Determination of native title

Lardil Peoples v Queensland [2004] FCA 298

Cooper J, 24 March 2004

Issue
This issue in this case was whether native title exists over the seas adjacent to the Wellesley Islands and an area of coastline in the Gulf of Carpentaria and, if it does, who holds it?

Background
This decision relates to a claimant application brought by the Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples seeking a determination of native title in respect of the land and waters below the high water mark in an area of sea adjacent to the Wellesley Islands and adjacent to the coast of Queensland between Massacre Inlet and the Leichhardt River, in the Gulf of Carpentaria (application area).

The original application made in 1996 sought a determination of exclusive ownership of the land and waters in the application area, with each of the four groups (claimant groups) claiming exclusive ownership of their respective traditional territory. The traditional territories were adjoining and, in certain locations, shared.

The evidence was prepared and tendered to support a claim to possession and occupation of the application area to the exclusion of all others. The High Court decisions in *Commonwealth v Yarmirr* (2001) 208 CLR 1 (*Yarmirr*), *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*, summarised in *Native Title Hot Spots* Issue 1) and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3) were handed down after the evidence concluded. The applicant subsequently amended the points of claim to seek a determination taking into account the impact of the High Court decisions (the amended draft determination). There was no claim to possession and occupation of the application area to the exclusion of all others made in the amended draft determination.

Law in relation to native title
At [44] to [51], Cooper J extracted the law as stated in the leading High Court decisions relating to the definition of native title in s. 223 of the NTA, the requirements for a determination of native title under s. 225 and proof of native title.

Existence of Indigenous inhabitants in claim area at sovereignty
On the evidence, Cooper J found:

- at sovereignty, each of the four claimant groups was an ethnographically and culturally separate group inhabiting the area claimed as their respective traditional territory;

- since sovereignty, there had continued to exist such an ethnographically and culturally separate group who were, and are, the direct descendants of the original group of Indigenous peoples; and
- the people named in the genealogy and identified as the members of each claim group are the direct descendants of the relevant original group—at [52].

Treatment of Indigenous witnesses' evidence

The existence of a right to control access to sea country, and the need to obtain permission to enter and engage in certain activities on it, was challenged by the respondents on the basis of:

- alleged inconsistencies in the evidence of Indigenous witnesses;
- concessions that permission had never been refused when sought; and
- general observations that people moved about in the seas abutting the islands and fished there without seeking express permission from anyone.

Cooper J stated that the evidence of Indigenous witnesses:

- must be carefully placed in context, as to take responses in isolation and out of context is too simplistic and want to mislead; and
- cannot be understood out of the context of their religious and spiritual beliefs—at [74], [80] and [85].

His Honour also noted:

- the systems which operated within each of the claimant groups were complex, involving an overlay of different, and differently sourced, rights;
- intervening circumstances during the mission period on Mornington Island and the greater degree of inter-marriage between members of the claimant groups made for a greater practical complexity than that which existed at sovereignty;
- the protocols adopted had to be viewed against a patchwork of rights, with the possibility of a *dulmada* (a senior person within a clan group with the right to control activity within the group) creating an ad hoc right where none otherwise existed—at [75] to [84].

Challenge to evidence of Indigenous witnesses

The Commonwealth submitted that the weight to be given to the evidence of the Indigenous witnesses should be substantially discounted because their written statements:

- were prepared by the applicant's legal and anthropological representatives and the language used was not that of the deponent;
- were sometimes prepared in the presence of and with the 'assistance' of other members of the claimant groups;
- contained bare assertions of ownership inadmissible under the applicable rules of evidence.

It was also argued that Indigenous witnesses were present in court and heard the evidence of other members of their constituent groups—at [86].

Where matters in the written statements were challenged or overtaken by oral evidence, Cooper J relied upon, and gave greatest weight to, the oral evidence. His Honour found:

- while much of the language was not the witnesses' form of expression and the subjective understanding of the person preparing the statements may have intruded through the interpretation process, this was not intentional or intended to mislead the court, or to misstate or over emphasise aspects of the witnesses' evidence; and
- as the witnesses were examined and cross-examined, there was a substantial body of oral evidence which overcame the objections to form and admissibility—at [87].

