

Determinations of native title — Wik and Wik Way Peoples

Wik Peoples v Queensland [2004] FCA 1306

Cooper J, 13 October 2004

Issue

Justice Cooper made orders consistent with the terms agreed by the parties in relation to Part B of the Wik and Wik Way Peoples' application for a determination of native title under the *Native Title Act 1993* (Cwlth) (NTA). This resulted in two determinations of native title recognising the existence of native title rights and interests. However, as noted below, the determinations do not take effect unless and until certain indigenous land use agreements are registered.

Background

The Wik and Wik Way Peoples' claimant application was lodged with the National Native Title Tribunal on 24 March 1994 and remained in mediation for some time. In June 2000, in an attempt to expedite the matter, Justice Drummond ordered that the claim be determined in two parts.

Part A was confined to areas that had always been unallocated Crown lands or lands that had only ever been subject to forms of title granted for the benefit of Aboriginal peoples (subject only to a small number of fishing permits in inland waters). Part B comprised the balance of the lands and waters, including lands held by pastoral and mining interests.

On 3 October 2000 Drummond J determined by consent that native title existed in the area within Part A. The recognised native title rights and interests conferred possession, occupation, use and enjoyment to the exclusion of all others (subject to certain qualifications regarding other interests in the determination area) and, in relation to tidal and flowing water, 'such rights and obligations as the common law recognises'. The determination was registered on the National Native Title Register (the NNTR) on 17 October 2000: see *Wik People v State of Queensland* [2000] FCA 1443—at [3], [5] and [8].

This decision determines Part B of the original application, which was further divided into two determinations. The Federal Court now recognises Part A, previously determined by Drummond J on 3 October 2000, as determination number one and the two determinations within Part B as determinations numbers two and three.

Section 87—appropriateness of orders sought

Cooper J was satisfied that it was within the power of the court to make the consent orders sought consistent with the terms agreed by the parties—see s. 87(1).

In this case, there appears to have been a substantial amount of evidence to which reference was made for the purposes of s. 87(1), in particular the evidence and opinions contained in anthropologist Dr Peter Sutton's affidavit and reports, with the latter providing 'details the substantial anthropological work carried out in respect of the claim area and its peoples', which dated back to 1927— at [8] and [12] to [13]. (On the factors going to the exercise of discretion under s. 87, see *Munn v Queensland* [2001] FCA 1229 and *Kelly v NSW Aboriginal Land Council* [2001] FCA 1479.)

Cooper J commented that:

[T]his is a case where there is a rich body of documented material which has been brought into existence over very many years. It establishes the existence of organised Aboriginal occupation and possession of the determination area extending back beyond the imposition of British sovereignty. It also establishes the continuity of an identifiable society of Aboriginal peoples having a connection with the lands and waters of the determination area in accordance with traditional laws which they acknowledged and traditional customs which they observed. Additionally, the content of these records, in terms of recorded Aboriginal names and language, enables the linguistic links to be made between the present claimants, their predecessors and the society which existed in the determination area at the time of sovereignty and the relationship of clan groups to particular parts of the determination area. There is also a history of long term field work and academic study in and of the determination area and its peoples which reveals a consistency and continuity in the research findings. This body of material enables the Court to make the findings as to the state of affairs which existed in the determination area at the time of sovereignty with greater confidence and to draw the inferences of connection and continuity between the present claimants and the state of affairs which existed at that earlier time

This work demonstrates that, despite European contact and the growth of the pastoral industry in the claim area, the predecessors of the claimant group and the members of the present claimant group continued their connection with their country and had cohesion as a social group with traditional laws and customs which they continued to acknowledge and observe. Indeed, it was the use of Aboriginal labour in the pastoral industry, which in part operated to keep together Aboriginal communities based on and around pastoral stations and to give to the young Aboriginal men and women the opportunity to travel over and learn about their country—at [9] and [12].

