have been treated independently'—at [198].

His Honour felt he had 'good reason for treating the applications independently', including:

- that is what the parties wanted, i.e. the Kurnai, a litigated outcome and the Gunai/Kurnai, a negotiated outcome, with the latter not wanting to 'advance their application' while negotiations were on foot;
- there was 'reason to think that the Kurnai application was unlikely to succeed, because, it seemed to run counter to the extensive literature which recognised a Gippsland wide Aboriginal society rather than a limited Kurnai society';
- the state, in exercise of its role as 'guardian' of the rights and interests of the people of the state, had indicated a willingness to commence negotiations with the Gunai/Kurnai based on investigations into the proper people for Gippsland;
- the Gunai/Kurnai and Kurnai had access to the report of Dr Morton, which lent support to the Gunai/Kurnai case—at [199].

In these circumstances, North J thought it 'necessary' to 'provide different management programs for each application'—at [199].

His Honour thought this approach was supported by *Kokatha Native Title Claim v South* Australia [2006] FCA 838 where, at [5], Finn J said the policy informing s. 67(1) was 'plain enough' and that: 'Fully informed decision-making and finality in respect of determinations relating to the same area are central to it. ... The policy informing s 67(1) ... seems clearly to be tied to facilitating the orderly and efficient administration of justice where claims overlap'. In North J's view, the 'orderly and efficient administration of justice was served in the case of these two applications by allowing them to proceed in different ways' and s. 67(1) did not require the court to ensure that two or more applications are dealt with in the same proceeding 'if to do so would be inefficient or would not advance the proper administration of justice'—at [201].

According to his Honour:

> The intent of ... [s. 67] is to require the Court to determine whether it is in the interests of justice that the applications be dealt with in one proceeding and, if the Court so determines, then to require the Court to make appropriate orders to achieve that purpose. The section was not brought into operation in the present circumstances because it was not in the interests of the administration of justice for the two applications to be dealt with in the same proceeding—at [201].

The result of dismissing the Kurnai application, as proposed, would be that only one application remained on foot and so the policy reflected in s. 67(1) 'will be effectuated'—at [202].

Comment on approach to s. 67

With respect, it is not at all clear that the 'obvious purpose' of s. 67 is as his Honour describes it. Nor is it clear that the court is able to effectively ignore the process mandated by the NTA for dealing with overlapping applications in the way his Honour suggests.

According to the Explanatory Memorandum to the Native Title Amendment Bill 1998, what became s. 67 was inserted because:

> The Federal Court may be required to deal with applications for a determination of native title which cover part or all of the same area. *It is intended that consideration by the Federal Court of an application for a determination of native title should involve consideration of all issues of native title in relation to that area*. The Federal Court *is required* to make such orders as it considers appropriate so that, *to the extent of the overlap, applications with overlapping areas are dealt with in the same proceeding ...* . In some cases, these orders may require that an *application be dealt with in the same proceeding as another application to the extent that those applications cover the same area*; and/or may require that an application *be split* so that *different parts of the application are dealt with in separate proceedings*—at [25.63]. emphasis added.