Appeal decision—Murchison Davenport

Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135

Wilcox, French and Weinberg JJ, 29 July 2005

Issues

The main issues before the Full Court of the Federal Court in these appeal proceedings were:

- the nature and composition of the native title holding group;
- the recognition of particular native title rights and interests;
- the application of s. 47B of the *Native Title Act 1993* (Cwlth) (NTA); and
- other matters relating to the form of the determination.

The court delivered a joint judgment in this case. None of the arguments raised in the appeal by the Northern Territory Government on the first point succeeded.

Background

This case deals with an appeal and cross-appeal against aspects of Justice Mansfield's determination of native title in *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* [2004] FCA 472 (summarised in *Native Title Hot Spots* Issue 10). Mansfield J determined that the common law holders were the Aboriginal persons who are:

- members of one or more of seven landholding or estate groups (landholding groups), each associated via descent with a particular part of the determination area;
- those people recognised by the landholding groups as members because of non-descent based connections, including adoption or birthplace affiliation; and
- spouses of persons referred to in the preceding categories who are recognised by the landholding groups as having native title rights and interests in the determination area.

Tenure

The determination area covered Northern Territory portions 4386 and 4387 and an area where a town site was proclaimed in 1953 but never developed. The remainder of the determination area was subject to a perpetual lease to the Land Conservation Corporation of the Northern Territory (the corporation) to manage the area with the intention of creating the Davenport Ranges National Park. The entire determination area had, at some point in time, been subject to the grant of pastoral leases but none were current when the determination was made.

Appeal and cross-appeal

The territory raised more than 50 grounds of appeal which fell into the four broad areas noted above. The cross-appeal filed by the applicants sought to vary some

aspects of the determination. Some variations were agreed and others were allowed by the court. Others that were 'stylistic' were not allowed as 'it is no part of the function of an appeal court to improve on the style of the trial judge. There must be some appealable error'—at [217].

The remainder of this summary deals only with the appeal.

Native title law in Australia

Before addressing the grounds of appeal, their Honours gave a useful summary of the 'developing law of native title'—see [61] to [93]. Some points of interest are noted below.

Recognition under the NTA

In reviewing the law on native title in Australia, the court made the following comments about 'recognition' under the NTA:

> Recognition is not a process which has any transforming effect upon traditional laws and customs or the rights and interests to which, in their own terms, they give rise. The term 'extinguishment' merely refers to the withholding or withdrawal of recognition of native title rights and interests where the exercise of non-indigenous sovereignty is reflected in legislative or executive acts inconsistent with such recognition—at [64].

It was also held that enforceability may be a condition of common law recognition:

> [T]here is a real question whether common law recognition has any role to play in relation to a right or interest which is incapable of enforcement. … [S]ymbolic statements which are empty of content have no place in a determination of rights—at [168].

Communal character of native title

In considering ss. 223 and 225, the court commented that:

> These aspects of the definition of native title rights and interests have their origin in the majority judgment in *Mabo (No 2)* [*Mabo v Queensland (No 2)* (1992) 175 CLR 1] and could not have been intended to undercut the fundamental principle of the communal character of native title—at [71].

Meaning of 'society' is non-technical

In relation to the concept of a 'society' in existence since sovereignty as the repository of traditional laws and customs, a notion derived from *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (summarised in *Native Title Hot Spots* Issue 3), it was said that:

> The relevant ordinary meaning of society is 'a body of people forming a community or living under the same government' … . It is not a word which appears in the NT Act … . It does not introduce … technical, jurisprudential or social scientific criteria for the classification … of people as 'societies'. …
>
> The determinations which may be made under s 225 cover a range of possibilities which depend upon the nature of the society…In some cases the members of the community identified as the relevant society may enjoy communal ownership of the native title rights and interests, albeit they are allocated intramurally to particular families and clans. …

> If, on the other hand, the society identified … is a cultural bloc whose members are dispersed in groups over a large arid or semi-arid area an inference of communal ownership of native title … derived from its laws and customs may be difficult if not impossible to draw [and in an appropriate case] … a native title determination could be made in favour of individuals or small groups who held native title rights under the traditional laws and customs of a society or community of which they are part [e.g. the Western Desert Bloc]. … Each case will … depend upon its own facts—at [78] to [80].