The court rejected any suggestion that the presence of Indigenous witnesses in court was for the purpose of fabricating a consistent story or to attempt to ensure that all witnesses gave a consistent story—at [88].

Challenge to expert evidence

The respondents argued that the court should discount or reject the anthropologists' evidence as it was:

- not objective;
- inconsistent with their previous writing, or the writings of other anthropologists that were tendered into evidence but not examined; and
- concocted, or over-emphasised, in order to give the traditional laws and customs of the claimant group features or incidents with respect to the sea claim which in fact had never existed.

Cooper J largely accepted the anthropologists' evidence, noting that:

- sympathy to the applicant's claim was an almost inevitable consequence of the methodology by which substantial field work is carried out over time with living communities to obtain base research data;
- each of the assertions as to why the evidence ought to be discounted was put to each witness and answered;
- much of the work done by each of the anthropologists was derivative of earlier published work; and
- much of the reports were sourced in materials that pre-dated the High Court decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 or the major emergence of the land rights movement in the 1980s—at [89] to [91].

Claim to seas 'as far as the eye can see'

The applicant claimed native title rights and interests in the seas 'as far as the eye can see'. This area extended to the horizon and included the observable deep waters and any island or reef which could be seen between the land and the horizon. Cooper J rejected submissions that the claim was one of recent origin or invention, adopted by anthropologists for the purpose of the sea claim—at [90], [110] to [112] and [121].

To give the boundaries of the application area some geographical precision the applicant tendered a hydrographic report that plotted the:

- location of the horizon from various high points on land; and
- extreme ranges at sea from which those high points were visible from a boat.

His Honour found:

- generally, the evidence was that people observed the seas in front of their country from the frontal dunes or the beach, rather than from higher land locations;
- there was no evidence of persons at the time of sovereignty standing on the outlying uninhabited islands looking seaward and claiming the seas to the distant horizon; and
- the extreme ranges calculated from positions at sea did not relate to the evidence of Indigenous people of landward observations at sea—at [227] to [229].

Continuing existence of society

Cooper J found that European contact with each of the groups had, to a greater or lesser extent, brought about the physical dislocation of the claimant group from their traditional territories, as the majority of people did not live on country and did not live a traditional lifestyle 'anywhere approaching that which existed at the time of sovereignty'. His Honour was satisfied that, despite this, none of the groups had lost their identity or existence as a society—at [199] to [201].

Normative system and connection

Cooper J was satisfied on the evidence that each of the groups had maintained, through successive generations from their forebears at sovereignty, a normative system of traditional laws which are acknowledged and customs which are observed, by which persons are allocated to a country and rights are allocated to those persons in respect of that country—at [102] to [107], [116], [118], [120] to [125], [133] to [137] and [202].

His Honour found:

- all the Indigenous witnesses who gave oral evidence:
  - knew what country they belonged to and knew that it gave them the right to live, hunt and fish on the land and within the seas of that country;
  - knew their genealogy and that genealogical relationships could create derivative rights in respect of country to which they did not belong;
  - were aware of systems of *dulmada*-ship which carried rights;
- the continuity of that knowledge was recorded over time in the published anthropological material; and
- the fact that some had chosen to return and live on country showed acknowledgement by each of the communities that the right to return to country had never been lost or abandoned and had at all times remained an option to be exercised by those who have the right to do so—at [202].

As to the connection of each of the claimant groups required under s. 223(1)(b), his Honour found:

- the Lardil and Yangkaal peoples continued to have the closest physical connection to country because the establishment of the mission in Gunana on Mornington Island kept those peoples in, or with access to, their traditional territories;
- the Kaiadilt peoples' physical connection with their traditional territory was severed when they were moved to Mornington Island in the mid-1940s;
- the Gangalidda peoples were physically isolated from their traditional territory by the granting of their traditional lands to pastoral interests and further as a result of the relocation of the mission from Old Doomadgee to new Doomadgee in 1936;
- the prohibition on travel by Indigenous peoples outside of the reserves managed by the missions also isolated the people from their countries;
- during the mission period, the majority of the members of the claimant group lost their native languages—at [199].

