

Determination of native title — Noonkanbah

Cox on behalf of the Yungngora People v Western Australia [2007] FCA 588

French J, 27 April 2007

Issue

The issue in this case was whether the Federal Court should make a determination by consent recognising the existence of native title in respect of a claimant application made on behalf of the Yungngora people.

Background

The application was lodged with the National Native Title Tribunal in March 1998 and, in September 1998, became a proceeding in the court following amendments to the *Native Title Act 1993* (Cwlth) (NTA). The area it covered was just over 1,800 square kilometres in the Kimberley region of Western Australia and included the area covered by the Noonkanbah pastoral lease (held by the Yungngora Association Inc), a small parcel of unallocated Crown land and two unvested reserves.

The court must be satisfied any order is within its power

Justice French said that, before making a determination by consent under s. 87, the court must be satisfied that the order sought by the parties was both within the court's power and otherwise appropriate—at [3].

Evidence relied upon

In addition to the agreement of the parties and the order proposed, French J considered 'a comprehensive expert report by two experienced consultant anthropologists'. The conclusions reached in that report indicated that the claimants would satisfy the criteria for a determination of native title in the terms sought—at [4] and [12].

His Honour noted (among others) the following points from the report:

- the native title claim group constituted a society whose members identified by reference to the Nyikina language and who considered themselves to be a community, based upon cultural beliefs, practices and ways of doing things that could be traced back to pre-sovereignty times;
- the contemporary system by which rights to land were articulated was either the same as existed at, or before, sovereignty or was directly founded or based upon it;
- ritual experience and knowledge constituted both a means of gaining authority and respect and for realising rights in matters relevant to making decisions about country, as well as other cultural matters;
- kinship relationships continued to be represented within the lives of members of the claim group;

- there was an understanding by adult members of the community of their traditional duties to pass on their knowledge to younger members;
- despite changes over the years, there remained a principled system of rights to country which 'relied upon normative rules for its legitimation and perpetuation' — at [6] to [11].

Recognition of the Noonkanbah struggle

French J noted that:

In achieving this determination of native title, the people have achieved an important milestone which involves recognition of their rights and interests in their country and of the traditional laws and customs from which those rights and interests spring — at [12].

Decision

His Honour ordered that there be a determination of native title in the terms sought by the parties.

The common law holders

The native title rights and interests are held by the Yungngora people, i.e. those Aboriginal people who:

- hold in common the body of traditional law and custom governing the determination area;
- identify themselves as, and are accepted as such by, the holders in common of that body of traditional law and custom; and
- are either descended from any one or more of certain named apical ancestors (listed in broad family groups) or adopted into that group in accordance with traditional law and custom.

The nature and extent of the native title rights and interests:

Native title over the area covered by Noonkanbah station and some unallocated Crown land is:

- the exclusive communal right to possess, occupy, use and enjoy the land and waters; and
- the communal right to take, use and enjoy the flowing and subterranean waters for personal, domestic and non-commercial communal purposes but not to the exclusion of others.

Native title over the remainder of the determination area consists of non-exclusive, communal rights to use and enjoy the land and waters as follows:

- the right to enter and remain on the land and waters;
- the right to camp and erect shelters and other structures and to travel over and visit any part of the land and waters;
- the right to take fauna and flora from the land and waters for personal, domestic and non-commercial communal purposes;
- the right to take other natural resources of the land such as ochre, stones, soils, wood and resin for personal, domestic and non-commercial communal purposes;
- the right to take, use and enjoy the waters and flowing and subterranean waters for personal, domestic and non-commercial communal purposes;

- the right to engage in ritual and ceremony; and
- the right to have access to, care for, maintain and protect from physical harm, particular sites and areas of significance to the common law holders.

The native title rights and interests:

- include the right to take and use ochre but only to the extent that ochre is not a mineral pursuant to the *Mining Act 1904* (WA);
- do not include rights to minerals and petroleum as defined in legislation;
- are subject to, and exercisable in accordance with, the laws of the State of Western Australia and the Commonwealth, including the common law.

Relationship with other interests in the determination area

The relationship between the native title rights and interests and other interests in the determination area, including the Yungngora Association Inc, is set out in the determination.