The court then gave a useful summary of earlier cases in this context, noting (among other things) the relevance of the finding in *Western Australia v Ward* (2000) 99 FCR 316 that:

> [A] composite community of estate holding groups may comprise a community which enjoys communal ownership of the native title rights and interests albeit there may be intramural allocations between particular family or clan groups or other sub-sets of the community—at [81].

***Mabo (No 2)* – extrinsic aid to interpretation of 'connection'**

It was noted that the 'connection' requirement in s. 223(1)(b) operates in two ways:

- it declares, as a condition of the existence of native title under the NTA, that the putative holders have 'a connection with the land or waters'; and
- it requires that the connection be 'by' the traditional laws and customs under which the claimed rights and interests are possessed—at [87].

The drafting of s. 223(1)(b) was said to be 'opaque' because the word 'connection' comes from the judgment of Brennan J in *Mabo (No 2)* at 59 but appears to have been applied in the NTA 'somewhat out of context'—at [87]. Note that in *De Rose v South Australia* (No 2) [2005] FCAFC 110 at [30], summarised in *Native Title Hots Spots* Issue 15, a differently constituted Full Court said: 'What was said in *Mabo (No 2)* cannot control the interpretation of s 223(1), although it may be taken into account'.

Having considered what Brennan J said in *Mabo (No 2)* as an extrinsic aid to interpreting the provision, their Honours noted that:

> It may be that not enough emphasis has been placed on the idea of continuity of observance as a manifestation of connection. ... The use of 'connection' as emphasising a requirement to show continuity of association with the land by observance and acknowledgment of traditional law and custom relating to it gives proper recognition to its origins in the Mabo judgment. It involves the continuing assertion by the group of its traditional relationship to the country defined by its laws and customs—at [92].

The territory submitted that the 'connection' required by s. 223(1)(b) could only be made out at the estate group level as a reflection of the identified native title rights and interests.

Their Honours found that this was a restrictive view of connection:

> The concept … involves the relationship of the relevant community to its country defined by laws and customs which it acknowledges and observes. The relationship may be expressed in various ways including, but not limited to, physical presence on the land. It does not depend upon the precise locus, within a community, of native title rights and

interests intramurally allocated, provided that they can be regarded as held by the community as a whole—at [111].

Limits on native title rights and interests

It was said that:

> The word 'connection' should not be taken as qualifying or limiting the range of rights and interests arising under traditional law and custom which are native title rights and interests for the purposes of the NT Act. … Their content is limited by the requirement that they be rights and interests 'in relation to land or waters'. The words 'in relation to' are words of wide import. The content of native title rights and interests may also be limited by the requirement, imposed by s 223(1)(c) that they 'are recognised by the common law of native title'—at [92] and [93].

Native title holders—one community or seven estate groups?

The territory argued that:

- the claim group was a recent composite of four language and tribal groups that were not connected to the claim area in accordance with traditional laws and custom;
- Mansfield J had failed to make any express findings about the community at the time of the assertion of sovereignty;
- a 'proper' determination would have reflected the evidence that members of each of the seven landholding groups had rights and interests in their own estate or country under traditional laws and customs and a connection with that country by those laws and customs;
- the evidence supported native title rights and interests being held severally by the seven landholding groups and the rights and interests associated with those groups could not be viewed as an intramural allocation of native title rights and interests held communally by the entire claim group.

Mansfield J had found that:

- the claim group constituted an identifiable community that lives under a common set of laws and customs and has its 'ancestral source' in the community occupying the claim area at the time of sovereignty;
- the evidence demonstrated the existence of 'a wider communal title than one on an estate group basis at that earlier period' ;
- there are different subgroups or persons who have a particular responsibility for particular areas but there was also a significant crossing or sharing of such responsibilities across particular persons from different estate subgroups which arises under the broader communal laws and customs;
- the claim group could collectively assert against non-members the right to enforce its native title rights and interests.