Claim by succession

The area claimed as the traditional lands of the Gangalidda peoples included an area once part of the country of the Mingginda peoples. The Mingginda peoples did not survive the impact of European contact and the Gangalidda peoples claimed their land by succession under traditional laws acknowledged and customs observed by the Gangalidda peoples at sovereignty. The Commonwealth submitted that the interest claimed by the Gangalidda peoples was an interest acquired post-sovereignty which was not recognised by s. 223(1) of the NTA.

Cooper J disagreed, finding that:

- succession to the Mingginda lands by the Gangalidda peoples occurred under traditional rules and customs which were acknowledged and observed at sovereignty by both peoples;
- the evidence showed a process of merger and absorption which occurred over time with the agreement of the Mingginda peoples under their traditional laws and customs; and
- rights and interests obtained by the Gangalidda people in the Mingginda lands under their traditional laws and customs were capable of recognition and protection under s. 223(1)—at [131] to [132], referring to *Yorta Yorta*.

Single joint claim to separate traditional territories

Cooper J found that:

- at sovereignty, there was no over-reaching communal system of traditional law acknowledged or custom observed with respect of the application area by the claim group as a whole, or by the groups separately, which gave any constituent group rights or interests in the traditional territories of the other constituent group;
- any cross-grouping rights were held at an individual level under the specific traditional laws and customs of the constituent group in whose territory the particular land and waters were located; and

- any agreement made post-sovereignty by the four claimant groups to treat the determination area as a single communal area held by them jointly with four internal areas which they each held separately, was not one recognised by the NTA—at [140].

Indigenous people's concept of 'ownership'
The applicant asserted that the claimant group owned the seas, the sea bed, the subsoil beneath the sea bed and the resources of the seas in their traditional territories. While his Honour found there were significant differences in the responses of the Indigenous witnesses, Cooper J was satisfied that their concept of 'ownership' of these elements was not one based on common law concepts of property. Rather, it was a concept born out of the connection of the peoples to each of the elements through their spirituality—at [141] to [147].

As to the translation of the spiritual connection underpinning the claims to ownership to the legal form sufficient for the purposes of s. 223(1) and s. 225, his Honour found:

- the right to be asked was the touchstone of the applicant's concept of 'ownership'; and
- the identifiable right in the application area under traditional law and custom was that to control access and conduct—at [149] to [152].

No right at sovereignty to control access to outer sea area
Cooper J found that the sea claim did not translate into identifiable rights and interests in relation to the area beyond that within which the claimant groups habitually hunted, fished and foraged. Specifically, it did not translate into a right to control access to the outer areas. His Honour found:

- this was not unexpected as 'rights in respect of the outer margins of country were not matters of pressing concern at the time of sovereignty';
- the deep waters did not involve any activity which produced a consumable resource which could be shared among the people—at [113], [125] and [138].

Despite so finding, the court accepted that the deep waters were part of the traditional territory of the original Lardil and Gangalidda peoples and their connection with it was spiritual or religious—at [115] and [139].
Claim to control access to and activity in sea areas
Cooper J considered, upon analysis, that the underlying core claim to control access to and activity in the application area was maintained by the applicant in the amended draft determination—at [168].

His Honour, applying the law as stated by the High Court in *Yarmirr* and *Ward*, found that control of access to the land and waters of the inter-tidal zone and the territorial seas with the right of exclusion, although a traditional right or custom acknowledged and observed at sovereignty, will not be recognised by the common law—at [164] to [167].

Right to non-exclusive possession, occupation, use and enjoyment
The applicant claimed the non-exclusive right of possession, occupation, use and enjoyment and, alternatively, the non-exclusive right to occupy, use and enjoy the waters and land (non-exclusive composite claim).

In view of the law as stated by the High Court in *Yarmirr* and *Ward*, Cooper J considered:

- any right expressed in non-exclusive composite terms gives rise to conceptual difficulties because the concepts of possession and occupation at common law involve notions of control of access;
- the articulation of native title rights and interests which existed at sovereignty in these terms, or variants of them, is not a useful exercise. Nor is it useful to attempt to state native title rights as existing in a broad and expansive way, subject to the common law rights of fishing and navigation, or the recognised international right of free passage;
- a non-exclusive composite claim begs the question of what the residual rights and interests which do not involve elements of control of access to and use of the claim area might be—at [169] to [172].

