The *Larrakia* Appeal

By Ross Mackay

***Risk v Northern Territory of Australia* [2007] FCAFC 46 ('*Larrakia*')**

Background

The Larrakia claim was the consolidation of a number of claimant applications for native title over land and waters in and around Darwin. The claim covers an area of 30 square kilometres including parts of metropolitan Darwin and its surrounds on the Darwin Peninsula, and consisted mainly of Crown land or land held by the Darwin and Palmerston City Councils.

At first instance, the main issues that the court had to consider were:

- Whether the Larrakia people had established that they held native title rights and interests in the claim area under s 223(1) of the *Native Title Act (Cth)* (NTA)
- Where established, the nature and extent of those rights and interests;
- Whether native title had been extinguished under the common law or by virtue of the NTA.

At first instance,[15] Mansfield J dismissed the claim. In doing so, he interpreted the High Court's decision in *Yorta Yorta* [16], as requiring continuity from pre-Sovereignty to the present day. In analysing the Larrakia community, he found that the 'society' required under s 223 of the NTA had ceased in the period between 1910 and WWII, as there was no evidence of a strong and identifiable Larrakia community.[17] In addition, he found it fatal that, although there was an identifiable Larrakia community currently who practiced traditional law and custom, there were significant discrepancies in relation to the content of these laws and customs, and that many fundamental beliefs were derived from the Kenbi land claim hearings, rather than being intergenerationally transmitted from pre-Sovereignty times.[18]

Intervention of the Attorney-General

The Attorney-General intervened in the appeal through a power under s 84A of the NTA contending that 'the course set' in a wide body of recent native title jurisprudence had 'departed from the law'.[19] The Commonwealth argued that it was concerned with the lack of consistency with which the courts have been treating native title.[20]

Their Honours accepted the grounds for the intervention, although they did not feel it necessary to respond directly to the submissions since the matters raised by the Attorney-General are covered elsewhere in the judgment, as responses to the appeal submissions generally.[21]

Grounds of Appeal – Larrakia Respondents

Consideration of Oral Evidence

In making this argument, the appellants cited as an example one claimant witness who gave evidence of named 'ceremony men', canoe making, learning dances and songs, burial ceremonies, bush food and crabbing expeditions. At least part of this evidence pertained to the period 1910 to WWII; the period for which Mansfield J ruled that there had been an interruption in the Larrakia's traditional association with the claim area.[22] The appellants submitted that Mansfield J insufficiently considered this and other such evidence in coming to this conclusion.[23]

Their Honours believed that the process detailed by Mansfield J in his judgment proves that he did fully consider the body of oral evidence. Their Honours note that he explicitly or implicitly refers to all of the witnesses in the judgment including the witness

[15] *Risk v Northern Territory* [2006] FCA 404 (*Larrakia*)

[16] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*).

[17] *Risk v Northern Territory* [2006] FCA 404 at [339]-[441].

[18] Ibid especially [820]-[822].

[19] Submissions of the Attorney-General of the Commonwealth of Australia, Intervening, 3 November 2006.

[20] *Larrakia* [5], referring also to *Northern Territory v Alyawarr* (2005) 145 FCR 325 and *De Rose v South Australia (No 2)* (2005) 145 CLR 290 in the Full Federal Court, and *Sampi v Western Australia* [2005] FCA 777 and *Bennell v Western Australia* [2006] FCA 1243.

[21] Ibid [8].

[22] See above.

[23] *Larrakia* [36].

singled out in submissions, most of them several times.[24]

Their Honours note that the submission is not that Mansfield J reached an incorrect conclusion, but that his decision-making process was flawed.[25] In rejecting this submission, their Honours ruled that:

> [i]t is true that his Honour did not record or refer to all of it [the evidence]. But he was not obliged to. He did, however, make copious references to the essential parts of the evidence of most of the ochre [1910 – WWII] witnesses, and some reference to all of them.[26]

Incorrect Application of Yorta Yorta: the 'Book-End' Approach

The appellants submit that Mansfield J adopted the 'book-end' error; comparing the current society with the traditional society, and assessing traditionality with reference to the correlation between the two. They submit that such an approach does not truly address the rule of *Yorta Yorta*, which requires the Court to determine whether the currently practiced laws and customs are borne from a normative system which has continued from pre-Sovereignty to the current day.[27]

Their Honours noted that adopting the 'book-end' approach leads to two grounds of error.[28] Firstly, it allows for societies that have ceased and later been revived to be considered traditional. Secondly, it does not allow for the adaptation of laws and customs in the natural evolution of a traditional society. However their Honours felt that the detailed methodology of Mansfield J's judgment in no way implied that he had adopted the 'book-end' approach in coming to his conclusions.[29]

