Determination of native title—Blue Mud Bay

Gumana v Northern Territory (No 2) [2005] FCA 1425

Mansfield J, 11 October 2005

Issues

This case is about the appropriate form of a determination of native title, with the essential issue being whether the native title holders of parts of Blue Mud Bay in Arnhem Land could exclude fishermen and others from the waters of the determination area. It follows from the decision of Justice Selway in *Gumana v Northern Territory* [2005] FCA 50 (*Gumana No 1*) , summarised in *Native Title Hot Spots* Issue 14 . The other issues are largely concerned with the draft determination of native title submitted on behalf of the native title holders and whether (among other things) it reflected Selway J's reasons for decision.

Background

As Selway J died before final orders were made, the parties consented to Justice Mansfield completing the hearing for the purposes of making a determination that reflected Selway J's reasons for judgment. Accordingly, the reasons given in this case must be read with the reasons for judgment in *Gumana No 1*.

Selway J had found that:

- a determination of native title should be made in favour of the native title claim group under s. 225 of the *Native Title Act 1993* (Cwlth) (NTA);
- a native title right of possession, occupation, use and enjoyment to the exclusion of all others (exclusive possession) existed over part of the claim area; and
- certain non-exclusive native title rights and interests existed over the remainder of the claim area, made up of the inter-tidal zone and the adjacent waters, i.e. the area of the foreshore between high water mark and low water mark and the area of rivers, streams and estuaries affected by the ebb and flow of the tides.

Utility in determination over Aboriginal lands

Selway J had questioned the utility of making a determination of native title in respect of the part of the claim area subject to grants under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA) to the Arnhem Land Aboriginal Land Trust (the Aboriginal lands).

Mansfield J concluded that there was utility in such a course for various reasons, including:

- there is no apparent legislative intent in the NTA to exclude land grants under the ALRA from being the subject of a determination of native title;
- the nature of native title rights and interests under the NTA is conceptually different from the rights granted under the ALRA;
- a grant under the ALRA is not predicated upon the existence of Aboriginal traditions, and rights and interests held under those traditions, which have their

origin in pre-sovereignty laws and customs and does not require the continuous existence and vitality of a normative system of traditional laws and customs since sovereignty under which those rights and interests are possessed, as is necessary for recognition as native title holders under the NTA;
- hence, the 'status' of persons recognised as native title holders over particular land may be different from persons who are beneficiaries of a grant under the ALRA in respect of the same land;
- a determination of native title finally determines the existence and nature of native title rights and interests whereas a grant under the ALRA can be surrendered, revoked or acquired in cases where native title may nevertheless survive (note that areas subject to a native title determination under the NTA can also be surrendered or acquired); and
- there is an issue as to whether native title has been extinguished by certain roads excluded from the ALRA grant—at [13] to [18].

Rivers, streams and estuaries

The issue here was whether the public right to fish extended into tidal waters that are not navigable. If that public right did not extend to those areas, it was arguable that 'exclusive' native title could be recognised because there would be no inconsistent common law public rights.

Mansfield J noted that Selway J had:
- defined 'inter-tidal zone' to refer to both the area of foreshore between the low and high water mark and the area of rivers, streams and estuaries 'affected by the ebb and flow of the tides';
- found native title rights to the intertidal zone were non-exclusive because he was bound by *Commonwealth v Yarmirr* (1999) 101 FCR 171 to hold the fee simple to the Aboriginal lands was qualified so as not to exclude those exercising (among other things) public rights to fish and to navigate;
- concluded that the decision in *Yarmirr* also applied to those parts of estuaries or navigable rivers where the waters are affected by the flow or ebb of the tide—at [23].

The first issue for the court was whether Selway J had resolved the question of whether or not the public right to fish extended to the non-navigable parts of tidal waters in rivers, streams and estuaries. Having considered the reasons for judgment at [80] and [87], Mansfield J concluded the reasons indicted that:

> [T]he public right to fish … was exercisable in the inter-tidal zone, including tidal waters, whether those waters are navigable or not. The public right to navigate is necessarily confined to tidal waters which are navigable—at [31].

Inland waters

Mansfield noted that the parties essentially agreed:
- about the nature of the native title rights and interests to be recognised over the land and inland waters of the determination area, i.e. the applicants should have possession, occupation, use and enjoyment to the exclusion of all others ;

- that Selway J did not intend to recognise a native title right of 'ownership' in the waters on that part of the land and inland waters area of the claim, in the sense of an exclusive right to ownership of those waters ;
- by virtue of the exclusive right to possess that part of the claim area, the native title holders had the right to control access to the waters on that part of the claim area and the right to use and enjoy (i.e. take and use) those waters while they are on that area—at [40].

Therefore, it was a 'matter of drafting' as to how that state of affairs should properly be reflected in the proposed determination—at [40].

Mansfield J referred to Selway J's reasons and noted that:
- normally the owner of land does not 'own' everything physically on it, that 'ownership' of free flowing water was not sensible and that the owner has a right to control access to that water and to use it for their own purposes;
- 'ownership' or the 'belonging' of things like free flowing water meant (according to the applicants' evidence) the right to use the water while they were on their country rather than a right of dominion over it;
- native title holders cannot obtain exclusive water rights in free flowing or subterranean waters;
- the form of determination proposed was the same as that made in *Passi v Queensland* [2001] FCA 697 and as recognised in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 217;
- the applicants contended that the proposed determination, by declaring exclusive possession of the land and inland waters, operated within a legal framework that the owner of the land had only the rights to control access to the waters thereon and to take and use those waters while on the land—at [36] to [38] and [41].

