Determination of native title – settlement of terms in Ngarluma & Yinjibarndi

Daniel v Western Australia [2004] FCA 849

RD Nicholson J, 2 July 2004

Issues
There were a number of issues before the Federal Court relating to a case where two groups—the Ngarluma and the Yinjibarndi—were found to hold native title. This summary deals with the main issues, which relate to the court's powers in relation to both the form and content of a native title determination and the determination of a prescribed body corporate.

Background
This decision addressed the settlement of a determination of native title, a draft of which was handed down in *Daniel v Western Australia* [2003] FCA 666, summarised in *Native Title Hot Spots* Issue 6. See also *Daniel v Western Australia* [2003] FCA 1425, summarised in *Native Title Hot Spots* Issue 8.

Principal and subsidiary determinations required
Justice RD Nicholson held that:

- there should be a determination in relation to the determination area, which included within it a determination of who holds common or group native title rights and interests;
- two levels of determination were required—the principal determination as to whether native title exists in relation to a particular area and subsidiary determinations of the matters set out in ss. 225(a) to (e) of the NTA;
- where, as in this case, different groups were found to hold different native titles, there was a requirement for more than one subsidiary determination;
- the fact that there was an overlap in a geographical area was relevant only to the extent of the rights of each group in that area and there was no need to make a separate determination in respect of any so-called overlap area—at [5] to [7] and see ss. 61, 223 and 225.

Prescribed body corporate determination
It was held that there was nothing in the NTA to inhibit nomination of more than one prescribed body corporate in respect of native title rights in the determination area where that:

- was supported by, and followed from, the findings of fact made with respect to the holding of such rights in that area by different groups; and
- accorded with the intention of each of them—at [23].

His Honour:

- disagreed with the first applicant's submission that the native title holders should be able to nominate a prescribed body corporate without any opportunity arising for other parties to object or otherwise make submissions; and
- held that a determination in relation to a prescribed body corporate should only be made when it can take effect unconditionally and not contingently upon determinations under ss. 56(2) or 57(2)—at [36], [37] and [38].

Areas where native title has been extinguished

The court had to consider whether the determination area, as defined in s. 225, could include areas where native title had been extinguished. The first applicant argued that areas where native title had been extinguished were not the subject of an application before the court, based on the fact that the application specifically excluded areas subject to previous exclusive possession acts (see s. 61A(2), which prohibits the claiming of such areas) and also any other area where native title had been extinguished (see s. 190B(9)(c), one of the conditions of the registration test). Almost all claimant applications exclude these areas.

His Honour held that:

- the difficulty with this argument was that whether particular interests fall within ss. 61A(2) or 61A(3) was an issue which must await the time at which the court is in a position to make a principal determination. (With respect, as s. 61A(3) does not require the exclusion of any area, but merely limits the native title rights and interests that can be claimed on any area subject to a previous non-exclusive possession act, there was no question of these areas being excluded from the area covered by the application or the determination area); and
- the court was required by s. 225(c) to include any area subject to a previous exclusive possession act or previous non-exclusive possession act within the terms of ss. 61A(2) or 61A(3) in the principal determination as 'other interests' in the determination area. Accordingly, the determination under s. 225 must address the totality of the extinguishment areas—at [31] and [32].

In making this finding, his Honour appears to have drawn a distinction between the 'claim area' and the 'terms of the claims [made in the application] themselves'—at [32]. Compare *Harrington-Smith v Western Australia (No 5)* [2003] FCA 218 at [12] to [15], summarised in *Native Title Hot Spots* Issue 5.

Cooper J appears to take the same view on this point in *Lardil Peoples v Queensland* [2004] FCA 298 but Sundberg J appears to have taken a different view (although no reasons were given), e.g. *Neowarra v Western Australia* [2003] FCA 1402 at [581], [593] to [596], [627] and [653]. Both are summarised in *Native Title Hot Spots* Issue 9 and see also Order 12 and Schedule 2 of the determination made in *Neowarra v Western Australia* [2004] FCA 1092, summarised in this issue of *Native Title Hot Spots*.

The Wong-Goo-TT-OO

In *Daniel v Western Australia* [2003] FCA 666, it was found that the third applicant, the Wong-Goo-TT-OO, did not hold native title rights in the proposed determination area except where they may do so as Ngarluma or Yindjibarndi people and that their

application required dismissal. The third applicant submitted that the determination of native title should refer to them as a sub-group of the Ngarluma or Yindjibarndi people. While conceding that the determination could note that the dismissal of the Wong-Goo-TT-OO application was 'without prejudice to any rights the third applicant may have as Ngarluma or Yindjibarndi people (and not as Wong-a-too)', it was found that no reference should be made to them as being a sub-group as that would go beyond the reasons previously delivered—at [42].