Determination of native title - Thalanyji People

Hayes on behalf of the Thalanyji People v Western Australia [2008] FCA 1487

North J, 18 September 2008

Issue
The issue before the Federal Court was whether to make a determination of native title pursuant to ss. 87 and 94A of the *Native Title Act 1993* (Cwlth) in terms of the proposed consent orders. The court decided that it was appropriate to make the determination in the proposed terms.

Background
The Thalanyji application was filed in 1999. The determination made recognises the existence of native title over an area of about 11,000 square kilometres in the West Pilbara region of Western Australia. Most of the area is pastoral land in the Shire of Ashburton. Some of it is in and around the Onslow town site and port area. The parties agreed to the terms of the determination in relation to most of the area covered by the application and to the dismissal of the application in respect of the balance of the area.

Five body corporate pastoral indigenous land use agreements (ILUAs) dealing with the practical co-existence issues between native title holders and pastoralists are scheduled to be executed after the determination. The National Native Title Tribunal has facilitated negotiations between the parties since May 2007.

Court's power under s. 87
His Honour Justice North noted that the court's power to make the orders sought under s. 87(1)(c) 'has been exercised in a variety of circumstances', from cases where judgment has been reserved following the hearing of all the evidence to cases where no evidence has been given—at [15] to [16], referring respectively to *Nangkiriny v Western Australia* (2002) 117 FCR 6 (*Nangkiriny*) and *Ward v Western Australia* [2006] FCA 1848 (*Ward*).

North J noted that, while the circumstances of each case must be considered, 'some principles are generally applicable' to the exercise of the power under s. 87, including that:

- section 87 focuses on agreement-making, which 'reflects the importance placed' by the NTA 'on mediation as the primary means of resolving native title applications';
- the court's power under s. 87 'must be exercised flexibly and with regard to the purpose for which the section is designed';

- in examining the appropriateness of an agreement under s. 87, the 'primary consideration...is whether there is an agreement and whether it was freely entered into on an informed basis';
- the court will take note of the fact that the parties have had independent and competent legal representation;
- in particular, the court needs to be satisfied at least that the State, through competent legal representation, 'is satisfied as to the cogency of the evidence upon which the applicants rely';
- the court may ask to be shown the evidence upon which the parties have based their decision to agree but only for the purpose of satisfying itself that those parties, particularly the State on behalf of the community generally, 'are acting in good faith and rationally'—at [18] to [20], referring to *Lovett v Victoria, Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229, *Nangkiriny* and *Ward*.

Role of the State

North J expressed the view that:

> The way in which native title jurisprudence has developed provides a significant contextual factor which should influence a State respondent in specifying the extent to which applications should be investigated...In broad terms the learning relating to extinguishment has shown that successful applications will not interfere significantly with the rights and interests of respondent parties...
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> This circumstance moderates the degree of verification required by a State respondent acting in the interests of citizens on questions such as the constitution of the relevant society at settlement, and the requirements of continuity in the acknowledgement of traditional laws and the observation of traditional customs...Section 87 is designed to avoid that necessity and all the disadvantages which are involved in the conduct of litigation—at [22] to [23].

While commending the State of Western Australia's approach in this case, North J emphasised that:

> [T]he Court is not in a position to know whether or not the connection material required to be provided by the applicants was excessive. There have been instances in other cases where excessive demands for information seem to have been made...[T]hat approach is inconsistent with the concept of agreement making provided by the Act—at [30].

Appropriate to make orders?

In this case:

- preservation evidence given by five senior, mostly elderly, Thalanyji people in September 2004 provided a 'firm foundation' for findings, had they been necessary, that there 'was and is a rich and enduring history of Thalanyji life in the area' and provided a strong basis for negotiating an agreement;
- the process adopted by the state was comprehensive and the Executive Director of the Office of Native Title swore an affidavit in support of the application setting out the process undertaken;
- all of the parties were represented by independent, competent lawyers;

- the preservation evidence allowed the court to hear the voice of the Thalanyji people directly and that evidence 'went a considerable way to establishing' the requirements for a determination of native title—at [24] to [26] and [31].

Adaptation and change

One 'important issue' was the significance of change in the traditional laws acknowledged and traditional customs observed by applicants. 'The history of the impact of white settlement on indigenous peoples means that change is an almost invariable feature of these cases'—at [28].

His Honour noted that:

- the state's acceptance in this case that any changes or adaptation to the Thalanyji laws and customs concerning land holding were acceptable demonstrated 'a liberal, flexible, fair and just application of the [relevant] principles';
- this approach was 'particularly appropriate' to the process envisaged by s. 87—at [30].

Decision

For the reasons summarised above, the court was satisfied it was appropriate to make the orders sought:

> For the Australian people generally today marks another step towards land justice for indigenous people. Each of these steps brings us nearer to a proper moral foundation of the nation. The orders reflecting the recognition of the ancient rights of the Thalanyji people will now be made in the terms agreed—at [45].

The court congratulated the parties for 'their efforts over a long period in arriving at this agreement' and noted that:

- no doubt, 'the work of...Tribunal...members Dan O'Dea and John Catlin who oversaw the mediation', was 'central to the positive outcome';
- Mr Bower, counsel for the applicants, described 'the great assistance given by the Tribunal to resolving the key problems of overlaps with other application areas'—at [32].

Prescribed body corporate

The Buurabalayji Thalanyji Aboriginal Corporation was determined to hold the determined native title in trust for the native title holders pursuant to section 56(2) of the NTA—at [34] to [42].

Determination

It was determined that:

- native title existed in relation to about 11,000 square kilometres;
- native title did not exist in relation to about 123 square kilometres; and
- the remainder of the application, covering about 7,310 square kilometres, should be dismissed.

The common law holders of native title are the Thalanyji people, being people who:

- are descended from certain named ancestors or adopted by their biological descendants in accordance with traditional law and custom;
- identify themselves as Thalanyji under traditional law and custom and are so identified by other native title holders; and
- have a connection with the land and waters in the determination area in accordance with Thalanyji traditional law and custom.

The native title rights and interests recognised over the part of the part of determination area where native title exists are non-exclusive rights to:

- enter and remain, camp, erect temporary shelters, travel over and visit the area;
- hunt, fish, gather and use the traditional resources of the area, with 'resources' defined to mean 'flora, fauna, and other natural resources such as charcoal, stone, soil, wood and resin but does not include P. Maxima [a species of pearl oyster]';
- take and use water, except any water captured by the pastoral lessees;
- engage in ritual and ceremony; and
- care for, maintain and protect from physical harm particular sites, areas and ceremonial or other sacred objects of significance.

Native title was determined not to exist in relation to a number of areas, including areas subject to various leases, the Onslow Port Area, areas subject to pastoral leases that had been improved in accordance with the terms of the lease, certain roads and public works, all freehold lands and areas in relation to the Dampier to Bunbury natural gas pipeline.

Other rights and interests in recognised in the determination area include those associated with:

- reserve lands;
- pastoral leases;
- various mining tenements and petroleum interests;
- public rights, including but not limited to public rights to fish and navigate
- access by an employee, agent or instrumentality of the state, Commonwealth or local government authority, as required in the performance of their duty, where such access would be permitted to private land.

Liberty to apply – pastoral improvements

The parties were granted liberty to apply:

- to establish the precise location of the boundaries of land on which the pastoral lease improvements had been constructed and any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements; and
- to establish whether any of the pastoral lease improvements had been constructed unlawfully.