The court held that:

> The reasoning and findings in the judgment under appeal reflected a mode of analysis of the evidence consistent with that explained in Yorta Yorta. … There was no error in the reasoning leading to the determination of communal rights. His Honour was correct to treat the relevant title as communal over the whole area rather than as severally held by the estate groups in respect of their particular estates—at [112].

Birthplace, adoption and non-descent connection

The territory's next point related to the class of persons recognised by members of the seven landholding groups 'by virtue of non-descent based connections, including adoption or birthplace affiliation', arguing that this:

- amounted to the determination of a native title right to enforce traditional laws and customs that was not a right with relation to land and waters; and
- gave effect to traditional laws and customs as a system of law operating concurrently with non-indigenous law.

The court rejected these submissions:

> The interpretation and application of laws and customs by which membership is defined, even if not expressly incorporating a requirement for 'recognition' by members of the relevant society, is likely to involve some process of interpretation and consequential acceptance or non-acceptance of individual membership. The Northern Territory's submissions would require the Court to descend to the fine detail of possible applications of traditional law or custom to a range of cases of non-descent based connection where an issue of recognition of membership may arise—at [114].

The applicants accepted that the words 'non-descent based connections, *including* adoption or birthplace affiliation' were 'somewhat uncertain and that this aspect of the determination should read 'non-descent based connections, *being* adoption or birthplace affiliation'.

Subject to that amendment, the court rejected the territory's submissions, noting that the determination involved:

> [A]n acceptance that the community of native title holders is a living society. It is not consistent with the purposes of the NT Act, nor productive of any practical benefit to require that the laws and customs of indigenous society and the rights and interests arising under them be presented as some kind of organism in amber whose microanatomy is available for convenient inspection by non-indigenous authorities—at [116].

Connection and spousal affiliation

The territory argued that any rights and interests spouses had could not be native title rights and interests unless they had a 'connection' with the country.

The court found that, in cases where the rights and interests are held communally, the relevant connection is that between the community as a whole and the land and waters the subject of the claim:

> Although it might be said that spousal connection to the community does not bring with it a connection between the spouse and the land, that is not the connection that is relevant in this case—at [117].

'Incidental' activities

The territory criticised part of the proposed determination recognising 'the right to conduct activities incidental to' the native title rights and interests. The court:

- found it was plain that each native title right and interest recognised in the determination included a right to conduct activities necessary to give effect to it;
- varied the determination for clarity to read: 'including the right to conduct activities necessary to give effect to them'—at [119].

Right to live and erect structures on land formerly subject to pastoral lease

The territory argued that the right to live and erect structures embraced a right to live permanently on the area, which was inconsistent with the rights created by the grant of the historical pastoral leases and, to the extent of that inconsistency, extinguished. Most of the leases contained reservations in favour of Aboriginal people and all were previous non-exclusive possession acts attributable to the territory under the *Validation (Native Title) Act 1999* (NT).

Mansfield J had found that the reservation 'preserved' rights to erect shelters and live on the land. The 'underlying issue' was the scope of the inconsistency between the historic pastoral leaseholders' rights and the determined native title rights and interests—at [123] to [129].

The court considered the authorities and noted that:

- the content of the reservations was incidental and did not define the limits of native title rights and interests but may be taken into account in determining the scope of the pastoral leaseholder's rights;
- the relevant extinguishment of native title rights and interests derives only from an inconsistency with rights historically conferred by the lease; and
- no prospective pastoral activity would arise—at [129] and [131].

It was held that:

> [T]he right to 'live' on the land can be interpreted as a right to live permanently on the land without any conflict with pastoral leaseholders' rights. That right does not necessarily involve permanent settlement at a particular place. The issue therefore reduces to the question whether a native title right of permanent settlement is inconsistent with a pastoral leaseholder's rights. There is no logical reason why it must be so. Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease. It is not inevitable that such a conflict will arise—at [131], referring to *Daniel v Western Australia (No 2)* [2003] FCA 1425 and *Neowarra v Western Australia* [2003] FCA 1402, summarised in Native Title Hot Spots *Issue 8* and *Issue 9* respectively.

