Determination of native title

Neowarra v Western Australia [2004] FCA 1092

Sundberg J, 27 August 2004

Background
This is the determination of native title reflecting the reasons for decision given in *Neowarra v Western Australia* [2003] FCA 1402, summarised in *Native Title Hot Spots* Issue 8 and Issue 9. It was made in accordance with s. 225 of the NTA. As the determination runs to more than 41 pages, this summary merely notes the major aspects.

When handing down of the determination on Mt Barnett station in the Kimberley, Justice Sundberg noted that:

- while the case was 'hard fought on all sides', once the outcome was known, 'the parties co-operated splendidly' in settling the determination;
- the area covered by the determination 'may not seem much to those who live in Western Australia. But to those...from more modestly constructed States, it is a vast expanse. The size of the whole of Tasmania'.

The native title holders
Native title was found to be held by the Wanjina-Wunggurr Community for their respective communal, group and individual rights and interests in the determination area. 'Determination area' was defined to exclude certain areas where native title was found to be extinguished that were also found to have been excluded from claimant applications considered in this case. On this point, see comment in *Daniel v Western Australia* (2004) 208 ALR 51; [2004] FCA 849, summarised in this issue of *Native Title Hot Spots*.

Exclusive native title to some areas
Over areas where it was found that there had been no extinguishment of native title and areas where any extinguishment must be disregarded because ss. 47A or 47B of the *Native Title Act* 1009 (Cwlth) apply (essentially, these are areas already either held for the use and benefit of Aboriginal people and some areas of unallocated Crown land), native title was found to consist of an entitlement against the whole world to possession, occupation, use and enjoyment of those areas.

Native title rights recognised on non-exclusive pastoral leases
In relation to current and historical pastoral lease areas (other than areas where any extinguishment must be disregarded), the native title holders were recognised as having the right to engage in specified activities, namely to:

- camp;
- access painting sites in order to freshen or repaint images there and use land adjacent to those sites for the purpose of engaging in that activity;

- use traditional resources for the purpose of satisfying their personal, domestic or non-commercial communal needs;
- conduct and take part in ceremonies;
- visit places of importance and protect them from physical harm;
- manufacture traditional items (such as spears and boomerangs) from resources of the land and waters for the purpose of satisfying personal, domestic or non-commercial communal needs;
- access;
- hunt for the purpose of satisfying their personal, domestic or non-commercial communal needs;
- gather and fish for the purpose of satisfying their personal, domestic or non-commercial communal needs.

The right to pass on and inherit these native title rights was also recognised in the determination area.

Limits on exercise of right to hunt

The native title right to hunt may only be exercised on pastoral leases:

- if hunting is conducted with rifles or other firearms, in areas where stock are not present; and
- if the pastoral lessee or a person otherwise responsible for the management of the pastoral lease is given sufficient advance notice of the intention to hunt in order that safety issues can be addressed.

Limitation as a result of enclosure/improvement

Note that the native title holders' right to access (insofar as it is exercised for the purpose of seeking sustenance in their traditional way), hunt, gather and fish can only be exercised over:

- unenclosed and unimproved parts of land that is or has previously been the subject of a pastoral lease granted after 1934; or
- unenclosed or enclosed but otherwise unimproved parts of land that is or has previously been the subject of a pastoral lease granted before 1934.

Comment

This limitation is a result of Sundberg J's earlier finding that certain native title rights and interests were inconsistent with 'rights' of the pastoralist under the reservation to prevent Aboriginal people from taking sustenance in their traditional manner in enclosed and/or improved areas: *Neowarra v Western Australia* [2003] FCA 1402 at [476]. As noted in *Native Title Hot Spots* Issue 9, this finding appears to conflict with what was said in the joint judgment in *Western Australia v Ward* (2002) 213 CLR 1:

> [U]pon the happening of the contingency of enclosure or improvement contemplated by the reservation or provision, those who would enter *or use* the land as native title holders could continue to do so—at [186], emphasis added.

Later, Gleeson, Gummow, Gaudron and Hayne JJ noted that:

> The right to control access apart, many other native title rights to use the land the subject of the pastoral leases probably continued unaffected. For example, the native title right to

> hunt or gather traditional food on the land would not be inconsistent with the rights of the pastoral leaseholder—at [192], emphasis added. See also *Daniel v Western Australia* [2003] FCA 666—at [426].

Note that in *Nangkirny v Western Australia* [2004] FCA 1156, summarised in this issue of *Native Title Hot Spots*, this limitation is not recognised i.e. the parties have apparently agreed to take the approach taken in *Daniel* rather than *Neowarra*.

Native title rights recognised over unvested reserves
In relation to unvested reserves, the native title holders have the right to do the same activities as on non-exclusive pastoral leases (see above). However, as there is no equivalent to the reservation found in a pastoral lease applying to these areas, rights to access, hunt, gather and fish are not restricted.

Native title rights recognised over unvested reserves subject to by-laws
In relation to reserves subject to by-laws made in 1963 under the *Parks and Reserves Act 1895* (WA), the native title holders have all the same rights as were recognised over unvested reserves, other than rights to do activities consisting of hunting, gathering, fishing or taking flora from those reserves. This is a result of his Honour's finding as to the extinguishing effect of the prohibition of these activities in the by-laws-see *Neowarra v Western Australia* [2003] FCA 1402 at [636].

Native title rights recognised seaward of the high water mark
In areas seaward of the high water mark, the native title holders have the right to do all the same activities as was recognised over unvested reserves, other than the following activities, which were found not to be applicable to an area of water:
- camp;
- visit places of importance and protect them from physical harm.

The right to move freely through and within these areas was also recognised.

All subject to other laws
All of the native title rights and interests are subject to and exercisable in accordance with:
- the laws of the state and the Commonwealth, and
- traditional laws acknowledged and traditional customs observed by the native title holders.

Other interests recognised
The other interests in the determination area were noted, including those of the public to fish in, and navigate over, any waters seaward of the high water mark, along any with rights of access to the determination area provided by a law of the state or the Commonwealth in force on the date of the determination.

Relationship between the native title rights and interests and other interests
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. It was also determined that both sets of rights must be exercised reasonably. On the doctrine of 'reasonable user', see *Western Australia v Ward* (2000) 99 FCR 316 at [312] to [315] and [329].