Native title on pastoral lease in the Northern Territory– Newcastle Waters

King v Northern Territory [2007] FCA 944

Moore J, 26 June 2007

Issue
The issue in this case was the nature and extent of the native title rights and interests that could be recognised under the *Native Title Act 1993* (Cwlth) (NTA) where those rights and interests co-existed with the rights granted under a pastoral lease in the Northern Territory.

Background
The relevant parts of the six claimant applications before the court were comprised of:

- areas subject to the Newcastle Waters and Murranji stations (both of which were perpetual pastoral leases);
- stock routes within the boundaries of those stations
- two reserves within the town of Newcastle Waters, one for a garbage dump and the other for 'commonage'.

The native title claimants were the members of nine estate groups, the members of six neighbouring estate groups (the neighbouring estate groups) plus the spouses of members of those estate groups. Each estate group was associated with a definable tract of land. All the groups were Mudburra or Jingili or mixed Mudburra/Jingili groups.

The history of the proceedings is set out in the reasons for decision. In brief, there was an eight-day hearing that was substantially confined to the issues of the existence and extent of native title on the area before the court. Oral evidence was given on country by 13 Aboriginal witnesses and one of the pastoralists. Expert evidence was given an anthropologist called by the claim groups. The Northern Territory and the pastoralists provided further evidence and tendered various documents relevant to the issue of the extent of co-existence of native title with other rights and interests. Final submissions were then made—at [29] to [60].

There was a late submission made by Yarabala Pty Ltd (Yarabala), the lessee of the neighbouring Beetaloo station, which put in issue numerous matters not put in issue by any of the other respondents. The applicants objected to this on the basis that Yarabala did not participate in the trial or seek to make oral submissions at the hearing of final submissions. Yarabala then filed new submissions, characterised by the court as being:

> [T]hat if one or more of the rights and interests in the bundle comprising native title was partially inconsistent with the valid grant of inconsistent rights, then the remnant was a partially extinguished native title right and interest—at [43].

Justice Moore found that these submissions should be rejected:

> They involve an unsupportable amalgam of concepts concerning the content of traditional laws and customs and the nature of rights which might be capable of recognition under the NTA ... .The scope of these proceedings and the path they have taken flowed from procedural orders made on earlier occasions ... . It was too late for Yarabala to seek to alter the course of the proceedings—at [44].

Native title holders

His Honour found that the evidence supported a finding that the 15 estate groups constituted a single native title holding community or society. For the purposes of ss. 223 and 225 of the NTA, the claim was 'properly' described as 'communal'—at [8] to [18].

Moore J explained that the decision in this case was confined to areas of contention between the parties because it was 'mostly conceded that ... use of the land by the [native title holders] ... and their forebears was in accordance with traditional laws and customs'—at [2].

Native title rights and interests claimed

At the court's request, the native title claimants filed a final statement of issues in dispute, agreed to by the respondents, which Moore J acknowledged was valuable in identifying the issues, the submissions and evidence in relation to them—at [61].

Draft proposed orders and a draft determination identified the claimed native title rights and interests. Non-exclusive native title rights and interests to use and enjoy parts of the claim area were identified for the six estate group holders. A smaller set of those rights and interests were claimed for the neighbouring nine estate groups and the spouses of the estate group members—at [21] and [23].

The territory proposed that a clause be added to the draft determination (apparently accepted by the applicants in regard to 'non-exclusive' native title areas only) stating that that the native title rights and interests are subject to, and exercisable:

- only in accordance with the traditional laws and customs of the native title holders;
- for the personal or communal needs of the native title holders which are of a domestic or subsistence kind and not for any commercial or business purpose;
- in accordance with the valid laws of the Northern Territory of Australia and the Commonwealth—at [27].

Not all the claimed native rights and interests claimed were at issue. His Honour commended the parties on reaching agreement on the existence of various rights and on the description of many of those rights and interests—at [42].

Moore J then made findings on the contentious rights as follows. (The non-contentious rights are not discussed here).

Right to travel over, move about and to have access to non-exclusive areas
It was found that the evidence established the existence of a native title right to travel over, move about and have access to non-exclusive areas, such as the pastoral leases. The Northern Territory agreed with the applicants' formulation, on the understanding that it did not include a right to be permanently located at any particular place on the area subject to the pastoral leases. The pastoralists adopted these submissions but proposed the right be reformulated as: 'The right to travel over, move about and to have **limited** access to the non-exclusive areas'. Implicit in the pastoralists' submission supporting the inclusion of the qualifying word 'limited' was that:

> [A] pastoralist could insist on a person seeking to exercise a native title right to access, not exercising the right near cattle if accompanied by a dog or, if exercising the right by entering a paddock through a closed gate, could only exercise the right on the basis that the gate would be closed—at [67].

