

# Sacred sites and native title

## *Sakurai v Northern Territory* [2004] FCA 971

Mansfield J, 28 July 2004

### Issue

There were two issues before the court:

- whether the *Northern Territory Aboriginal Sacred Sites Act* (NT) (Sacred Sites Act) and the NTA are inconsistent; and
- whether the extinguishment of native title rights affects the rights recognised and protected by the Sacred Sites Act.

### Background

Three sites were registered with the Aboriginal Area Protection Authority (AAPA) under s. 29 of the Sacred Sites Act. The applicant in these proceedings, Motoo Sakurai, held two exploration licences under the Mining Act (NT) in the vicinity of the sites. One of the sites was partly within an area also subject to a claimant application. Mr Sakurai sought a declaration that:

- a sacred site registered pursuant to s. 29 of the Sacred Sites Act is inconsistent with the NTA and, on the basis of this inconsistency, a declaration should be made that sacred sites so registered or the registration of them was of no force and effect; or
- common law extinguishment of native title rights and interests can have the effect of also extinguishing the traditional laws and customs which give rise to those rights and interests in such a way that a declaration under s. 29 of the Sacred Sites Act is ineffective.

### Decision

Justice Mansfield held that there was no inconsistency between the Sacred Sites Act and the NTA noting that:

- section 8 of the NTA provides expressly that the NTA is not intended to affect the operation of any law of a state or territory that is capable of operating concurrently with the NTA and section 29 of the Sacred Sites Act is capable of operating concurrently with the NTA;
- the NTA provides for the recognition of rights and interests recognised by the common law that are possessed under traditional laws and customs of Aboriginal peoples;
- there was nothing to suggest that the NTA confines or defines in any way rights or interests of Aboriginal people, whether they arise by virtue of traditional law and custom or by statute or both (including rights which may arise under the s. 29 of the Sacred Sites Act);
- section 29 of the Sacred Sites Act does not provide any foundation for thinking that it confines or defines rights and interests recognised by the common law possessed under the traditional laws and customs of Aboriginal people so as to be incapable of operating concurrently with the NTA—at [25] to [27].

His Honour, having noted the preamble to the Sacred Sites Act and the definitions of 'sacred site', 'Aboriginal traditional' and 'custodian' in that Act, concluded that:

[T]he Sacred Sites Act provides for the existence of a sacred site to be recognised, as a matter of law, from its sacredness to Aboriginal people or its significance under Aboriginal tradition—at [27].

### **Extinguishment**

Mr Sakurai asserted that common law extinguishment of native title rights and interests can have the effect of also extinguishing the traditional laws and customs which give rise to those rights and interests in such a fashion that a declaration under s. 29 of the Sacred Sites Act was ineffective.

In Mansfield J's view:

- 'to state the proposition is to demonstrate that it is premature' — as there had been no determination of native title rights and interests in the area concerned, there could be no operational inconsistency and no inconsistent rights had yet been established;
- the assertion of rights by the communal native title claim group, in its terms, did not assert rights that were inconsistent with the protection that registration of a sacred site gives—at [30] to [32].

Mr Sakurai also argued that, if the claimed native title rights and interests were found to have been extinguished, then their extinguishment must also have resulted in the extinguishment of any effective declaration of a registered sacred site under the Sacred Sites Act.

His Honour noted that:

The Sacred Sites Act operates not with respect to Aboriginal tradition recognised by the common law, but with respect only to notions of sacredness and significance under Aboriginal tradition ... . The existence of a sacred site under the Sacred Sites Act requires no satisfaction of a statutory test of traditional ownership as prescribed under s. 223 of the Native Title Act ... . The Sacred Sites Act concerns the protection of sites of significance according to Aboriginal tradition, and is intended to apply to land in the Northern Territory regardless of tenure or the existence of native title at law—at [35].

### **Decision**

The application was dismissed, with his Honour noting that, to the extent that the applicant otherwise wished to preserve and protect his rights or interests under his exploration licences, he could apply under s. 84 of the NTA to become a party to the relevant claimant application—at [38].