His Honour stated:

> The Act requires that the relationship between a community or group of Aboriginal people and the land is to be expressed in terms of rights or interests in relation to that land. This means that a relationship which is essentially religious or spiritual, must be translated into law. "This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them"
>
> [W]hen the unity of the relationship between Indigenous people and the land and waters is fragmented, and the rights to control access to, and use of and activities in the land and waters are excluded, little may remain which is capable of being translated into rights and interests in relation to that land and waters capable of recognition and protection under the NTA. What is left may amount to little more than non-exclusive rights to engage in specified activities in relation to the land and waters. Because the content of those rights or interests was fixed at sovereignty, no subsequent enlargement of these rights will be recognised under the Act—at [173] and [175], quoting *Ward* at [14] and referring to *Yorta Yorta* at [43] to [44].

Alternative form of determination
Counsel for the applicant proposed an alternative form of determination to the non-exclusive composite claim in essentially the following terms:

- an interest in maintaining the land and waters free from intrusion, interference and affectation inconsistent with the spiritual connection and responsibility for the land and waters;
- a right to be acknowledged as the native title holders by Aboriginal people governed by the traditional laws and customs of the claimant groups, any person requiring consent to enter upon or use the land and waters and persons proposing to do a future act under Division 3, Part 2 of the NTA.

Cooper J found:

- the first of these was 'an emotional, as opposed to a practical, interest to exclude from the claim area anyone or anything which was inconsistent with the spiritual connection and responsibility for the land and waters'; there was no other interest separate or apart from the right to control access, use, or activities;
- the second did not relate to a right or interest under the traditional laws acknowledged and the traditional customs observed by the Indigenous inhabitants of the claim area in relation to the lands or waters claimed, as required by s. 223(1) of the NTA because it:
    - related to a right of acknowledgement of native title holder status but neither the content nor the extent of native title interests held was identified;
    - purported to be a right to present day acknowledgement, which was not a right or interest which existed at, or survived, sovereignty—at [178] and [179].

Right to speak for country

The Indigenous witnesses variously claimed a right to speak for country. Cooper J noted that the statement of right as 'a right to speak for country' lacks the precision required by the NTA. It is in fact the expression of a concept which embraces a 'bundle of rights' varying in number and kind, which may or may not be capable of full or accurate expression as rights to control what others may do with the land or waters—at [70] to [72], citing *Ward* at [95].

Right to enjoy amenity of determination area

His Honour held that such right did not satisfy s. 223(1) as:

- it did not translate into a right in relation to land and waters at sovereignty; and
- any right the Indigenous inhabitants had at sovereignty to control the amenity of the land and waters in the application area was the right to control access and use by members and non-members of the claimant group. That right did not survive the assertion of sovereignty—at [179].

Right to maintain and protect sites

Cooper J found that, to the extent that the right to control access did not survive the assertion of sovereignty, the rights with respect to spiritual sites within the inter-tidal zone and the adjacent seas were diminished by the assertion of sovereignty—at [185].

Rights controlling access other than public rights of fishing, navigation and innocent passage

In their amended draft determination, the applicant claimed the right to grant or refuse:

- access to the waters or land;
- permission to use the land or waters;

- permission to take and use the resources of the waters or land to people other than those exercising the public right of fishing or navigation, the right of innocent passage, or a right lawfully conferred under statute.

The court found such formulations of rights involved an attempt to control access and use and were rejected by in *Yarmirr* and *Ward* on the basis that the assertion of sovereignty was fundamentally inconsistent with any asserted native title rights to control who had access to the inter-tidal zone and adjacent seas—at [188] to [190].

Right to protect against unreasonable and impermissible user

In the amended draft determination, the applicant claimed the right:

> [T]o protect the resources of the waters and land by taking steps to prevent acts which are not consistent with the reasonable exercise of public or statutory rights and which may cause damage, spoliation or destruction of the habitat of fish, plants or animals in or on the waters or land.

Cooper J declined to recognise this right both for the same reasons as in respect of the claimed right to enjoy the amenity of the area (see above) and because:

- the claimed right to control the exercise of the public rights to fish and navigate and the international right of innocent free passage is inconsistent with the existence of those rights;
- the existence of a native title right to prevent the exercise of rights on the ground of unreasonable and impermissible user is inconsistent with the assertion of sovereignty;
- the content and control of the exercise of rights given by the common law at the time of sovereignty are determined under common law;
- there is not, and never was, any native title right to control the exercise of such public rights imported with the common law at the time of sovereignty—at [191] to [193].