The court held that the right recognised by Mansfield J should stand.

Is the right to teach a right 'in relation to land and waters' as required under s. 223(1)?

The territory argued that the right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters was not a right in relation to land and waters, as required by the chapeau to s. 223(1). Rather, it was

akin to the right to maintain and protect spiritual knowledge rejected by the High Court in *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*, summarised in *Native Title Hot Spots* Issue 1).

The court found it was a right in relation to land and waters if specified as a right to teach on the land that requires access to, and use of, the land for that purpose—at [134].

A reformulation in the following terms was substituted to clarify the position:

> The right to do the following activities on the land: … teach the physical and spiritual attributes of places and areas of importance on or in the land and waters.

Is the right to trade traditional resources a right 'in relation to land and waters'?
The court held that:

- the right to trade is a right relating to the resources of the land and it was difficult to see on what basis it would not be a right in relation to land (see also *Commonwealth v Yarmirr* (1999) 101 FCR 171 at [250] on this point);
- however, there was no evidence to support the right to trade in this case. Therefore, the determination was amended to delete reference to trade so that the right recognised is now: 'the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters' —at [157].

Right to protect sites of importance does not imply right to control
The territory submitted that:

- the right to protect sites necessarily involves a right to control access;
- historical grants of non-exclusive pastoral leases had extinguished any such right.

The court found that there was no error by the trial judge on this point, noting that:

- the determination expressly stated that the native title rights and interests were not to be exclusive (other than in relation to the town site area, where s. 47B applied, discussed below); and
- the notion of protection of sites may involve physical activities on the site to prevent its destruction and also extends to control of ceremonial activities but need not be read as implying a general right to control of access—at [140], citing *Attorney-General (Northern Territory) v Ward* (2003) 134 FCR 16 at [25], summarised in *Native Title Hot Spots* Issue 8 and compare with Mansfield J in *Gumana v Northern Territory (No 2)* [2005] FCA 1425 (*Gumana No 2*)at [60] to [62], summarised in *Native Title Hot Spots* Issue 16.

Right to make decisions about access and use
The question on appeal was whether the partial extinguishment by the grant of historical non-exclusive pastoral leases left in place a qualified native title right to exclude persons (other than the relevant pastoralists, their invitees or other statutory entrants) and, in particular, other Aboriginal people.

The court held that:

- the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world;
- the underlying rationale for that conclusion is that particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty;
- the rights set out in the determination did not resemble the holistic right of exclusion which went with exclusive possession and occupation at the time of sovereignty—at [148].

The applicants proposed an alternative in the following terms:
As an incident of their rights in relation to the use and enjoyment of the land and waters, a right to take appropriate steps according to law to prevent or mitigate any activity or presence of persons on the land which—
- is without or in excess of lawful authority; and
- interferes with or impairs the use and enjoyment of the land in accordance with rights and interests identified above.

This formulation was also rejected by the court because:
- it imported a right of exclusion;
- it was very difficult to interpret and apply the formulation to support a right to exclude a person from the land in the circumstances it defined—at [150].

The appeal on this point was allowed and the paragraphs in the determination where a residual right to control access was recognised were deleted, except over the town site, where prior extinguishment must be disregarded because s. 47B applies—at [148] and see below on s. 47B.

Right to make decisions about use and enjoyment by Aboriginal people
The right to make decisions about the use and enjoyment of the determination area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders was 'not without difficulty' because:

> There is a risk that it may be seen as creating a criterion for exclusion based in part upon Aboriginality. In any event it does not appear … that there are persons other than the native title holders who are bound by their traditional laws and customs. The position would be different were the native title holders a subset of a wider society incorporating other groups bound by the same traditional laws and customs. … To the extent that the native title holders could collectively exclude particular members from particular areas, such as women from law grounds, that is a matter best left to the intramural workings of the traditional laws and customs. It is not a matter requiring determination as a distinct native title right—at [151], compare with Mansfield J in *Gumana No 2*.

