Determination of native title – Victoria

Lovett on behalf of the Gunditjmara People v Victoria [2007] FCA 474

North J, 30 March 2007

Issue
The issue in this case was whether the Federal Court should make a determination of native title by consent in favour of the Gunditjmara People pursuant to s. 87(1) of the *Native Title Act 1993* (NTA).

Background
Justice North described the application area as being bounded on the west by the Glenelg River, to the north by the Wannon River and extending as far east as the Shaw River. Lady Julia Percy Island and coastal foreshore between the South Australian border and the township of Yambuk were also included. The application for a determination recognising native title covered Crown land and waters, including state forests, national parks, recreational reserves, river frontages and coastal foreshores.

The original claimant application was filed on behalf of the Gunditjmara People in August 1996. A second application was later made to cover areas excluded from the first. There were 170 respondents, including mining, farming, local government, fishing, beekeeping, and recreational interest holders.

In January 2007, orders were made dividing the application area into Part A and Part B, with the latter being an area over which the Framlingham Aboriginal Trust had responsibilities under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth). The determination made in this case does not include Part B.

Procedural history
In December 2002, North J referred the claim to the National Native Title Tribunal for mediation. The Gunditjmara People then supplied the state with anthropological assessments, genealogies and other evidence to support their claim to native title. In February 2005, after assessing the material, the state decided it was not persuaded to agree to a consent determination recognising native title.

As a result, his Honour held an early evidence hearing in March and April 2005, where evidence was given on country by several witnesses. At the conclusion of the hearing, his Honour noted that he was surprised that negotiations had not proceeded more quickly in view of the strength of the evidence that had been led, which included evidence of:

- the development of fishing technology, including the existence of fish traps and remains of house sites, suggesting a long standing connection with the country visited;
- the witnesses' personal heritage and that of the Gunditjmara People;
- Commonwealth and state government sources recognising the Aboriginal heritage of the area, including that part of the area was placed in the Commonwealth's National Heritage List 'less than 12 months before the early evidence hearing'—at [17] and [18].

North J concluded that:

> [I]n light of what I have seen, and in the view I have formed in a preliminary way of the strength of the applicant's case, I am not prepared to see this case meander on for very much longer—at [18].

Intensive negotiations followed the hearing but, despite substantial progress, no agreement had been reached by mid-2005 and so the court shifted the focus to preparation for trial, ordering a conference of experts (see O34A r3 of the Federal Court Rules) to be convened by two deputy registrars of the court. This led the claimants and the state to ask the deputy registrars to conduct a more general mediation—at [19] to [24].

In November 2005, the state offered to settle the claim and recognise the Gunditjmara People's native title. The offer was put to the Gunditjmara People and, by February 2006, resolution in principle was achieved. As a result, other respondents were brought into the mediation, eventually leading to an agreement to apply to the court for an order setting out a determination of native title.

Power to make the orders sought—s. 87

North J noted that s. 87 must be construed in the context of the NTA as being designed to encourage parties to take responsibility for resolving proceedings without the need for litigation: 'The power [to make the orders] must be exercised flexibly and with regard to the purpose for which the section is designed'—at [34] to [36].

His Honour said that:

- the primary considerations were whether there was an agreement and whether it was freely entered into on an informed basis;
- the court was not required to examine whether the agreement was grounded on a factual basis that would satisfy the court at a hearing of the application;
- the court must be satisfied that the state party has taken steps to satisfy itself that there is a credible basis for an application—at [38].

Although the court was not privy to what happened in mediation, North J was able to confirm the contention of the parties that the agreement reached between the parties was genuine because the court had exercised very close supervision and control over the process—at [42].

The combination of the documentary evidence, limited evidence from several senior Gunditjmara people and visits to important sites satisfied North J that it was appropriate to make the orders sought—at [41] to [45].

Further, it was found that s. 94A, which requires the order to set out the details of the matters mentioned in s. 225 of the NTA, was satisfied and so the terms of the order were within the power of the court—at [44] and [45].

Decision

His Honour decided that a determination of native title should be made in terms of the agreement, going on to note that:

> This day marks ... a special achievement for the Gunditjmara People. They have won another battle to cement their place in this country and in history. But their success is a shared victory. By doing justice to the Gunditjmara People, the State, the Commonwealth and the other respondents have taken a step to right past wrongs and lay a basis for reconciliation between indigenous and non-indigenous Australians—at [55]

Connection guidelines

NorthJ took the opportunity to criticise the 'overly demanding nature of the investigation conducted' by some states as reflected in 'complex connection guidelines':

> The Act does not intend to substitute a trial ... conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. The Act contemplates a more flexible process than is often undertaken in some cases. These comments relate to the requirements of s 87, and are not intended to reflect on the conduct of the State in this case—at [38].

Nature of the native title rights and interests

The determination area covers over 133,000 ha. In relation to it, the Gunditjmara People are recognised as having non-exclusive native title rights to:

- access or enter and remain on the lands and waters;
- camp on the lands and waters landward of the high water mark of the sea;
- use and enjoy the land and waters;
- take the resources of the land and waters;
- protect places and areas of importance.

The determination also specifies areas amounting to 7600ha over which native title has been completely extinguished.

Other interests

The determination:

- sets out the nature and extent of other interests in the area and the relation between the native title interests and those other interests;
- provides that where, and to the extent of, any inconsistency between the native title rights and interests and the other interests, native title rights and interests have no effect during the currency of the other interests.

Prescribed body corporate
Gunditj Mirring Traditional Owners Aboriginal Corporation was determined to hold the determined native title in trust for the native title holders pursuant to s. 56(2) of the NTA—at [46].