In accepting that what the applicants proposed was consistent with Selway J's reasoning, the court noted that:

> It does not mean that … [the native title holders] have some additional or unique form of right in respect of subterranean or flowing water on that part of the claim area within the defined section 'land and inland waters'. It means simply that … they have the exclusive right to control access to the water within that part of the claim area and to use and enjoy it—at [43].

Description of other interests in land and inland waters

In deciding that the determination should more comprehensively describe the other interests in the land and inland waters, particularly relating to rights of entry under a number of enactments, his Honour noted that:
- 'interests' as defined in s. 253 include statutory rights of access and so these should be described in the determination;
- paragraph 225(c), in conjunction with s. 94A, requires a determination to provide details of 'the nature and extent of any other interests in relation to the determination area';
- it would be unsafe to endeavour to provide an exhaustive list of such enactments as some relevant statutory provision might be overlooked;

- a reference to those exercising statutory rights or privileges would not extend to members of the public purporting to exercise common law rights and persons seeking access pursuant to any interests arising from an invalid future act;
- Selway J contemplated such a 'catch-all' description—at [48] to [54].

Non-exclusive native title rights and interests extend to use of resources
The territory argued that, in the area where non-exclusive native title rights and interests were recognised:
- native title rights and interests recognised should not extend to the 'use' of the resources of the area; and
- the word 'resources' should be confined to 'living and plant resources'.

Mansfield J rejected the territory's submissions essentially because the formulation proposed by the applicants reflected Selway J's reasons for judgment—at [57] to [59].

Right to protect sites rejected
His Honour agreed to delete the word 'protect'; from the proposed right to 'maintain or protect' sites because:
- there was no such right in the determination in *Lardil Peoples v Queensland* [2004] FCA 298 (summarised in *Native Title Hots Spots* Issue 9), which Selway J had adopted; and
- it included a right to exclude others from those sites that was inconsistent with common law public rights to fish and navigate—at [60] to [62].

With respect, this seems to be at odds with the findings of the Full Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*) at [140], summarised in *Native Title Hot Spots* Issue 16.

Commercial native title rights to inter-tidal resources rejected
The applicants submitted that rights to hunt, fish, gather and use the resources of the inter-tidal zone should extend to commercial purposes, arguing that it was only in the case of the 'outer' waters that these rights should be confined to non-commercial purposes.

Mansfield J concluded that Selway J:
- regarded any rights possessed under traditional laws and customs to use the waters of the inter-tidal zone and outer waters for commercial purposes were rights that could not be recognised by the common law of Australia as required by s. 223(1)(c) and so should not be the subject of a determination;
- recognised that fishing, gathering and using resources within the area would include the exchange of those resources.

Therefore, no commercial native title right was recognised. Rather, it was held that the applicants have the right to hunt, fish, gather and use resources within the area (including the right to hunt and take turtle and dugong) for personal, domestic or non-commercial exchange or communal consumption for the purposes allowed under their traditional laws and customs—at [71].

Right to control access of Aboriginal people in non-exclusive areas
The applicants sought recognition of a native title right to control access to certain sites by Aboriginal people governed by traditional laws and customs. Mansfield J was of the view that:

> [What the applicants] … proposed is not fully consistent with his Honour's determination and should be permitted to remain only on the basis that it is expressed to refer to those Aboriginal people who recognise themselves as governed by those traditional laws and customs. It cannot operate more extensively—at [74], cf Full Court in *Alyawarr* at [151].

Other interests in the inter-tidal zone
His Honour agreed with the respondents that:

- people holding licences to fish granted under the *Fisheries Act 1988* (Fisheries Act) should be described 'generically' rather than by name; and
- licensed persons should include those licensed under regulations.

This would:

- accommodate the fact that licences under the Fisheries Act are generally renewable annually and that some are transferable;
- ensure that the passage of time did not result in the guidance the determination should give losing utility;
- enable identification of those holding such rights at the time of the determination as distinct from some later time—at [76] to [77].

His Honour also agreed that the determination should recognise as 'other interests' in the intertidal zone:

- rights of access by an employee, servant, agent or instrumentality of the Northern Territory, Commonwealth or other statutory authority as required in the performance of his or her statutory duties; and
- the interests of persons to whom valid and validated rights and exercise have been:
    - granted by the Crown pursuant to statute or otherwise in the exercise of its executive power; or
    - otherwise conferred by statute.

It was noted that the objective of s. 225 was to secure clarity and certainty in the determination—at [79].

Other interests: public roads and public works
The respondents contended that the determination should expressly exclude land over which there was a public road at 26 January 1977 or 30 May 1980 (such roads being excluded from land grants under the ALRA). Mansfield J found that there was no apparent arguable factual foundation in the reasons for judgment to allow for the inclusion in the determination of a reservation relating to public roads and public works—at [85] to [86].

Conclusion and subsequent orders

Subject to the matters noted above, his Honour was satisfied that the draft determination proposed by the applicants gave effect to Selway J reasons for judgment and so made a determination recognising native title and consequential orders, including that:

- native title is not to be held on trust;
- an Aboriginal corporation must be nominated within 12 months (or such other time as the court allows) to be the prescribed body corporate: see ss. 57(2) and 57(3); and
- each party and the intervener (the Commonwealth Attorney-General) bear their or its own costs of the proceeding.