

Determination of native title

Gangalidda and Garawa People v Queensland [2010] FCA 646

Spender J, 23 June 2010

Issue

The issue in this case was whether the Federal Court should make two determinations of native title pursuant to s. 87A of the *Native Title Act 1993* (Cwlth) (NTA) recognising the Gangalidda People as holding native title. Each determination related to part only of the relevant claimant applications, which cover part of the southern Gulf of Carpentaria and are brought on behalf of the Gangalidda and the Garawa Peoples. The court decided to make the determinations.

Background

The first application was filed in May 2004 and the second in March 2005. The Gangalidda and Garawa people were described in identical terms in each. Notice was given in accordance with s. 66 and each application was then referred to the National Native Title Tribunal for mediation. With the Tribunal's assistance, the parties reached agreement on a proposed determination of native title over part of the area covered by each application (the Prioritised Areas) and applied to the court in March 2010 for orders pursuant to s. 87A(4) 'in, or consistent with, the terms' of the proposed determinations. The Prioritised Areas fell within two proposed determination areas. The first included four pastoral holdings (Troutbeck, Bundella, Brokera and Tarrant) and the area known as Old Doomadgee reserve, which are areas where each party that held an interest (the relevant parties) had agreed that s. 47A applied. The parties agreed that exclusive native title rights and interests could be recognised in relation to these areas. It also included part of a fifth pastoral holding (Escott) where it was agreed that non-exclusive native title rights and interests could be recognised. The second proposed determination included another part of the Escott pastoral holding and the whole of the Cliffdale pastoral holding as areas where the parties had agreed that non-exclusive native title rights and interests could be recognised. The court had to be satisfied that it had the power to make orders in terms of those sought by the parties and that it was 'proper to do so' — at [10].

Court's powers

Justice Spender noted that the conditions of s. 87A(1) were met, including that:

- there were proceedings 'in relation to an application for determination of native title' on foot, namely two applications made pursuant to ss. 13 and 61;
- after the close of notification, the relevant parties had negotiated an agreed proposed determination of native title in relation to an area included in the area covered by each application — at [11] to [13].

However, as his Honour noted:

The exercise of power by the Court is also subject to the Court being satisfied that it is appropriate for the Court to make the orders sought ... and, as with any order of the Court, being satisfied that the proposed orders are unambiguous and certain as to the rights declared—at [16].

Material considered

In *Lardil, Yangkaal, Gangalidda and Kaiadilt People v Queensland* [2008] FCA 1855 (*Lardil No 2*), Spender J made orders by consent recognising (among other things) the Gangalidda People's native title rights and interests in relation to certain islands. In considering whether it was appropriate to do so, the court had the benefit of 'a significant amount of evidence from witnesses and experts', much of which had been collected for *The Lardil Peoples v Queensland* [2004] FCA 298 (*Lardil No 1*). The evidence relied on in both of those matters 'as it relates to the Gangalidda People' was relevant in this case. As Spender J noted:

Given that the Gangalidda claim group in these proceedings is the same as before Cooper J [in *Lardil No 1*], and having regard to the power in section 86 of the Act to take into account evidence in other proceedings, it is appropriate that the Court also has regard to that evidence in this matter in analysing the history of the claim groups and their connection with the land—at [19].

Section 47A

The applicants' submissions addressed the elements of s. 47A and the court was satisfied that the requirements of s. 47A were met. Among other things, Spender J considered the material in relation to Old Dumaji (Old Doomadgee reserve), which is held by the Gurridi Traditional Land Trust as 'Trustee for the benefit of Aboriginal people and their ancestors and descendants and under the Aboriginal Land Act 1991'. His Honour was satisfied that the reserve is held in trust 'for the benefit of Gangalidda People and their ancestors and descendants'. There was evidence that certain pastoral properties are held by the Carpentaria Land Council Aboriginal Corporation (CLCAC) for the benefit of Gangalidda People. His Honour was satisfied that the Gangalidda People are in occupation of those pastoral holdings and s. 47A 'will also apply to these areas'—at [34] to [36].

Subsection 223(1)

In its submissions, the State of Queensland confirmed it was satisfied the applicants had met the requirements of s. 223 (1). In these proceedings, the claim group was comprised of Garawa and Gangalidda People. After considering the evidence and the findings in *Lardil No 1*, Spender J was satisfied that:

[T]he members of the claim group who identify as Gangalidda in these proceedings are descended from Indigenous people who were in occupation of the Determination Area, at sovereignty—at [42].

In addition to demonstrating 'a continued physical connection' with the area, Spender J was satisfied on the evidence that:

[T]he Gangalidda people have maintained a spiritual connection with the land and waters the subject of the Proposed Determinations, and that the body of their traditional laws

and customs support the rights and interests that are recognised in the Proposed Determination[s]—at [45].

His Honour was also satisfied that the material relied upon allowed the court to recognise the right to possession, occupation, use and enjoyment to the exclusion of all others of the areas to which s. 47A applied and the other ‘non-exclusive’ rights set out in the proposed consent determinations—at [46] to [48].

Spender J concluded that:

It is clear ... that the Gangalidda members of claim group has established and maintained a system of laws and customs over Gangalidda country – the land and waters the subject of the Determination Areas – sufficient to satisfy the requirements of the Act—at [49].

It was noted that the rights and interests of the Gawara People ‘will be dealt with in the balance of the claims’—at [50].

Sections 94A and 225

Pursuant to s. 94A, a determination of native title must ‘set out details of the matters mentioned’ in s. 225 which are, in paraphrase, whether or not native title exists in relation to a particular area and, if it does:

- who holds the common or group rights comprising the native title;
- the nature and extent of the native title rights and interests in the determination area;
- the nature and extent of any other interests in that area;
- the relationship between those rights and interests;
- whether there is ‘exclusive’ native title in relation to any part of the determination area that is subject to a non-exclusive pastoral lease or a non-exclusive agricultural lease.

His Honour found that the material before the court satisfied these requirements—at [53] to [61].

Prescribed body corporate

Pursuant to s. 55, if the court proposes to make an approved determination of native title that native title exists, then it must ‘at the same time’ make a determination in relation to a prescribed body corporate pursuant to ss. 56 and 57. His Honour was satisfied the proposed determinations met the requirements. In this case, the Gangalidda and Garawa Native Title Aboriginal Corporation, incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cwlth), is the prescribed body corporate.

Decision

Spender J was satisfied that the court had power to make the determinations in the terms proposed by the parties and that it was appropriate to do so ‘to give effect to the parties’ agreement without a full hearing’ of the claim. His Honour hoped these orders will ‘bring the promise of a brighter future to the Gangalidda People who

have had an ongoing relationship with their country since ancient times' — at [64] to [66].