Determination of native title

Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory [2010] FCA 911

Collier J, 7 September 2010

Issue

The main issue in this case was whether the Federal Court should make a determination of native title by consent pursuant s. 87 of the *Native Title Act 1993* (Cwlth). Justice Collier decided to do so because the orders sought were within power and it was appropriate to make them.

Background

The determination made in this case relates to a claimant application made on behalf of the Akwerlpe-Waake, Ileyarne, Lyentyawel Ileparranem and Arrawatyen People in relation to an area in the Northern Territory, 110km south of Tennant Creek and 310 kilometres north of Alice Springs. The area is subject to a perpetual pastoral lease. In July 2010, joint submissions in support of a minute of a proposed consent determination, a statement of agreed facts and a minute of proposed consent determination of native title pursuant to s. 87 of the NTA were filed. All parties to the minute acknowledged that the claim group should be recognised as the native title holders for the determination area. Therefore, the issues for the court were:

- whether orders in, or consistent with, the minute of proposed consent determination of native title were within power; and
- whether it was appropriate for the Court to make the orders sought—at [7], referring to ss. 87(1) and (2).

On the material before the court, Collier J was satisfied of both of these matters for the reasons summarised below, including that:

- an expert anthropological report was completed by Ms SD Donaldson in December 2006, which the parties accept was written following 'detailed field work ... in and around the determination area';
- the anthropological analysis and findings set out in the report had been confirmed at a meeting of the claimant community in March 2006;
- the solicitor for the Northern Territory advised the applicant that the material in the report 'provided a proper basis for the making of a consent determination'—at [8] and [14] to [15].

Evidence before the court

There was a 'considerable volume of material' before the court to support the application 'in both its original and amended forms', particularly anthropological and affidavit evidence 'produced and filed to substantiate the claim of the applicant that the native title claim group has native title rights and interests in respect of the

determination area'. Her Honour canvassed the anthropological evidence, noting it indicated (among other things) that:

- the native title claim group is part of a broader Kaytetye community living in the region in which the determination area is located;
- that community constitutes a society whose members continue to acknowledge and observe a common body of traditional law and custom;
- the determination area lies within the four Aboriginal territories or estate areas known as Ileyarne, Akwerlpe-Waake, Lyentyawel Ileparranem and Arrawatyen and the native title claim group is comprised of four landholding groups named after the four estate areas;
- the earliest contact between the ancestors of the claim group and Europeans appeared to be during the 1860 expedition undertaken from Adelaide by John McDouall Stuart, who noted evidence of Aboriginal occupation;
- throughout the 1860s and 1870s, Europeans described evidence of occupation, ceremonial preparations, weaponry, art and activity by the inhabitants and the later records (which followed the arrival of pastoralist and miners) indicated that 'station life ... allowed for the continuation of a traditional lifestyle during the time of the year when people were not needed for station work';
- ethnographic records since 1901 in the region described the people of the area and their beliefs, practices, social organisation and lifestyle;
- the *Altyerre* or 'The Dreaming' or 'Dreamtime' covers a range related concepts and rules governing the social order 'which affect the everyday life of members of the Kaytetye society, [and] continues to underpin the everyday lives of the native title claim group';
- descent 'is the most important basis for acquiring rights and interests in land' but people 'without a descent connection to an estate may satisfy certain non-descent based criteria regarding their connections with the estate, and acquire rights in or over the estate';
- people from other tribes must ask persons with specific roles in the society, namely the *apmerek-artwey* (those affiliated with an estate through father's father) and *kwertengerl* (those with affiliations through mother's father) before drinking from sacred water sources, rock holes and swamps—at [26] to [30] and [32] to [33].

According to her Honour:

> It is important to note that, in Ms Donaldson's expert opinion, while the native title claim group is made up of the four landholding groups, they consider themselves interconnected because they jointly hold knowledge relating to the application area and acknowledge themselves to be "all one family"—at [31].

The evidence also addressed the specific rights claimed, e.g. the report said that:

> The right to live on the land, and for that purpose, to camp, erect shelters and other structures, and to travel over and access any part of the determination area is possessed under traditional laws and customs, including those concerning mourning, social organisation (including marriage, kinship and subsection systems), access to land, the protection of sites and the use of resources.

It was noted that the way in which claimants continued to acknowledge and observe the Kaytetye traditional laws and customs that give rise to rights and interests in the land was also addressed—at [36] to [37].

Affidavits and witness statements from 10 of the claim group members were also before the court which attested to 'the basis of the witness' membership of their respective landholding groups ... and to their connection with the claim area under traditional laws and customs'. They made 'compelling reading' and her Honour set the detail of that material out at some length—at [41] to [53].

Conclusion
Collier J concluded that:

> [A]n order in, or consistent with, the terms of the consent orders proposed by the parties is within the power of the Court. In particular, I am satisfied that the material filed by the parties in these proceedings evidences native title rights and interests in the claim group as defined by s 223(1) ... .
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> Material in the anthropological report filed by Ms Donaldson, in addition to material in affidavits and witness statements before the Court, supports the conclusion that the applicant, on behalf of the native title claim group, has native title rights and interests in the determination area—at [53] to [54].