Rights and interests continuing

With two qualifications (relating to the right to hunt turtle and dugong and rights in relation to fish traps — see below), Cooper J was satisfied that each of the groups continued to possess the same rights and interests in respect of the land and waters under the traditional laws acknowledged and the customs observed by them, as were possessed by their forebears under the same traditional laws and customs at sovereignty—at [210].

Qualification on right to hunt turtle and dugong

His Honour, found that, although the native title right to hunt turtle and dugong is not inconsistent with the right of government to pass laws for the conservation and management of wildlife, it was capable of being regulated by those laws, subject to s. 211 of the NTA—at [211], citing *Yanner v Eaton* (1999) 201 CLR 351 at [37].

No native title right to rock fish traps

Cooper J held that the rights which existed at sovereignty as to the construction, maintenance and use of rock fish traps no longer existed, or were no longer

acknowledged and observed, by contemporary members of the claimant groups—at [226].

His Honour also found that:

- following the introduction of the *Harbour Boards Act 1892* (Qld), any right under traditional law and custom to build and maintain rock fish traps in the inter-tidal zone, while not necessarily extinguished, was subject to regulation by the crown in the manner recognised by the High Court in *Yanner v Eaton* (1999) 201 CLR 351; and
- in the absence of exclusive rights in respect of the fish traps, the balance of the evidence demonstrated that they had fallen into disuse and disrepair and any hunting and fishing in their vicinity was opportunistic and undertaken as a general right to fish and hunt in the area—at [212] to [226].

Sea areas where native title exists

Cooper J held that some native title rights and interests existed in all the land and waters, including reefs and sand bars within:

- five nautical miles of the high water mark of the inhabited islands and mainland coastline; and
- half a nautical mile of the high water mark of the uninhabited islands lying outside of five nautical miles from the inhabited islands or mainland coast.

His Honour found:

- the five nautical mile limit reflected the area within which the court found Indigenous peoples engaged in activities of hunting, fishing and gathering, or in accessing sites for spiritual or religious ritual. It also recognised that some of that area was sea country with which the people had a spiritual connection because it was part of the total world in which they lived, although that did not translate into rights or interests in the land and waters recognised and protected by s. 223(1) of the NTA; and
- a half-mile limit reasonably represented the outer limits of areas adjacent to uninhabited islands which were in fact used by the original peoples—at [231] to [233].

Claim to waters, bed and banks of Albert River

The Gangalidda peoples claimed a right to control access to, and conduct in, the Albert River, a navigable tidal river. The area of the river claimed fell within the boundaries of a reserve for public purposes. Cooper J agreed with the submission by the state, relying on *Ward*, that the reservation for public purposes extinguished any exclusive rights and, therefore, any right to control use and access—at [160].

His Honour found that the same outcome was produced by the operation of:

- common law with respect to the Crown prerogative in relation to the foreshore and the banks and beds of navigable rivers; and
- the *Harbour Boards Act 1892* (Qld) and the *Harbours Act 1955* (Qld), with it being found that the effect of s. 77 of the *Harbours Act 1955* (Qld) was to extinguish any native title right (if not extinguished at sovereignty) that was

inconsistent with the estate and interest of the Crown in the inter-tidal zone, the land lying under the sea within Queensland waters and the land under any harbour, including any tidal river—at [161], [162] and [221] to [224].

His Honour also noted that:

- the claimed right was inconsistent with the statutory enactments which affirm the interests of the crown in the bed and banks and provide statutory provisions for the control of activities in the river;
- a navigable river is an area where the public retains the common law public right to fish and navigate. On the basis of *Yarmirr* and *Ward*, the continued existence of a right to control access or use within such an area post-sovereignty was denied—at [162] to [163].

The court determined that the Gangalidda peoples have the right to access the river, in accordance with traditional law and custom, for:

- hunting, fishing and gathering for personal, domestic and non-commercial consumption; and
- religious and spiritual purposes.