On the basis of the evidence and opinions before the court, his Honour was satisfied that it was appropriate to make the orders sought.

Some traditional laws and customs noted

In recital G to each determination, the court notes that the traditional laws and customs of the Wik and Wik Way Peoples include:

- the authority to resolve disputes about who is, or is not, a Wik or Wik Way person or about native title rights and interests as between Aboriginal people, with the assistance with the latter from native title holders in adjoining areas if necessary;
- to determine, as between Wik and Wik Way Peoples, the particular native title rights and interests over particular parts of the relevant determination area;

- to 'exclude' particular Wik and Wik Way Peoples from exercising particular native title rights and interests over particular areas.

Native title holders

In both determinations, it was recognised that the common law holders of native title in the determination area are the Wik and Wik Way Peoples, in accordance with the traditional laws acknowledged and traditional customs observed by them: order 1 of both determinations.

Determination two: areas of exclusive possession

The nature and extent of the native title rights and interests recognised in determination two (other than in relation to flowing, tidal and underground waters and 'but for' the non-native title rights and interests recognised in the determination—see below) are that they confer possession, occupation, use and enjoyment of the determination area on the native title holders, including rights to do the following:

- speak for, on behalf of and authoritatively about, the determination area;
- inherit and succeed to the native title rights and interests;
- give or refuse, and determine the terms of any permission to enter, remain on, use or occupy the determination area by others;
- make use of the determination area by:
 - engaging in a way of life consistent with the traditional connection of the native title holders to the determination area;
 - hunting and gathering on, in and from the determination area;
 - living on and erecting residences and other infrastructure
 - conducting ceremonies on the determination area;
 - being buried on, and burying native title holders on, the determination area;
 - maintaining and caring for springs, wells and other places in the determination area where underground water rises naturally, for the purpose of ensuring the free flow of water;
- take, use and enjoy the natural resources from the determination area;
- maintain and protect by lawful means those places of importance and areas of significance to the native title holders under their traditional laws and customs in the determination area; and
- use and enjoy the determination area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the native title holders in relation to the determination area: order 3.

These rights and interests were determined to confer possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others, other than in relation to flowing, tidal and underground waters and subject to the non-native title rights and interests recognised in the determination: order 9. The limitations are set out below.

Determination two: ss. 47A and 47B

In determination two, it is stated that:

- subparagraph 47A(1)(b)(i) applied to the land and waters comprising the Aurukun Shire Lease because, when the claimant application was made, the lease was in force under the Local Government (Aboriginal Lands) Act 1978 (Qld), which was an Act that made provision for the grant of such a lease only to, or for the benefit of, Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area at that time;
- subparagraph 47A(1)(b)(ii) applied to the areas covered by a pastoral lease and two Deeds of Grant in Trust because, when the claimant application was made, those interests were held expressly for the benefit of, or were held on trust expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area at that time; and
- paragraph 47B(1)(b) applied to the land and waters comprising Lot 2 on Plan SP161882 because, when the claimant application was made, that area was not covered by a freehold estate or a lease or by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth or the state under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose. Nor was it subject to a resumption process. Further, one or more members of the native title claim group occupied the area.

The effect of the application of these provisions is that all extinguishment brought about by the creation of a prior interest must be disregarded for all purposes under the NTA, including the making of a determination of native title—ss. 47A(2) and 47B(2) but see ss. 47(3) and (4) and 47B(3).

Determination three: areas of non-exclusive possession

The nature and extent of the native title rights and interests recognised in determination three (other than in relation to flowing and underground waters and subject to the non-native title rights and interests in the determination area) are non-exclusive rights to:

- be present on, use and enjoy the determination area;
- make use of the determination area by:
 - hunting and gathering on, in and from the determination area;
 - conducting ceremonies on the determination area;
 - being buried on, and burying native title holders on, the determination area;
 - maintaining springs and wells in the determination area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;
- take, use and enjoy the natural resources found on or within the determination area;
- maintain and protect by lawful means those places of importance and areas of significance to the native title holders under their traditional laws and customs in the determination area;
- use and enjoy the determination area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental,

- spiritual and other knowledge, traditions, customs and practices of the native title holders in relation to the determination area; and
- inherit and succeed to the native title rights and interests.