Right to control disclosure of spiritual beliefs and practices not 'in relation to land or waters'
The determination made by Mansfield J included:

> The right to control the disclosure (otherwise than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated with them

(including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters.

His Honour found this was site specific and concerned with controlling the acquisition of the knowledge, not the use of it, in accordance with traditional laws and customs. The territory appealed against this finding.

On appeal, the court found that the right recognised in the determination was 'not a right in relation to land'. Reformulating it to read: 'the right to such control of access to places on the land and waters as will prevent the disclosure of spiritual beliefs etc.' was found to be equally problematic as it purported to confer 'a right to exclude persons from entry on to the land' in circumstances where any right of that kind had been extinguished by the grant of the historical non-exclusive pastoral lease. Therefore, this part to Mansfield J's determination was deleted—at [162] to [164].

Right to determine membership of landholding group
The applicants accepted that this was more properly recognised as part of their traditional laws and customs rather than as a native title right. Therefore, it was deleted from the determination—at [165].

Right to be acknowledged as the Aboriginal owners of land
The court found that this right should not be included in the determination of native title because it 'is incapable of precise definition and incapable of enforcement'—at [166] to [168].

Application of s. 47B
If s. 47B applies to an area, then all extinguishment brought about by the 'creation of any prior interest…must be disregarded' for all purposes under the NTA. However, there are three conditions that must be fulfilled to attract this provision:

- the area concerned must be subject to a claimant application;
- it must not be either:
    - 'covered' by any of a number of interests (e.g. reservation or proclamation) 'made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, 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'; or
    - subject to a 'resumption process' as defined in s. 47B(5)(b); and
- one or more of the members of the native title claim group must 'occupy' the area when the claimant application is made.

The territory appealed against the finding that s. 47B applied to the township area on two grounds:

- the township area was not occupied by one or more members of the claim group at the time the application was made; and
- s. 47B did not apply because the area was 'covered by' the township proclamation—see s. 47B(1)(b)(ii).

The proclamation in question was made over Hatches Creek in 1953 pursuant to s. 111 of the Crown Lands Ordinance 1931—1952 (NT) (CLO), continued in force by operation of s. 108(2) of the Crown Lands Act 1992 (NT). In it, the Governor General declared that:

> [A]ll that portion of Crown land described in the Schedule … shall … be constituted a new town … and … the boundaries of the … new town shall be as defined … . ... [A]ll Crown land within the … town shall be set apart as town lands.

Proclamation for a particular purpose or public purposes

The court considered the terms of s. 111 of the CLO and found:

- the proclamation of a township had no operative legal effect beyond providing satisfaction of a condition precedent for the grant of the various kinds of leases contemplated by the ordinance;
- while the proclamation made over the Hatches Creek town site was a 'proclamation' within the meaning of s. 47B(1)(b)(ii), to be excluded from s. 47B, it must also be a proclamation 'under which the whole or a part of the land ... in the area is to be used for public purposes or a particular purpose';
- any qualification on the application of s. 47B was intended to minimise the impact of a determination that native title exists on areas set aside for public or particular purposes and, as it is a beneficial provision, that limitation should not be construed more widely than is necessary to achieve its purpose;
- a proclamation for a broadly expressed purpose encompassing a variety of potential but unascertained uses was not a proclamation for a particular purpose;
- the term 'public purposes' might cover a land use planning purpose met by establishing a framework for the allocation of private rights, like residential leases, or refer to purposes of a public nature, like the creation of reserves for recreation;
- a narrower construction accords with a comprehensible policy that, in the public interest, prior extinguishment which might prevent public exposure to compensation claims or future act processes should be continued in force—at [178] and [185] to [187].

It was found that, while it was not necessary in aid of the narrower construction to define its outer limits here:

> [T]he mere proclamation of a town site, which might comprise largely private property holdings by lease or otherwise, does not define public purposes or a particular purpose within the meaning of s 47B(1)(b)(ii)—at [187].