Further to this submission, the Larrakia appellants felt that the correct way to address the traditionality requirement was not to determine whether there had been a substantial interruption in the practice of laws and customs, but to inquire whether the laws and customs today had their origins in pre-Sovereignty.[30] Their Honours agreed, but felt that Mansfield J had, in keeping with *Yorta Yorta*, viewed continuity of practice of laws and customs without substantial interruption as an integral (although not in itself disentitling) indicia of traditionality.[31]

Reliance on Physical Presence

The appellants submitted that Mansfield J had attached too much weight to the Larrakia's perceived lack of continued physical presence in the claim area. By reference to the discussion of this issue in *Western Australia v Ward*,[32] their Honours rejected this submission.[33] They ruled that Mansfield J had correctly concluded that

> [i]t is not that the dispossession and failure to exercise rights has, *ipso facto*, caused the appellants to have lost their traditional native title, but rather that these things have led to the interruption in their possession of traditional rights and observance of traditional customs.[34]

Requirement of Traditional Methods of Knowledge Transference

It was found at first instance that the Larrakia's traditional word-of-mouth method of knowledge transference constituted a traditional custom that was no longer observed.[35] The appellants submitted that Mansfield J had erred by considering this a traditional custom, and that it should not have had a bearing on the question of interruption.

Their Honours viewed this submission as somewhat redundant, since Mansfield J's conclusion was based on a more fundamental interruption to the Larrakia's observance of traditional law and custom.[36] Regardless, the submission was found to be unsound, as there was no reason that knowledge transference could be considered not to be a traditional custom for the purposes of the NTA.[37]

Non-Adoption of the Kenbi Land Claim Findings

The final submission of the Larrakia appellants was that Mansfield J had erred by not using his powers under s 86 of the NTA to adopt the findings of the Kenbi claim report.

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[24] Ibid [38]-[66].

[25] Ibid [68].

[26] Ibid [69], drawing from the evidentiary consideration requirements of *Mifsud v Campbell* (1991) 21 NSWLR 725.

[27] See especially *Yorta Yorta* [46]-[47].

[28] *Larrakia* [82].

[29] Ibid [83].

[30] Ibid [77].

[31] Ibid [96], quoting *Yorta Yorta* [86]-[88].

[32] (2002) 213 CLR 1.

[33] Ibid [103].

[34] Ibid[104].

[35] *Risk v Northern Territory* [2006] FCA 404 at [823].

[36] *Larrakia* [106].

[37] Ibid [107].

Their Honours note that it is only with great difficulty that an act of judicial discretion can be overturned.[38] In conjunction they note that, although it will often be expedient to do so, the ultimate decision of whether to adopt such previous findings depends on the circumstances of each matter.[39] In this case, their Honours noted that, unlike the NTA, the Kenbi land claim report made no finding that the land holders were the traditional holders of land rights, as this is not a feature of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). They found that this, combined with the substantive difference between the evidence presented by the Larrakia at trial and that put forward in the course of the land claim, meant that Mansfield J had exercised his discretion correctly.[40]

Grounds of Appeal – The Quall Applicants

The Quall applicants opposed the Larrakia's claim at first instance, asserting that native title rights were held by a wider Aboriginal society extending from the Cox Peninsula to West Arnhem Land, which encompassed the Larrakia. At first instance, Mansfield J quite briefly ruled that the insufficient and inconsistent evidence regarding this society meant that there could be no positive determination.[41] He further found that, since the Quall applicants relied primarily on evidence relating to the Larrakia, the finding that the Larrakia society did not fulfil the requirements of s 223(1)(a) of the NTA dictated that the society put forward by the Quall applicants also fell short of these requirements.[42]

The Quall appellants submitted that Mansfield J did not adequately assess their submission and was wrong to infer the wider society was not traditional as per the NTA simply because the Larrakia society was found to be wanting in this regard.[43] In response, their Honours noted that submissions are not evidence per se, and that the Quall applicants' submissions could only be examined to the extent that they had a basis in the presented evidence.[44] Further, it is noted that a case submitted at appeal must not be substantially different from the case presented at first instance. By placing further reliance on different aspects of evidence, the Quall applicants advanced a case on appeal that differed from their submissions at first instance, and their Honours believed they could only assess the Quall applicants appeal in light of the claim they presented at first instance.[45]

With this in mind, their Honours dismissed the appeal. They found the evidence presented by the Quall applicants was so brief that it could not be relied upon to prove the existence of a wider Aboriginal society prior to sovereignty and Mansfield J's considerations reflected this.[46]

Orders

The appeal was dismissed with the Commonwealth as intervener ordered to pay costs.

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[38] Ibid [113], citing *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 627.

[39] Ibid [111], citing *Phillips v Western Australia* [2000] FCA 1274 at [16].

[40] Ibid [114].

[41] *Risk v Northern Territory* [2006] FCA 404 at [798].

[42] Ibid [796].

[43] *Larrakia* [159].

[44] Ibid [166].

[45] Ibid, citing *Commonwealth Evidence Act 1995* (Cth) s 55.

[46] Ibid [175].