Shared rights in certain areas

Cooper J found there were certain shared rights between the Yangkaal, Gangalidda and Kaiadilt peoples—at [117], [126] and [138].

Native title determined to exist in part of determination area only

Cooper J held that the area in respect of which native title rights were possessed at the time of sovereignty constituted part only of the determination area for the purposes of s. 225 of the NTA. Native title was determined otherwise not to exist—at [234] and [245].

Native title rights and interests determined to exist

The native title rights and interests included in the determination were the right to:

- access the land and waters seaward of the high water line in accordance with and for the purposes allowed by and under their traditional laws and customs;
- fish, hunt and gather living and plant resources, including the right to hunt and take turtle and dugong, in the inter-tidal zone and the waters above and adjacent thereto for personal, domestic or non-commercial communal consumption in accordance with and for the purposes allowed by and under their traditional laws and customs;
- take and consume fresh drinking water from fresh water springs in the inter-tidal zone in accordance with and for the purposes allowed by and under their traditional laws and customs;
- access the land and waters seaward of the high water line in accordance with and for the purposes allowed under their traditional laws and customs for religious or spiritual purposes and to access sites of spiritual or religious significance in the land and waters within their respective traditional territory for the purposes of ritual or ceremony.

In respect of the waters of the Albert River where native title was found to exist, the Gangalidda peoples were recognised as having the right to:

- access those waters for the purposes of hunting, fishing and gathering for living and plant resources for personal, domestic and non-commercial consumption in accordance with and for the purposes allowed by and under their traditional laws and customs;
- fish, hunt and gather living and plant resources in the river for personal, domestic and non-commercial consumption in accordance with and for the purposes allowed by and under their traditional laws and customs;
- access the river in accordance with and for the purposes allowed under their traditional laws and customs for religious or spiritual purposes and to access sites of spiritual or religious significance in the river for purposes of ritual or ceremony.

Among other things, the native title rights and interests are subject to regulation, control, curtailment or restriction by valid laws of the Commonwealth and the state.

Interests other than native title interests

Cooper J found that the nature and extent of the interests required to be determined under s. 225(e) were:

- interests held by members of the public under common law, including the public right to fish, the public right to navigate and the international right of innocent passage;
- the rights and interests of holders of a licence or authority issued under the *Fisheries Act 1994* (Qld), the Fisheries Regulation 1995 (Qld) and the *Fisheries Management Act 1991* (Cwlth) or any other legislative scheme for the control, management and exploitation of the living resources within the determination area;
- the rights and interests of the holders of interests issued under the *Transport Operations (Marine Safety) Act 1994* (Qld) (TOMS Act) and the Transport Operations (Marine Safety) Regulation 1995 (Qld) (TOMS Regulation);
- the rights of Pasminco Century Mine Ltd under a permit granted to it under the TOMS Act and the TOMS Regulation to place and maintain in position a specified buoy mooring—at [235] to [240].

To the extent that any inconsistency exists between the native title rights and interests found to exist and these other, non-native title interests, the native title rights and interests must yield to the other rights and interests.

Confidentiality orders

The applicant sought permanent orders preventing access to genealogies and reports relating to sacred sites on the basis that:

- the genealogies contained private information as to family affiliations which was compiled for the purpose of the application only and otherwise would not be publicly available in that form; and
- to identify the location of sacred sites put them at risk of desecration.

The court declined to make the orders sought as:

- no supporting material was filed to support a finding that:
  - the genealogies and reports were so sensitive or culturally important that disclosure would be contrary to traditional laws or customs limiting access to the information to particular people or classes of people;
  - public access to the reports would give rise to a real risk of desecration of sites;
- the evidence contained in the genealogies and the reports was to a degree the subject of oral testimony and there was no indication from any of the Indigenous witnesses that there existed any cultural reason as to why:
  - access to the information should be denied; or
  - the location of sacred sites was culturally or spiritually sensitive. The Indigenous witnesses spoke freely of them;
- there was no suggestion in the evidence that sites were at risk of wilful destruction if the location of them was accessible to search of the court proceeding;
- proof of connection is an essential step in the proof of an entitlement to native title; and
- the public interest in the proper administration of justice requires that, unless there are special reasons to the contrary, the evidence given in public proceedings in court ought to be available to the general public—at [241] to [244].