Determination of native title — Karajarri

Nangkirny v Western Australia [2004] FCA 1156

North J, 8 September 2004

Background

This is the second consent determination made by the Federal Court under the *Native Title Act 1993* (Cwlth) (NTA) recognising the Karajarri people's native title. The first was made in February 2002, covered 30,358 sq km in the Kimberley region of Western Australia and followed a full hearing of the claimants' evidence. The two stage approach was adopted because, after settling the terms of the first determination over unallocated Crown land not subject to any prior non-native title interests, a pastoral lease owned by a Karajarri association and land reserved for the use and benefit of Aboriginal people, the parties agreed to wait until the High Court decision in *Western Australia v Ward* (2002) 213 CLR 1 before dealing with the other areas claimed.

After that decision, the matter was referred to the Tribunal for mediation, as a result of which this consent determination was negotiated. The 5,647 sq km covered by this determination includes several non-exclusive pastoral leases (as defined in s. 248B), along with an area between the mean high water mark and the lowest astronomical tide (the intertidal zone), any other tidal waters in the determination area, several reserves and some areas of unallocated Crown land that were previously reserves.

In reasons accompanying the determination, Justice North noted that:

> Today is the day of formal recognition under the laws of Australia...of the ancient rights and interests of the Karajarri people ... . I wish to express the hope that the events of today will be seen ... as part of the tide of history which washed away the past injustices which ... were visited upon the Karajarri people—at [16] and [19].

Appropriate to make the order-consideration of s.87

Under s. 87, the court may make a determination of native title by consent (among other things) if it is satisfied that the orders are within its power and that it is appropriate to do so.

In this case, North J was satisfied that the proposed determination complied with the requirements of s. 225 of the NTA and, therefore, that it was within the court's power to make of the order sought, relying on:

- primarily, the fact that the parties had freely agreed to the terms of the orders;
- the evidence before the court;
- the fact that each of the parties had the benefit of independent legal advice; and
- the fact that the State of Western Australia and Commonwealth actively participated in the proceedings in the interests of the community—at [8].

Comments on PBC and s. 87

It was submitted that the prescribed body corporate nominated under s. 56, the Karajarri Traditional Lands Association, was unable to carry out its statutory functions because of a lack of resources.

North J was of the view that: 'There is a good argument that this is a relevant factor in the Court's consideration of whether an agreement providing for such a PBC is appropriate for the purposes of s. 87'. However, his Honour accepted that, in this case, it was appropriate to make the determination because no party to the proceedings wanted the court to refuse to do so on that ground. However, the court did note that:

> It would be an absurd outcome if, after the expenditure of such large sums to reach a determination of native title, the proper utilisation of the land was hampered because of lack of a relatively small expenditure for the administration of the PBC—at [11].

The native title holder

The native title holder is the Karajarri Traditional Lands Association (Aboriginal Corporation) as trustee for the common law holders of native title, the Karajarri People—see ss. 55, 56, 57 and 224(a).

Compromise on extinguishment

Over several small areas of unallocated Crown land and two optical regenerator sites, it was agreed that native title was wholly extinguished. However, the applicants submitted this was 'a compromise [as a result of intensive mediation] on a number of issues where, in the absence of judicial pronouncements ... , there remains a degree of uncertainty'. They also noted an undertaking by the state to grant title under the *Land Administration Act 1997* (WA) to six parcels of unallocated Crown land within the first determination area as one of the matters relevant to the position taken—at [6].

Native title rights recognised on non-exclusive pastoral leases, reserves and USL

Over areas subject to non-exclusive pastoral leases, unvested reserves and unallocated Crown land that was previously reserved, it was determined that native title consisted of the non-exclusive right to use and enjoy those areas as follows:

- enter and remain on the land and waters;
- camp and erect temporary shelters;
- take flora and fauna from the land and waters;
- take other natural resources of the land such as ochre, stones, soils, wood and resin;
- take the waters (as defined in the determination), including flowing and subterranean waters;
- engage in ritual and ceremony;
- care for, maintain and protect from physical harm, particular sites and areas of significance to the Karajarri people.

Native title rights recognised in intertidal zone and tidal waters

In the area between the mean high water mark and the lowest astronomical tide and in any other tidal waters, the court recognised the non-exclusive right to use and enjoy those areas as follows:

- access the land and waters
- take fauna, flora, fish and other traditional resources;
- take the waters, including flowing and subterranean waters;
- engage in ritual and ceremony;
- care for, maintain and protect from physical harm, particular sites and areas of significance to the Karajarri people.

Must be exercised traditionally for non-commercial purposes and subject to law
All the rights recognised in the determination must be exercised in accordance with the traditional laws and customs of the Karajarri people for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) only. Further, the native title rights and interests are subject to, and exercisable in accordance with, the laws of the state and the Commonwealth, including the common law.

Relationship between the native title rights and interests and the other interests
The other interests in the determination area were noted, including those of the public to fish in, and navigate over, tidal waters, along with any public rights of access to waterways, beds and banks or foreshores of waterways, coastal waters and beaches and stock routes (see s. 212). Generally speaking, the relationship between the native title rights and interests and the other interests in the determination area is described in similar terms to ss. 23G (and the state analogue), 44H and 238 of the NTA, except in the case of public rights, which are simply said to coexist with native title rights and interests.

Areas excluded from the determination area
As in *Neowarra v Western Australia* [2004] FCA 1092 (summarised in *Native Title Hot Spots* Issue 11), areas subject to previous exclusive possession acts were specifically excluded from the determination area on the basis that they had been excluded from the claimant application: see ss. 23B, 23C and 61A of the NTA and ss. 12I and 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (the state analogue). These were all reserves vested under various land Acts. On this point, see comment in *Daniel v Western Australia* (2004) 208 ALR 51; [2004] FCA 849, summarised in *Native Title Hot Spots* Issue 11.