

Determination of native title – Victoria

Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria [2005] FCA 1795

Merkel J, 13 December 2005

Issue

The issue before the Federal Court was whether to make orders as agreed by the parties pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (NTA) over an area of land and waters in Western Victoria. The significance of this was that that, if made, the orders would constitute the first determination, whether by consent or otherwise, made recognising the existence of native title in Victoria.

Background

The orders sought in this case would finalise three claimant applications, the first of which was made in 1995. The orders sought included:

- a determination recognising the existence of native title over part of the area covered by one of the applications; and
- a determination that native title did not exist over the remainder of the area covered by the applications.

Court's power to make orders—s. 87

Pursuant to s. 87, if the parties reach agreement on the terms of an order, the court may make the order without holding a hearing. In this case, the pre-conditions to making an order under s. 87 were satisfied in that:

- the terms of the agreement were in writing, signed by or on behalf of the parties and filed in the court;
- an order in the terms agreed upon was within the court's power - it had jurisdiction and there was nothing in the terms of the orders, which reflected s. 225, to suggest it did not have power;
- it was 'appropriate' to make the orders because 'the terms of the orders were clear and unambiguous and ... freely agreed upon after the parties ... had access to competent and independent legal advice' and the court was satisfied in relation to the 'substantive aspects' of the orders as a result of the written submissions filed by the applicant and the State of Victoria—at [4] to [10].

Justice Merkel 'strongly commended' the parties for resolving issues by mediation and consensus, rather than by an adversarial process involving 'great expense and conflict'. The National Native Title Tribunal was also commended for its role in resolving the dispute between the parties—at [10].

Submissions to the court

His Honour noted the applicant and the state's written submissions relied upon certain affidavits and anthropological material, including material from one of the

claimants, the late William John Kennedy (known as Uncle Jack Kennedy), who was born on the banks of Wimmera River in 1919 and was the senior Wotjobaluk elder. Uncle Jack Kennedy outlined the traditional laws and customs acknowledged and observed by the Wotjobaluk people, including teachings about Bunjil, the creator spirit.

The anthropological material referred to in submissions included:

- a description of the boundaries of the Wotjobaluk people's country and some of their customs and traditions, including their belief in Bunjil, from 1904;
- recognition that, in 1965, the Wotjobaluk peoples had a strong attachment to tradition and their language had been preserved;
- contemporary reports that explained why the native title claim group:
- was a recognisable body of persons united in and by traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests are being claimed;
- possessed communal native title rights and interests under the traditional laws and customs that have been acknowledged and observed by the applicants;
- had, by those laws and customs, a connection with some of the land and waters covered by the claimant applications: see s. 223(1)(a) and (b)—at [8] to [10].

Tradition and the 'tide of history'

Merkel J was of the view that the orders were:

[O]f special significance as they constitute the first recognition and protection of native title resulting in the ongoing enjoyment of native title in ... Victoria These are areas in which the Aboriginal peoples suffered severe and extensive dispossession, degradation and devastation as a consequence of the establishment of British sovereignty over their lands and waters during the 19th century—at [2].

Merkel J went on to note that:

The outcome of the present claim is testimony to the fact that the 'tide of history' has not 'washed away' any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants and has not, as a consequence, resulted in the foundation of their native title disappearing Indeed, the evidence in, and the outcome of, the present case is a living example of the principle that is now recognised in native title jurisprudence that *traditional* laws and customs ... evolve over time in response to new or changing social and economic exigencies to which all societies adapt as their social and historical contexts change In some cases ... that adaptation may result in some of the evolving laws and customs no longer being characterised as *traditional*, and therefore no longer capable of founding a claim to native title However ... it is important to recognise that that is simply the criterion established under Australian law for the recognition and protection of native title. It does not follow that the tide of history has also washed away the evolving laws and customs that are acknowledged and observed by Aboriginal peoples. Although in some cases those laws may not found native title ... they nonetheless remain fundamental to the identity of those persons as individuals belonging to a particular indigenous people or community—at [11], emphasis in original.

That said, Merkel J was careful to note that 'the continued existence, and the nature and extent, of that native title can only be resolved on a case by case basis'—at [12].

Determination

The court determined that:

- non-exclusive native title rights and interests exist in what was designated determination area A, subject to the exceptions and qualifications noted below;
- native title does not exist in the area designated determination area B.

Determination area A covers Crown reserves totalling 269 square kilometres along the banks of the Wimmera River. While native title was not be recognised over determination area B, under a number of agreements, the claimants will have other rights and receive certain benefits in relation to those areas.

Who holds native title?

The Wotjobaluk People are the native title holders, defined as those Wotjobaluk, Jaadwa, Jadwadjali, Wergaeia and Jupagalk Aboriginal persons who:

- are accepted in accordance with their traditional laws and customs as descended from one of seven named ancestors; and
- acknowledge and observe Wotjobaluk traditional laws and customs.

Native title rights and interests recognised

The native title rights and interests recognised over determination area A are non-exclusive rights to hunt, fish, gather and camp for personal, domestic and non-commercial communal needs. They are held in trust by the Barengi Gadjin Land Council Aboriginal Corporation (BGLCAC) on behalf of the Wotjobaluk People as the common law holders.

As required by ss. 94A and 225(e), it is specifically stated that the native title rights and interests do not confer possession, occupation, use and enjoyment to the exclusion of all others. The determination also states that native title rights and interests do not exist in:

- any waters, with it being noted this does not include the bed or subsoil under, or airspace over, those waters; and
- any lands on which validly created public works are situated.

Relationship between native title and non-native title rights and interests

The nature and extent of other rights and interests were also set out in the determination, as required by ss. 94A and 225(c) and 225(d), with the relationship between native title rights and interests and other non-native title rights and interests being that the other rights and interests, and any activity done in exercise of a right conferred or held under the other rights or interests, prevail over the native title rights and interests and any exercise of those native title rights and interests, but do not extinguish them. The native title rights and interests are subject to and exercisable in accordance with:

- the traditional laws acknowledged and the traditional customs observed by the Wotjobaluk People;
- the laws of the state or Commonwealth; and
- the terms and conditions of the proposed access agreement noted below.

Subsequent agreements

His Honour also noted that following the making of the determination:

- the state and the BGLCAC would enter into agreements to provide financial and other benefits to the Wotjobaluk People;
- the state, BGLCAC and certain other respondents would enter into an access agreement over Determination Area A regarding the co-existence of:
- the Wotjobaluk native title holders' non-exclusive native title rights to hunt, fish, gather and camp;
- the rights of the state;
- the rights of the other respondents.