Determination three: no right to control access to, or use of, the determination area

It is expressly stated that, notwithstanding the recognition of the preceding native title rights and interests, they 'do not extend to a right to control access to or a right to control the use of' the determination area and 'do not confer possession, occupation, use and enjoyment of the determination area...to the exclusion of all others'.

Flowing, tidal and underground waters

In determination two, the nature and extent of the native title rights and interests in relation to the flowing, tidal and underground waters of the determination area are that they confer non-exclusive rights to:

- hunt, gather and fish on, in and from the flowing, tidal and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;
- take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs.

It is stated that, to avoid any doubt, the rights to take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters, are only rights to do so for non-commercial purposes: order 4. In determination three, the same native title rights and interests are recognised and the same limitation imposed but the reference is to 'flowing and underground waters' only.

'Flowing, tidal and underground waters' and 'flowing and underground waters' are defined in the determinations. Both limit underground water to that accessed by traditional means and differ significantly from the definition of 'waters' found in s. 253 of the NTA.

All subject to other laws

In both determinations, the native title rights and interests are subject to and exercisable in accordance with:

- the laws of the State and the Commonwealth; and
- the traditional laws acknowledged and traditional customs observed by the native title holders.

Other interests recognised

In both determinations, the other rights and interests in the determination area were noted, as required under s. 225(c). In determination two, these included those of relevant local governments, those held under the *Fisheries Act 1994* (Qld), those of the Ports Corporation of Queensland within the limits of the Port of Weipa, the public to fish in, and navigate over, any tidal navigable river or tidal waters, along with any other rights and interests held by or under the Crown under laws current at the

determination date: order 6. In determination three, they included those held under pastoral leases or the *Fisheries Act 1994* (Qld).

Relationship between the native title rights and interests and other interests

In determination two, the relationship between the native title rights and interests and the other rights and interests in the determination area is that, where there is any inconsistency between the two, the non-native title rights prevail, as does the doing of any lawful activity under those rights and interests. It is described in similar terms to ss. 44H and 238 (the non-extinguishment principle) of the NTA.

In determination three, the relationship between the native title rights and interests and the other rights and interests is that:

- the other rights and interests continue to have effect; and
- for avoidance of doubt, any activity that is required or permitted by or under, and done in accordance with, the other rights and interests or any activity that is associated with or incidental to, such an activity, prevails over the native title rights and interests and any exercise of the native title rights and interests, but does not extinguish them.

Determinations are conditional

Determination two is to take effect if and when an indigenous land use agreement (ILUA) is registered on the Register of Indigenous Land Use Agreements (the ILUA Register). Determination three is to take effect if and when four ILUAs are registered— see Part 2, Div 3, Subdivs C and E of the NTA.

If these agreements are not registered within six months of the date of the orders or such later time as the court orders, the matter is to be listed for further directions. The Tribunal provided assistance with the preparation of the ILUAs.

Prescribed Body Corporate

In all three determinations, the native title is not to be held in trust and so is held by the Wik and Wik Way Peoples. In relation to determinations two and three, the court determined that the Ngan Aak Kunch Aboriginal Corporation is to be the prescribed body corporate for the purposes of s. 57 of the NTA.

Remainder of the claim

These two determinations finalise the majority of the Wik and Wik Way Peoples' claimant application. However, there are still four pastoral leases amounting to about 5,200 sq km subject to claim that are not covered by any of the determinations to date. A second claimant application brought by the Wik Peoples in 2001 over bauxite mining leases south of the Embley River (about 1,600 sq km) is still in mediation.