Appropriate to make the orders?
After setting out some of the case law on point, her Honour noted that the fact that 'an order recognising native title is good as against all third parties, and not only the specific parties to the application' was 'an important factor in determining whether an order is appropriate' for the purposes of s. 87. In this case, it was 'clear from the evidence ... that the applicant has "native title rights and interests" as defined in s 223(1)'. Further:

- all parties were legally represented and so had had 'the benefit of legal advice in reaching a consent position';
- the Northern Territory had 'played an active role in the negotiation of the proposed orders';
- joint submissions filed by the parties stated that, in so doing, the territory '(acting on behalf of the community generally) having regard to the requirements' of the NTA 'and having conducted a thorough assessment process ... is satisfied that the determination is justified in all the circumstances';
- 'the inevitable inference to be drawn' by the absence of the pastoral lease holder was that this was 'dictated by choice, rather than circumstance';
- There were 'no other proceedings' before the court relating to native title determination applications that covered any part of the determination area—at [56]

Removal of deceased person from group constituting the applicant
One of the persons comprising the applicant was deceased. On 21 July 2010, the applicant applied to 'further amend the amended application by the removal of the name' of the deceased person 'as an applicant'. The application was not opposed.

Her Honour made an order to that effect 'without the need for a further authorisation meeting of the native title claim group pursuant to s 251B or an application pursuant to s 66B to replace the applicant'. In doing so, Collier J 'respectfully applied the reasoning of Mansfield J' in *Lennon v South Australia* [2010] FCA 743 (*Lennon*)—at [17] to [18]. See *Native Title Hot Spots* Issue 33 for a summary of *Lennon*. Note that the Commonwealth is seeking leave to appeal against the judgment in *Lennon*.

Decision

In the circumstances summarised above, her Honour was satisfied that 'an order in the terms proposed by the parties is appropriate within the meaning' of s. 87 of the NTA.

Determination

It was determined that native title exists in the parts of the determination area described in Schedule A and mapped in Schedule B. Native title does not exist in the parts of the determination area described in Schedule C. The persons who hold the common or group rights comprising the native title are the Aboriginal persons who are:

- members of one or more of the Akwerlpe-Waake, Ileyarne, Lyentyawel Ileparranem or Arrawatyen landholding groups by virtue of descent, including adoption, through father's father, father's mother, mother's father and mother's mother; or
- accepted as members of one or more of the landholding groups by the senior members of a landholding group, referred to in subparagraph (a), by virtue of non-descent connections to an estate.

The native title rights and interests are the rights possessed under, and exercisable in accordance with, the native title holders' traditional laws and customs, including the right to conduct activities necessary to give effect to them, being:

- the right to access and travel over any part of the land and waters;
- the right to live on the land, and for that purpose, to camp, erect shelters and other structures;
- the right to hunt, gather, take and use the natural resources of the land and waters, including the right to access, take and use natural water resources on or in the land;
- the right to access, maintain and protect places and areas of importance on or in the land and waters;
- the right to do the following activities (including the power to regulate the presence of others at any of these activities on the land and waters): engage in cultural activities, conduct ceremonies, hold meetings, teach the physical and spiritual attributes of places and areas of importance, participate in cultural practices relating to birth and death including burial rites;
- the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves as governed by Aboriginal traditional laws and customs and who acknowledge the traditional laws and customs of the native title holders;

- the right to share and exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources.

The other interests in the determination area are also noted and the relationship between those interests and the native title rights and interests is set out as required under s. 225. The native title rights and interests are subject to, and exercisable in accordance with, valid territory and Commonwealth laws. There are no native title rights and interests in minerals as defined in the *Minerals Acquisition Act 1953* (NT), petroleum as defined in the *Petroleum Act 1984* (NT) and prescribed substances as defined in the *Atomic Energy Act 1953* (Cwlth) and the *Atomic Energy (Control of Materials) Act 1946* (Cwlth).

'Natural resources' is defined to mean animals, birds, fish, plants including timber, wax, resin and gum, and surface soils, clays, stone, rocks and ochre, but does not include minerals, petroleum and prescribed substances. 'Natural waters' includes springs and rockholes.

The native title is not to be held on trust. Mpwerempwer Aboriginal Corporation is to be the agent prescribed body corporate for the purposes of s. 57(2) (b) and will perform the functions set out in s. 57(3) once it is a registered native title body corporate.

Public works and pastoral improvements – liberty to apply
The determination area does not include any land or waters on which a public work is or has been constructed or established. The parties have liberty to apply to precisely establish:

- the location and boundaries of any public works;
- the location of the boundaries of land on which the pastoral improvements have been constructed and any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements; and
- whether any of those pastoral improvements have been constructed unlawfully.