It was found that the qualification was unnecessary:

> Once it was established ... that the right of access existed it was to be expressed in terms fully expressing the right. The applicants accepted ... that in the event of a conflict ...the pastoralist's rights prevail—at [69].

Right to take and use the natural water resources on the non-exclusive areas
There was no dispute that the evidence established a native title right of water usage. The applicants preferred the terms 'natural water resources', the territory preferred 'natural free water' and the pastoralists preferred 'natural free standing and free flowing water resources.' The pastoralists wanted to distinguish between water that they captured and possessed (e.g. in a dam) from water in naturally occurring sources.

Moore J found both 'resources' and 'free' were unnecessary but that it was necessary to clarify any limitation as so the right recognised was:

> To take and use the natural water on the non exclusive areas and for the sake of clarity and the avoidance of doubt this right does not include the right to take or use water captured by the holders of ... [the perpetual pastoral leases]—at [78].

Right to live, to camp and for that purpose to erect shelters and other structures and to camp on the non-exclusive areas
The pastoralists and territory proposed that the right to camp should be expressly limited so that none of the estate group members could live permanently on the non-exclusive areas. Moore J found this qualification was unnecessary in relation to the neighbouring estate group members because the right to camp did not include living permanently.

In regard to the other 'primary' primary estate groups, his Honour noted what was said on a native title 'right to live' on land subject to a pastoral lease in *Northern*

Territory v Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr* , summarised in *Native Title Hot Spots* Issue 16). The leases in question there were 'historical', i.e. no longer in force when the determination of native title was made.

In that case at [131], the Full Court held that:

> Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease. It is not inevitable that such a conflict will arise at.

Moore J held that:

- the court was bound by *Alyawarr* to conclude the grant of the pastoral leases did not extinguish any native title right to live or camp on leasehold land;
- while the leaseholds in this case were current and not historical (as was the case in *Alyawarr*), this was not (as the territory had submitted) a relevant point of distinction—at [85].

There was unchallenged evidence from the claim group of both the existence of the right to live on their country and the exercise of that right. It was noted that, although the evidence did not establish a current widespread observance of the 'right to live' on the claim area by the exercise of building permanent dwellings, it did not compel the conclusion that they did not now possess that right in the statutory sense—at [86] to [92], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [84], Gleeson CJ, Gummow and Hayes JJ, summarised in *Native Title Hot Spots* Issue 3 .

Moore J held that:

> [T]he critical question concerns possession of the rights and interests and not their exercise ... .The relevant right should be viewed as having the same content as the right discussed ... in *Alyawarr*. That right does not necessarily involve permanent settlement at a particular place ... . Ultimately, [such] a right ... cannot be exercised in a way that derogates from the leaseholder's rights ... . If, for example, the assertion of the ... right involved the construction of a modern brick building on land used or proposed to be used for grazing or for some other purpose ... authorised by the ... lease, then its exercise would almost certainly derogate from the leaseholder's rights. In such circumstances the leaseholder could insist on the removal of the structure ... or prevent its construction—at [93].

Right to light fires on the non-exclusive areas for domestic purposes

Moore J held the unchallenged evidence was that the native title right was not only used for cooking and heating but also for burning bark for domestic purposes, boiling foliage for medicinal purposes and manufacturing *nulla nullas* . No right to set alight vegetation was claimed. However, Moore J accepted that 'domestic purposes' could be interpreted to include setting alight vegetation and held it was appropriate to add the words 'but not for the clearance of vegetation'—at [99].

If was also found that the powers under legislation such as the *Bushfires Act 1980* (NT) merely regulated the exercise of native title rights and interests—at [100].

Right to maintain and protect sites and places on the non-exclusive areas that are of significance under their traditional laws and customs

The respondents contended the right should be qualified to make it clear it did not give the native title holders a right to exclude persons. Moore J noted the findings in *Attorney-General (NT) v Ward* (2003) 134 FCR 16; [2003] FCAFC 283 (summarised in *Native Title Hot Spots* Issue 8) at [24] to [25] and *Alyawarr* at [136] to [140], going on to hold that:

> In view of what has now been said by the Full Court on two occasions, it is inappropriate that words of qualification or clarification be included when they are demonstrably unnecessary—at [105].

Right to share or exchange subsistence and other traditional resources obtained on or from the non exclusive areas

The pastoralists opposed this claimed right arguing it was not a right in relation to land and therefore not recognisable by the common law. Moore J held he was bound by Alyawarr to reject the submission that the claimed right was not in relation to land—at [106] to [107].

Extinguishment on garbage reserve

The area concerned, which was within the town site, was reserved in 1964 for the 'purposes of a garbage reserve'. In 1971, approval was given for it to be used as a depot for depositing garbage for the purposes of regulation 30 of the *Public Health (Night-Soil, Garbage, Cesspits, Wells and Water) Regulations 1960* (NT).

