Land rights grant over intertidal zone, river bed and banks

Northern Territory v Honourable Justice Olney [2002] FCAFC 280

Black CJ, French and RD Nicholson JJ, 3 September 2002

Issue

This case concerned an application for judicial review of a recommendation by the Aboriginal Land Commissioner to the relevant minister for grants of land in three coastal regions on the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the ALRA). A grant under the ALRA is a grant in fee simple, i.e. freehold.

Background

This was the first inquiry into a claim made under the ALRA to parts of the intertidal zone and to the bed and banks of a river in circumstances where no other adjacent land was either claimed or was already Aboriginal Land held under ALRA. It was not suggested that any part of the land claimed was either required for, or suitable as, a place to live. The Full Court of the Federal Court noted that the long title of the ALRA provides for the granting of traditional Aboriginal land in the Northern Territory 'for the benefit of Aboriginals, and for other purposes'. The substance of the Northern Territory's complaint was that:

- the recommendations related to land that was not intended for occupancy by its traditional owners and was not contiguous to any land under which such occupancy had been or could be granted under the ALRA;
- the recommendations failed to have regard to principles contained in s. 50(4) of the ALRA about the desirability of providing secure occupancy for traditional owners.

In the reports containing his recommendations, the Commissioner found (among other things) that:

- the evidence on behalf of the claimants of their traditional spiritual affiliation to, and responsibility for, sites and the land was both cogent and credible;
- the Aboriginal tradition to forage as of right over the land included obtaining of fish and other aquatic creatures for food;
- the traditional attachment of many of the claimants to the claim area was 'demonstrably strong';
- although the area claimed was relatively small, it was part of a much larger area made up of numerous traditional countries from which the indigenous inhabitants and their forebears had, for the most part, been excluded since the commencement of European settlement;
- the claimants had maintained a traditional attachment to all parts of their traditional country, despite the fact that some parts may not have been visited as much as others or were lacking in an abundance of sacred or significant sites. It

could not be said that the claimants had in any way abandoned any part of the claim area;

- their attachment to different parts of it varied according to the nature of the land and its location. The claimed entitlement to forage as of right over the land the subject of the claim was not in dispute. A number of witnesses gave evidence of the exercise of the claimed right by hunting, fishing and gathering the resources of the land and waters within and in close proximity to the claim area;
- the sole purpose of the ALRA land claim process is not to provide Aboriginals with secure occupancy of a place to live—at [8] to [25].

Decision

The Full Court dismissed the review applications, finding that the Northern Territory Government's suggested interpretation of the ALRA proposed 'an inhibiting operation' of the ALRA which tended against grants of land under that Act where no actual occupancy is sought:

> That construction is inconsistent with the recognition by the Act, in its definitions of "traditional Aboriginal owners" and "Aboriginal tradition" of the spiritual dimensions of traditional ownership. It is a concept which runs much wider than physical occupancy of a particular location—at [35].