Vesting of Lake Victoria – effect on native title

Lawson v Minister Assisting the Minister for Natural Resources (Lands) [2004] FCAFC 308

Wilcox, Sackville and Finn JJ, 19 November 2004

Issue

The issues on appeal before the Full Court of the Federal Court were whether:
a vesting for an estate in fee simple by notice given in the *New South Wales Government Gazette* under the *Public Works Act 1912* (NSW) (Public Works Act) was qualified by the reservation of certain rights under the River Murray Waters Agreement (the agreement); and
any such qualification could encompass native title rights and interests.

Background

The trial at first instance dealt with a single 'knock-out' question asked in advance of the hearing of the matter, as provided for in O 29 r. 4 of the Federal Court Rules. The central issue was whether the vesting of the area known as Lake Victoria for an estate in fee simple in the State of South Australia was a 'previous exclusive possession act' attributable to the State of New South Wales, as defined in s. 20 of the *Native Title (New South Wales) Act 1994* (NSW) (the NSW NTA).

His Honour Justice Whitlam found that it was 'perfectly plain' that the gazette notice satisfied the three requirements set out in ss. 23B(2)(a), (b) and (c)(ii) of the *Native Title Act 1993* (Cwlth) (NTA) and s. 20 of the NSW NTA, namely:

- it was valid;
- it took place on or before 23 December 1996 (in fact, in 1922); and
- it consisted of the grant or vesting of a freehold estate.

The exception found in s. 23B(9C) of the NTA in relation to Crown-to-Crown grants did not apply because the gazette notice was: 'valid and effective to extinguish native title at common law', that is, 'apart from' the NTA NSW. The gazette notification was thus a 'previous exclusive possession act': see *Lawson v Minister for Land & Water Conservation NSW* [2003] FCA 1127 at [22], summarised in *Native Title Hot Spots* Issue No. 7, and *Lawson v Minister for Land & Water Conservation NSW* [2004] FCA 165. The native title applicant appealed against this decision.

Argument on appeal

The appellant contended that the vesting was not a previous exclusive possession act because the resumption of the area was qualified by the reservation of certain rights under clause 57 of the agreement, which was reproduced as a schedule to the *River Murray Waters Act 1915* (NSW) (RMW Act). This contention had been raised and rejected at first instance.

Decision

The court dismissed the appeals, finding that Whitlam J was correct to conclude that the agreement had no legislative force and did not confer upon, or reserve to, third parties any proprietary rights in the area concerned. The court also held that there was nothing in the RMW Act to give the Agreement that effect—at [28].

The court held that:

- nothing in clause 57 of the Agreement could detract from the fact that, upon notification in the Gazette, the claim area vested in the Crown in right of South Australia for an estate in fee simple in possession;
- it followed that, under the general law, any native title over the claim area was extinguished and that the NTA and the NTA NSW operated in the manner described by Whitlam J;
- even if clause 57 could have operated to preserve pre-existing property rights, it could not have preserved native title rights and interests over the claim area because:

  Clause 57 referred to rights 'lawfully exercisable by an occupier of land on the bank of the ... lake' to use the water for 'domestic purposes or for watering cattle ... or for gardens'. This language was not apt to encompass any native title rights and interests that might then have been in force—at [28] to [29].