

Determination of native title — Githabul People

Close v Minister for Lands (NSW) [2007] FCA 1847

Branson J, 29 November 2007

Issue

The issue was whether the court should make orders pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (NTA) in terms of the consent orders sought. It was decided that it was appropriate to do so. The determination area covers over 1,120 sq km in northern New South Wales, just south of the Queensland border, and includes areas of state forest, national park and part of a travelling stock reserve. It is only the second determination recognising the existence of native title in NSW, with the first being more than a decade ago: see *Buck v New South Wales* [1997] FCA 1624.

Background

The application for a determination of native title was lodged with the National Native Title Tribunal (the Tribunal) in September 1995. The court referred the application, together with two overlapping claims, to the Tribunal for mediation. Subsequently, the overlapping claims were discontinued and the remaining application, which is dealt with in this case, was amended to (among other things) remove any claim to areas in Queensland.

An indigenous land use agreement was registered in August 2007, pursuant to which (among other things) the State of New South Wales:

- recognised that the Githabul People hold native title in accordance with the consent orders the court was invited to make in this case; and
- agreed to join with the applicant in applying for the consent orders.

Court's power to make the determination

After considering the terms of s. 87, Justice Branson concluded that the court was authorised to make the consent determination in the terms sought. Branson J also decided that it was appropriate to do so because:

- the applicant (representing the Githabul People) and the state together asked the court to make the determination;
- the NTA discloses an intention that mediation leading to agreement should be the primary means of resolving native title applications;
- the parties had been assisted during the mediation process by independent and competent legal representatives; and
- the court was satisfied by affidavit evidence that, as a consequence, the respective interests of the parties have been protected and that the state had given appropriate consideration to all relevant evidence and other material in the interests of the community generally — at [4] to [7].

Comments by the court

The court noted that its orders 'do not grant native title' but, rather, 'recognise that the Githabul People have long held rights and interests in the land under the traditional laws acknowledged and the traditional customs observed by them' — at [8].

Her Honour also commented that:

Today is ... a most significant day for the Githabul People and a significant day in the history of New South Wales Reaching an agreement of this kind can take a lot of hard work and it requires the development of mutual trust. I commend the parties on their achievement—at [9].

Determination — s. 225

The determination recognises the existence of native title in the determination area held by the Githabul People. The native title rights and interests recognised in the determination area are non-exclusive rights to:

- access and camp (defined to mean ‘casual camping’) on the area;
- fish, hunt and gather animal and plant resources for personal, domestic and non-commercial communal consumption;
- take and use water for personal, domestic and non-commercial communal purposes;
- access the area for spiritual purposes and access sites of spiritual significance in the area; and
- protect, by lawful means, places of importance to the Githabul People from physical harm.

These rights and interests are subject to, and exercisable in accordance with:

- the laws of the State of New South Wales and the Commonwealth;
- the traditional laws acknowledged and traditional customs observed by the Githabul People; and
- the terms of the Indigenous Land Use Agreement registered in August 2007.

The determination states that native title does not exist in minerals, petroleum or uranium as defined in the relevant NSW legislation.

The other interests recognised in the consent determination area include those of the Casino Rural Lands Protection Board and others holding interests granted by the state, members of the public arising under state or Commonwealth law or the common law, local government authorities and electricity supply authorities. The relationship between the native title rights and interests and the other interests is set out in the determination.

The Githabul Nation Aboriginal Corporation was determined to be the agent prescribed body corporate for the purposes of ss. 56 and 57.