The approval for reserved land to be used as a garbage depot created both a right to deposit garbage and an obligation to do so. Moore J found that:

> [T]he creation of a right to deposit garbage coupled with an implied obligation on third parties to do so involved an assertion of a power to determine how the land should be used which was inconsistent with the continuation of what might be described as some of the core native title rights in this matter such as to travel over, move about and have access to the land, to hunt and fish, as well as to live on the land ... . The assertion of the power concerning use was inconsistent with the continuation of those rights and they were extinguished—at [115].

Extinguishment by improvements on pastoral leases

It was common ground that both historical and current pastoral leases were 'previous non-exclusive possession acts' that engaged Division 2B of Part 2 of NTA and the territory's equivalent provisions. The territory contended (and the applicants accepted) that all of the grants had the same effect on native title i.e. partial extinguishment—at [119] and [121] to [122].

The improvements in issue consisted of:

- a homestead, a house, sheds and buildings;

- bores, turkey nests, squatters' tanks constructed dams or other constructed stock watering points;
- the homestead airstrip and highway airstrip—at [130], [148] and [153].

The applicants conceded that native title had been wholly extinguished in parts of Newcastle Waters and Murranji stations by lawfully made improvements. They also conceded, 'in principle', that native title was also extinguished over the adjacent land necessary for enjoyment of those improvements. However, they submitted that:

- the respondents' case was in regard to potential conflict of activities, not rights, which was rejected in *Alyawarr* ; and
- any conflict would be provided for by s. 23G(1)(a) i.e. the rights granted under the lease prevailed over, but did not extinguish, native title rights and interests—at [147].

Moore J noted that:

- the pastoral leases in question extinguished various native title rights, including any native title right or interest amounting to the right to exclusive possession, occupation, use and enjoyment;
- it was not determined in *Ward* which other native title rights and interests would be inconsistent with rights conferred by the grant of a pastoral lease, although views were expressed about certain rights;
- the eight pastoral leases in question extinguished the native title right of permission to use or have access, independently of the *Validation (Native Title) Act* (NT) (Validation Act)—at [123], referring to *Ward* at [192], [194] and [425] and s. 9M(1)(a) of the Validation Act.

As in *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCFCA 110 (summarised in *Native Title Hot Spots* Issue 15), Moore J found that:

> [T]he native title rights and interests are extinguished over the land on which the improvements are **constructed** and any adjacent land the use of which is reasonably necessary for or incidental to the operation or enjoyment of the improvements—at [163], emphasis added.

As it is the exercise of the right to construct improvements that extinguishes native title, the determination will be expressed in terms of extinguishment by improvements made at the time of the determination—at [170].

His Honour found that:

- the construction of stockyards and trap yards extinguished the applicants' native title rights;
- where there was no evidence that other airstrips and roads, tracks, laneways and mustering routes involved anything being constructed (i.e. it was just an area used for that purpose), the area was capable of being use by both native title and non-native title interest holders—at [137] to [138], [142] to [146], [155] and [157] to [160].

Extinguishment by public works

The issues here were:

- whether the gas pipelines constructed and operated by NT Gas pursuant to pipeline licences under the *Energy Pipelines Act 1981* (NT) and registered energy supply easements were public works for the purposes of the 'previous exclusive possession act' provisions of the NTA and Pt 3 of the Validation Act;
- whether certain areas of land were adjacent to and necessary for, or incidental to, the construction, establishment or operation of a public work for the purposes of s. 251D of the NTA.

Evidence was given of the history of the pipelines in support of the submission the that these were public works.

Moore J accepted that the pipelines were fixtures. However, to come within the scope of the definition of a 'public work' in s, 253 of the NTA, it had to be established that they were constructed on behalf of a statutory authority—at [177] to [178].

NT Gas asserted it constructed the main pipeline on behalf of the Northern Territory Electricity Commission (NTEC), a statutory authority, the functions of which were later taken over by the Power and Water Corporation (PAWC). The applicants disputed that the pipelines were constructed 'on behalf of' a statutory authority.

Moore J held:

- the expression 'on behalf of', in the context of s. 253, is intended to comprehend the construction or establishment of a public work where its construction or establishment is done by the Crown or an emanation of the Crown indirectly rather than directly i.e. the work is constructed by a person or body for the Crown or an emanation of the Crown;
- as there was no evidence of whether the NTEC exercised any control over the construction of the pipelines or what the nature of the control was, the main pipeline was not a public work as defined;
- public works that were not in dispute all gave rise to the question as to areas 'adjacent' to them fell within the expanded definition in s. 251D NTA—at [183], [185] and [187].

