Determination of native title – Martu and Ngurrara

James v Western Australia [2002] FCA 1208

French J, 26 September 2002

Issue

The issue here was whether the Federal Court should make a determination of native title pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) in terms of proposed consent orders. The court decided to do so. This was the first determination of native title to be made since the High Court's decision in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*), summarised in *Native Title Hot Spots* Issue 1.

The determination of native title was made in relation to part of the area covered by each of the Martu and Ngurrara people's claimant applications. It covers approximately 136,000 sq km of unallocated State land in the Western Desert region of Western Australia and involves the recognition of native title rights and interests, many of which are exclusive, over the largest area of land and waters to date. Location map of Martu Native Title Claimant Determination WG6110/98 (WC96/078).

Section 87 factors

Section 87 of the *Native Title Act 1993* (Cwlth) (NTA) empowers the Federal Court to make orders giving effect to agreements about native title. Justice French noted that, before making a consent determination of native title, the court must be satisfied that it has the power to do what it is asked to do and that what it is asked to do is appropriate. French J gave examples of circumstances where these criteria may not be met:

- the parties had reached an agreement where it appeared to the court that there was nothing to support the claimed connection of the applicants to their country; or
- the determination appeared in some way to be obviously unfair or unjust—at [4].

In such circumstances, the court might conclude that making such a determination was not appropriate. In the matter before French J, the criteria were met. It was noted that:

- the parties have had the benefit of legal advice;
- extensive anthropological research has been carried out to establish the connection of the native title holders to their country, the extent of that country and the existence and content of their traditional laws and customs. The anthropologists also reported upon the way in which they have kept their connection with their country since colonisation;
- evidence has been considered by the State to support their claim;

- the parties generally have been involved in the process of mediation—at [4].

His Honour noted that the court is entitled to, and does, give weight to the fact that agreement has been reached—at [4]. See also *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229 and *Kelly v NSW Aboriginal Land Council* [2001] FCA 1479 on the s. 87 factors.

Native title and boundaries

His Honour commented that:

> [I]t is a fact that in the extremely arid region of the Western Desert boundaries between Aboriginal groups are rarely clear cut ... . Desert people define their connection to the land much more in terms of groups of sites, thinking of them as points in space not as areas with borders ... .Various conventions and practices have arisen to guarantee freedom of movement by Aborigines into the territories of their neighbours in areas of extreme variability of rainfall. Despite this there is much evidence for the existence of ideas of territoriality. People suffer home sickness when away from their heartlands for long periods and a sense of unease when entering or camping in or travelling through someone else's country particularly for the first time—at [10].

Shared country

The determination recognises concurrent native title rights and interests of the Martu and the Ngurrara people over part of the determination area. His Honour noted that:

> It is particularly encouraging in this case that each of these groups, consistently with their traditional law and custom, is able to recognise the interests of the other in a common area of land—at [12].

Excluded areas

Certain areas covered by the application are excluded from the determination. According to his Honour, in some cases this was because native title is thought to have been extinguished by operation of the Act or by operation of the common law. French J noted that it is on the latter basis that the Rudall River National Park is not included in the determination—on this point, see *Ward* at [249] to [258]. However, his Honour was careful to note that:

> This simply means that native title in such cases cannot be recognised by the Courts ... . The relationship of the people to their country in those areas is not changed by the limits that the Act or the common law place on recognition. If it is their country under their traditional law and custom it remains so under their law and custom whatever the Act or the common law say about recognition—at [12].

Common law holders

The common law holders of native title over the determination area are the Martu people, defined as those Aboriginal people who hold in common the body of traditional law and culture governing the determination area and who both:

- identify as Martu; and
- in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of 11 named language groups.

Over the shared area, the Ngurrara people have concurrent native title. They are defined as those Aboriginal people who, in accordance with their traditional laws and customs:

- identify themselves and their forebears as: Jiwaliny; Mangala; Manyjilyjarra; Walmajarri; Wangkajungka; or any combination thereof; and
- acknowledge the beliefs, practices, and protocols associated with the jilakalpurtu rain making ritual complex.

Exclusive native title rights and interests recognised

The right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others including the right to:

- live on the determination area;
- make decisions about the use and enjoyment of the determination area;
- hunt and gather, and to take the waters (other than flowing or subterranean waters) for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial, and communal needs;
- control access to, and activities conducted by others on, the land and waters of the determination area;
- maintain and protect sites and areas which are of significance to the common law holders under their traditional laws and customs; and
- be acknowledged as the traditional Aboriginal owners of the determination area, as against any other Aboriginal group or individual.

Non-exclusive native title rights and interests recognised

For the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, the right to use the traditionally accessed resources listed i.e. ochre, soils, rocks and stones, and flora and fauna.

The right to take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean waters.

Manner of exercise

The native title rights and interests are:

- exercisable in accordance with the traditional laws and customs of the common law holders;
- subject to and exercisable in accordance with the laws of the State and the Commonwealth including the common law.

Other interests in the determination area

The other interests recognised included:

- interests held under a State Agreement Act by Western Mining Corporation, various miscellaneous licences for mining purposes, 95 exploration licences, two prospecting licences and four petroleum exploration permits;
- mining leases granted on or after 1 January 1994. (The non-extinguishment principle applies to such leases—see ss. 24MB, 24MD(3) and 238);

- Telstra's rights and interests, including as the owner and operator of the telecommunications facilities installed within the determination area and its right of access to those facilities;
- public rights at common law;
- rights and interests granted by the Crown in right of both the State and the Commonwealth;
- access rights held by state and commonwealth instrumentalities and local government authorities as required in the performance of statutory or common law duties where such access would be permitted to private land;
- rights of public access, subject to state laws, to existing roads within the determination area, where members of the public have a right of access to such roads under the common law, and to the part of the Canning Stock Route included in the determination area.

The relationship between the native title rights and interests and the other rights and interests

This relationship is that:

- native title and non-native title rights and interests co-exist. To the extent that the non-native title rights and interests are inconsistent with native title rights and interests, the latter continue to exist in their entirety but, to the extent of the inconsistency, have no effect in relation to the non-native title rights and interests. (The wording used in the determination is reminiscent of the wording of the non-extinguishment principle found in s. 238 of the NTA.); and
- 'for the avoidance of doubt', the existence and exercise of native title rights and interests does not prevent non-native title interest holders from doing any activity they are required or permitted to do because of the interest they hold. Both the non-native title rights or interests and any activity required or permitted to be done under that right or interest prevail over the native title rights and interests and any exercise of them but do not extinguish them. (This wording appears to draw on the language used in s. 24GB and s. 44H of the NTA.)

Areas not subject to determination

Several reserves that were vested under s. 33 of the *Land Act 1933* (WA) were excluded from the determination area because they are areas where previous exclusive possession acts have occurred and native title has been confirmed as being completely extinguished in relation to the whole of those areas: see Ward at [235] to [254] and [260]. In addition to excluding several repeater station sites on the basis that they constituted public works as defined in s. 253 and s. 251D of the NTA, any other public works were also excluded from the determination area without further definition. The other areas excluded from the determination include:

- mining leases and general purpose leases granted prior to 1 January 1994, presumably because the final effect of the grant of such leases on native title was not settled by the High Court in *Ward* — see [308] and [341]; and
- reserves that are not vested.

As noted above, Rudall River National Park was also excluded from the determination area. In a ministerial statement made on 24 September 2002, the Hon. the Acting Premier of Western Australia, Mr Eric Ripper, said:

> [T]he Government remains committed to negotiating joint management arrangements [over the national park] with traditional owners — including the Martu people — as that is the only just and proper course of action under the circumstances.