Meaning of 'is to be used'

The proclamation must be one under which the land or waters which it covers 'is to be used' for the specified purposes if s. 47B is to be excluded. The court noted that:

- 'is to be used' imports the need to identify some intention to use the area for the requisite purpose or purposes;
- the relevant intention must be 'fixed for the duration of the proclamation' and ascertained 'objectively' by examining the terms of the proclamation and the relevant legislation;
- while there was evidence of a public plan dated 1977 showing recreation area, government offices, tennis courts, a school site and, apparently, residential lots

and roads, it had no statutory significance or legal effect and so it did not impact upon the characterisation of the proclamation for the purposes of s. 47B;
- the evidence suggested that there is little or no prospect of the Hatches Creek town site ever becoming a town, i.e. the proclamation is a 'dead letter'—at [188] to [189].

Finding on s. 47B(1)(b)(ii)
On the basis that the proclamation in this case was not to be used for 'public purposes' or for a 'particular purpose', it was held that the 'proclamation' was not of a kind that would exclude the area from the application of s. 47B. This left the challenge to the finding on 'occupation'.

Occupation—s. 47B(1)(c)
It was submitted that:
- the court should act only on direct evidence of the occupation, not upon inference, because s. 47B has a significant effect; and
- in any case, the evidence referred to by Mansfield J was insufficient to support any such inference, i.e. that the claim group hunted and traversed the town area at the time the application was made.

Both submissions were rejected, with the court:
- noting there was nothing about s. 47B that required a more restrictive approach to the discharge of its function;
- finding that it was not disputed that the Hatches Creek town site was part of the applicants' traditional country or that there were native title rights or interests subsisting in it;
- given that background and the evidence of activity in its vicinity, Mansfield J did not err in concluding that the claimants occupied it in the broad sense relevant to s. 47B—at [196].

Decision on appeal against application of s. 47B
Given the matters set out above, the appeal against the finding that s. 47B applied was unsuccessful. Therefore, any extinguishment in the Hatches Creek town site brought about by the creation of a prior interest must be disregarded for all purposes under the NTA.

Effect of the grant of CLP 1117 to the Land Conservation Corporation
Mansfield J had found that CLP 1117 was category D past act which conferred a right of exclusive possession subject to the reservations expressed in s. 122, which provided that nothing in the *Territory Parks and Wildlife Conservation Act* (NT) (TPWC Act) limited Aborigines who have traditionally used an area from continuing to use the area in accordance with Aboriginal traditions for non-commercial hunting, gathering and ceremonial purposes. The territory sought to vary the determination (although this was not a ground of appeal) in relation to the area covered CPL 1117 on the basis that it conferred a right of exclusive possession and was, therefore, wholly inconsistent with native title—at [218] to [219].

The court referred to the inconclusive findings on the operation of the non-extinguishment principle (see s. 238) in the joint judgment by the High Court in *Ward*, agreeing with the applicants that, had the conferral of a right of exclusive possession been a relevant consideration for the purpose of s. 238, the High Court could have reached the conclusion that the grants were wholly inconsistent with any subsisting native title rights and interests.

Their Honours went on:

> While it is not disputed that CLP 1117 confers a right of exclusive possession…the stated purpose of the lease is 'Conservation Land Corporation purposes [and the terms and conditions of the lease state that] … the lessee will not use the lease for a purpose other than the purpose for which it is leased'. … The purpose of the lease is plainly related to the conservation and protection of the natural environment. It is not necessarily inconsistent with the [non-exclusive] native title rights which remain in … the determination area—at [226].

Therefore, the amendment proposed by the territory was refused.

Conclusion and costs

The appeal was allowed in part by varying or deleting the native title rights and interests set out in paragraph 3 of the determination. Other than that, the appeal and cross-appeal were dismissed. Given these mixed results, the court was of the view that it was not appropriate to make any order other than that the parties bear their own costs but gave the parties the opportunity to make written submissions on point—at [230] to [231].