Section 251D of the NTA provides:

> Land or waters on which a public work is constructed, established or situated In this Act, a reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work.

It was conceded by the applicants that Newcastle Waters road, which was not subject to a road reserve, was a public work which extinguished native title rights and interests. It was held that native title had been extinguished in the 50m corridor either side of the centreline of the road as the land being adjacent land 'necessary for or incidental to' the operation of the road—at [190] to [194] and [213].

His Honour accepted the interpretation of 'adjacent' as used in s. 251D given in *Neowarra v Western Australia* [2003] FCA 1402 (summarised in *Native Title Hot Spots* Issue 9), where Justice Sundberg said at [656]:

> The word "adjacent" does not just mean "next door to" or "very close to". Its meanings include "adjoining", "contiguous" and "bordering". The tracks here fit those descriptions. They adjoin, border and are contiguous to the site even though they only meet it over a small area, namely the width of the track.

Moore J went on to find that the meaning of 'adjacent' must be considered in the context of the extended definition which is to ensure that:

> [A]reas around and immediately proximate to public works were available (and unencumbered by native title rights and interests) to facilitate the initial construction or establishment and ongoing operation of the works—at [216].

Four gravel pits used to maintain the Stuart Highway, and their associated access tracks, were found to be 'adjacent' to the highway in the sense contemplated by s. 251D. However, long access tracks associated with seven gravel pits used for the Buchanan Highway were not 'adjacent' to the highway for the purposes of s. 251D. Nor were storage dams and roads serving the Buchanan Highway at a distance—at [195] to [201] and [216] to [218].

In relation to Bore RN23745, it was found that s. 251D was directed to the land necessary to the operation of the bore and not to the 100 metres radius submitted as necessary to avoid pollution of the water source. The evidence did not establish the four bores on the stock routes were constructed by the Crown or a statutory authority and so they were not public works—at [204] and [219] to [220].

Application of s. 47B

Under s. 47B(2), extinguishment of native title is to be disregarded. However, it does not apply if the relevant area is covered by, among other things:

> [A] ... proclamation, [or] dedication ... made or conferred by the Crown in any capacity ... under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose-see s. 47B(1)(b)(ii).

An issue arose whether or not s. 47B applied to areas of vacant Crown land that were subject to:

- a proclamation of a town (Newcastle Waters) under s. 111 of the *Crown Lands Ordinance 1931-1963* (NT) on 17 December 1963;
- a declaration of a heritage place within the town under s. 26(1)(a) of the *Heritage Conservation Act 1991* (NT) (HC Act) on 11 November 1993.

Moore J considered *Alyawarr* at [174] to [190], which related to an area subject to a proclamation under the same legislation as in this case, where it was found that:

> In summary, ... s 47B(1)(b)(ii) did not apply because, firstly, a proclamation for a broadly expressed purpose [i.e. a townsite] which encompassed a variety of potential but unascertained uses was not a proclamation for a particular purpose, and secondly, that the mere proclamation of a townsite, which might comprise largely private property

> holdings by lease or otherwise, did not constitute a public or particular purpose, within the meaning of s 47B(1)(b)(ii)—at [233].

The respondents sought to distinguish *Alyawarr* on the basis that no tenure had ever been granted in Hatches Creek, while Newcastle Waters had houses, roads and a school.

Moore J held there was no basis for distinguishing *Alyawarr* and confirmed the Full Court's test at [188] that:

> Whether the land "is to be used" for a prescribed purpose was to be gleaned from the proclamation and constating legislation. Those instruments provide an objective test for determining the question—at [238].

On the application of s. 47B, see also *Moses v Western Australia* [2007] FCAFC 78, summarised in *Native Title Hot Spots* Issue 25.

Declaration of a heritage place

On 11 November 1993, one of the lots in the town site was declared a heritage site under s. 26(1)(a) of the HC Act. The territory contended that the declaration was for a 'public purpose', namely environmental protection. Reference was made to the objects of the HC Act. The principal object of the HC Act is to provide a system for the identification, assessment, recording, conservation and protection of places and objects of prehistoric, protohistoric, historic, social, aesthetic or scientific value—at [244] to [245].

Moore J held (among other things) that:

- the declaration was comprehended within the s. 47B (1)(b)(ii) categories of 'reservation, proclamation, dedication, condition, permission or authority' and it was 'demonstrably' for a public purpose;
- the objects of the HC Act made it clear that a declaration was to protect and preserve a place of historic and social value;
- the question posed by s. 47B(1)(b)(ii) was whether the area 'is to be used' for a public purpose;
- the mere making of the declaration under s. 26(1) (a) did not give the land the character of land which 'is to be used' for public purposes;
- section 47B applied to the land the subject of the declaration—at [247] to [250].