

# Determination of native title —Miriuwung Gajerrong #4

## *Ward v Western Australia* [2006] FCA 1848

North J, 24 November 2006

### **Background**

A determination recognising the existence of native title was made by Justice North on 24 November 2006 in relation to the Miriuwung Gajerrong #4 claimant application (MG #4). The reasons for decision were not published until 15 February 2007.

The area covered by MG #4 was about 7 km<sup>2</sup> in the north-east Kimberley region of Western Australia. It was bounded on three sides by the area the subject of the first Miriuwung Gajerrong determination—see *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16; [2003] FCAFC 283, summarised in *Native Title Hot Spots Issue 8*.

In 1998, Justice Lee made findings in relation to an area that included that covered by MG #4. Lee J's judgment was subject to appeal and was eventually resolved by the first Miriuwung Gajerrong determination. However, the area the subject of MG#4 was not included in that determination and Lee J's findings in relation to it (which were not disturbed on appeal) supported the making of a determination recognising the existence of native title.

### **Power of the court**

North J noted that the court must be satisfied both that the consent orders sought were within the power of the court and that it was otherwise appropriate that the orders be made—see s. 87(1) of the *Native Title Act* 1993 (Cwlth).

In this case, the court was satisfied that both the applicant for MG #4 and the State of Western Australia had given careful consideration to the findings made by Lee J and had addressed the question as to whether or not they justified the proposed determination in this case. Therefore, his Honour was satisfied that the requirements of the NTA were met and that the orders should be made.

### **Determination area**

The determination area is made up of areas identified with the Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija languages or dialects.

Each of Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija is a group identified with those respective languages or dialects and the members of those groups are those Aboriginal persons who:

- are descended from a person who is also identified with such language or dialect and country or by adoption by such a person, in accordance with traditional laws and customs; and
- identify themselves as Miriuwung, Gajerrong, Doolboong, Wardenybeng or Gija (as the case may be), under traditional law and custom and are so identified by other members of the respective Miriuwung, Gajerrong, Doolboong, Wardenybeng or Gija groups.

### **Common law holders of native title**

The common law holders of native title in the determination area are:

- the members of the Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija groups in respect of Miriuwung, Gajerrong, Doolboong, Wardenybeng and Gija country respectively in accordance with traditional law and custom; and
- other Aboriginal persons who are acknowledged by the respective Miriuwung, Gajerrong, Doolboong, Wardenybeng or Gija groups as having rights in the determination area through descent, marriage, spiritual conception, birth or responsibility for sites of significance.

### **Rights and interests recognised**

Over part of the determination area, native title was determined to be an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and waters, subject to some qualifications, including in relation to rights to water.

Over the remainder of the determination area, non-exclusive rights were recognised, including:

- the right to hunt and fish, to gather and use the resources of the area (such as food and medicinal flora, timber, charcoal, ochre, stone and wax) and have access to, and use of, water;
- the right to live on the determination area (defined as entering and remaining on the land), to camp and erect structures for that purpose and to light camp fires;
- the right to engage in cultural activities on the land, conduct ceremonies, hold meetings, teach the physical and spiritual attributes of places and areas of importance, participate in cultural practices relating to birth and death;
- the right to have access to, maintain and protect places and areas of importance on or in the land and waters;
- the right to make decisions about the use and enjoyment of the land and waters by the native title holders; and
- the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.

### **Water**

Native title rights and interests in relation to the flowing, tidal and underground waters of the determination area are non-exclusive rights to:

- hunt, gather and fish on, in and from the flowing, tidal and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs but not for commercial purposes;

- take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs but not for commercial purposes.

### **Qualifications**

The native title rights and interests recognised are subject to, and exercisable in accordance with:

- the laws of the Commonwealth and the state, including the common law;
- the traditional laws acknowledged and traditional customs observed by the native title holders for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) but not for commercial purposes.

### **Minerals**

The native title does not include rights to minerals and petroleum as defined in state legislation. The right to take and use ochre to the extent that ochre is not a mineral pursuant to the *Mining Act 1904* (WA) was recognised.

### **Relationship with other rights and interests**

The other rights and interests noted include those held under various leases and mining and petroleum tenements, the public right to fish and to navigate in tidal waters and the existing rights of the public to access and enjoy waterways, beds and banks or foreshores of waterways, beaches and stock routes. The relationship between these interests and the native title rights and interests is set out in the determination.

### **Trustee prescribed body corporate**

Pursuant to ss. 55 and 56 of the NTA, the Miriuwung Gajerrong Number 4 (Native Title Prescribed Body Corporate) Aboriginal Corporation was determined to be the prescribed body corporate for the determination area and will hold the native title in trust for the common law holders.