

## **Kimberley Land Council : media backgrounder**

### **Miriuwung Gajerrong native title determination 8 August 2002**

In April 1994, the Miriuwung and Gajerrong peoples filed a native title application with the National Native Title Tribunal. This application sought recognition of their native title rights and interests over an area of approximately 8000 km<sup>2</sup>, partially in the East Kimberley region of Western Australia and partially in the Northern Territory.

On 24 November 1998, the Federal Court handed down the Miriuwung Gajerrong native title determination (outlined below).

As a result of appeals, in March 2000, the Full Bench of the Federal Court handed down a two:one decision overturning important parts of the Lee judgement. In August 2000, the High Court granted leave for an appeal of this Full Bench decision to the High Court.

The High Court is expected to hand down its decision on 8 August 2002.

#### **The application area**

The claim area includes vacant Crown land, pastoral leases, former pastoral leases, the Ord River irrigation area, Lake Argyle and its catchment, Lake Kununurra, part of the Argyle diamond mine, two national parks, Aboriginal-owned freehold, three small islands and various reserves, including Aboriginal reserves. Waters claimed included part of the intertidal zone and mud flats on the east side of Cambridge Gulf.

#### **The applicants and non-native title parties**

The Miriuwung and Gajerrong applicants are descended from the original inhabitants of the application area.

Aboriginal people in the southern part of the claim area, who define themselves as Kija and Malgnin peoples, were included by Justice Lee in the community of native title holders. He also found that there was shared interest in Booroonoong (Lacrosse Island) between Miriuwung and Gajerrong peoples and the Balangarra community.

Others with interests in the claim area included the Commonwealth, the State of Western Australia, the Northern Territory Government and groups with mining, pastoral, local government, agricultural, and business interests. Mediation between the groups was unsuccessful and the claim was referred to the Federal Court in 1995.

#### **The determination**

In the November 24, 1998, Federal Court Miriuwung Gajerrong native title determination (*Ward v Western Australia* (1998) 159 ALR 483), Justice Lee found that the Miriuwung and Gajerrong peoples held native title to a large part of the claim area. The Balangarra people were found to have concurrent native title over part of the area.

For the Miriuwung and Gajerrong peoples, this decision represented the culmination of their struggle for recognition of their rights and interests over their traditional country.

Justice Lee held that the native title rights held by the Miriuwung Gajerrong peoples in the determination area included:

- a right to possess, occupy, use and enjoy the area;
- a right to make decisions about the use of the area;
- a right of access to the area;
- a right to control access by others;
- a right to use and enjoy the resources of the area;
- a right to control the use of resources by others;
- a right to trade in those resources;
- a right to receive a portion of resources taken by others;
- a right to maintain and protect important cultural sites; and
- a right to maintain, protect and prevent the misuse of cultural knowledge.

He held that these rights were subject to validly granted rights of others, and that the native title rights could be regulated, controlled, suspended or restricted by the exercise of concurrent rights granted to others or held by the Crown.

The trial judgement established, at common law, the idea that native title is a 'title in the land', a root title, not merely a 'bundle of rights' which can be broken up and extinguished, or permanently impaired, part by part.

Native title rights, such as fishing, hunting, food gathering, looking after country and performing ceremonies, depend on this root title for their existence, but the root title does not depend on all these native title rights for its existence; so long as one dependent right remains, the root title remains.

On the basis of this finding, pastoral and other leases, 'limited in time and purpose', and which allow for co-existent rights, merely 'regulate Aboriginal rights arising from the root title', and only to the extent that they are inconsistent with the lease-holders rights. Upon the expiry of the interests held by the lessee, native title rights will again be able to be exercised by the holders of the root native title.

Justice Lee held that native title could only be extinguished by a clear and plain intention of the Crown to do so.

This determination was appealed to the Full Bench of the Federal Court of Australia.

### **The decision of the Full Bench of the Federal Court**

On appeal, the Full Bench of the Federal Court unanimously upheld Justice Lee's finding that the claimants held native title to those parts of the determination area where native title was not extinguished.

But the two:one majority (the two were Justices Beaumont and von Doussa: the one was Justice North), Justice Lee's findings in relation to the nature of native title and the manner in which it may be extinguished were overturned.

A summary of the main points contained in the decision follow.

*Extinguishment:*

The majority of the Full Bench found that native title is a 'bundle of rights' which can be extinguished one by one. When inconsistent rights are created by law or by actions of government, then some of the rights in that 'bundle' are extinguished and, according to the majority, 'partial extinguishment' has occurred.

Justice North took a different view. He accepted Justice Lee's earlier view that native title is a right to the land itself. Justice North found that "the notion that native title is a right to the land itself conforms more closely to the traditional aboriginal law than the notion that native title consists of a bundle of rights". As Justice North found, the right to hunt is meaningless without a place to hunt.

*Pastoral leases:*

The majority of the Full Bench found that once an enclosure or improvement takes place that is inconsistent with native title, extinguishment follows.

This is an unjust situation, and one that is inconsistent with the High Court decision in Wik, which found that native title can co-exist with pastoral leases.

Provisions in WA legislation, included to ensure that Aboriginal people could access their traditional lands covered by pastoral leases, were seen by the Full Bench as no longer applying if there had been improvements made (for example, sinking a bore) or if areas of the lease had been enclosed (for example, by fencing). These were interpreted by the Full Bench as wholly extinguishing native title.

*Mining and other projects:*

Justice Lee's original decision found that the native title holders had rights to resources, although there was no definition of what those rights might consist of.

In the Full Bench decision, it was found that mining leases and similar authorities allowing natural resource exploitation, as well as project agreements with governments, extinguished native title.

The majority found that mining and general purpose leases (often granted for infrastructure associated with mining) granted under WA legislation extinguish native title. This extinguishment takes place regardless of when those authorities were issued or made, however short in duration the physical operation might have been, however long ago the events took place, and however overgrown or rehabilitated by natural vegetation the areas concerned might be.

There is no requirement that an inconsistent grant of any lease be permanent before extinguishment of native title to the extent of the inconsistency occurs.

The Full Bench decision found that the Ord irrigation project area wholly extinguished native title, even though not all the land within the area is utilised for the project. Substantial areas

of land form buffer zones around the lakes, to protect them against erosion and cattle incursion. There are long-term Aboriginal outstation communities within these buffer zones.

*Connection:*

Significantly, the Full Bench found that an absence of physical connection to the application area did not necessarily lead to an extinguishment of native title. The Full Bench unanimously found that, "the spiritual connection and the performance of responsibility for the land can be maintained even where physical presence has ceased, either because the Indigenous people have been hunted off the land or because their numbers have become so thinned that it is impracticable to visit the area".

### **The High Court Appeal**

The Full Bench decision of the Federal Court became subject to five appeals to the High Court (one each by the State of Western Australia, the Northern Territory Government, Argyle Diamond Mine Pty Ltd and the native title holders in WA and the NT). These appeals were heard in March 2001 and in August 2000, the High Court granted leave to appeal the Full Bench decision.

The then WA Government made submissions which included arguments that evidence of a continuing spiritual connection is not sufficient to prove continuing native title, that pastoral leases extinguish native title, and also made submissions regarding the way in which a native title holding community is constituted .

The applicants' submissions mainly related to questions of the nature of native title rights and interests and the application of the principles of extinguishment — such as intention; inconsistency; permanence and areas.

Full details of the applicants' submissions can be made available upon request..

### **Cost**

By the end of the Full Bench decision of the Federal Court, more than \$10 million had been spent on litigation associated with the Miriuwung Gajerrong native title application — much of that expense borne by the former WA Government who opposed the Miriuwung and Gajerrong peoples efforts to gain recognition of their native title rights.

Many of the issues arising in this case could have been settled through negotiation some time ago had the former WA Government been prepared to address the matter in a constructive manner.

Regardless of the High Court's findings, the Miriuwung and Gajerrong peoples will still need to secure and protect their cultural heritage; they will still be concerned with their ongoing survival and the social and economic development of their community. Whatever the High Court determines will still need to be negotiated between people on the ground and constructive dialogue — which is long overdue — is required.

In finding a resolution to the issues raised by the High Court appeals, it is imperative that the WA Government, with its land management responsibilities, to work to facilitate constructive, negotiated and real outcomes for all parties.

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