Determination of native title

Adnyamathanha No 1 Native Title Claim Group v South Australia (No 2) [2009] FCA 359

Mansfield J, 30 March 2009,

Issue
The issue before the court was whether to make three consent determinations in the terms proposed: one determination under s. 87 of the *Native Title Act 1993* (Cth) (the NT A) fully determining the Adnyamathanha No 2 application and two part determinations under s. 87A relating to the Adnyamathanha No 1 application.

Background
Two separate applications for a determination of native title under s. 61 were made on behalf of the Adnyamathanha people over areas in and around the Flinders Ranges National Park. The claims were described in *Adnyamathanha No 1 Native Title Claim v South Australia* [2009] FCA 358 (summarised in *Native Title Hot Spots* Issue 30) at [2], where Justice Mansfield ruled that the court could make the three consent determinations as requested by the parties.

Determination 1
This determination covers the whole of the land within the outer boundary of the Angepena pastoral lease, subject to the areas over which native title had been extinguished by specified acts— at [3] and see schedule 2 of the determination.

Determination 2
This determination relates to a much larger part of Adnyamathanha No 1. Schedule 2, Part 1 of the determination outlines the areas where native title was not determined to exist either because it had been extinguished or because the parties required further time to assess whether s. 47B of the NTA applied. The determination area includes Lake Frome Regional Reserve, proclaimed under the *National Parks* (SA) (NPW Act). Although native title rights and interests are declared to exist over the area, they are subject to the non-extinguishment principle found in s. 238 of the NTA.

The State of South Australia asserted that the vesting in the Crown of parts of the determination area meant that all native title rights and interests in relation to those areas were suppressed at the date of vesting and remained suppressed for as long as the area remains vested under the NPW Act or other relevant state legislation. The applicants asserted that some native title rights were not suppressed by the vesting but acknowledged that the non-extinguishment principle applies. The orders reflect the compromise reached in relation to this issue—see recitals D to G to the determination.

The parties agreed that s. 47A applied to certain areas (listed in Schedule 4), including land held by the Aboriginal Lands Trust and the Mount Serle Pastoral Lease—at [5].

Determination 3

This determination relates to the whole of Adnyamathanha No 2 and is comprised the whole of the Flinders Ranges National Park. It includes areas of extinguishment, areas of non-exclusive native title and areas where native title rights and interests continued to exist but were subject to the non-extinguishment principle by reason of the NPW Act.

Pastoralist objected but did not join

There was one outstanding matter. On 27 March 2009, a pastoralist whose lease appeared to be within the larger determination area of Adnyamathanha No 1 advised the court that he did not consent to the proposed determination. At no stage did that pastoralist apply to become a party to the proceedings. His Honour decided to proceed with the determinations for two reasons. First, the notification procedures prescribed in the NTA are 'widespread' and there 'for an obvious and very good reason':

> A person so notified [as the pastoralist was] may elect not to become a party to the proceeding. But such a person cannot then whimsically or capriciously choose to assert their claimed interests at any time and without regard to the structure provided by the ... [NTA]—at [14], referring to s. 87A(1)(c)(v).

Second, the pastoralist had been aware of Adnyamathanha No 1 for many months but gave no explanation as to why he had not raised his concerns earlier. The court found that:

> It is entirely inconsistent with the orderly management of any proceeding ... that a person who has been aware of the process for some time should, by an informal side wind, be in a position to frustrate the outcome of that process—at [15].

Evidence before the court

The evidence before the court in support of the determination included:

- a report by Bob Ellis, an anthropologist who had worked with the Adnyamathanha people for 30 years (the Ellis Report), a work he published called Adnyamathanha Genealogy and the results of interviews Mr Ellis conducted with six claimants on topics identified by the state as requiring clarification;
- the transcript of preservation of evidence hearings where two senior Adnyamathanha men gave evidence over three days;
- thirteen witness statements from Adnyamathanha claimants addressing outstanding issues following the anthropological report and the preservation of evidence hearings; and
- extensive written submissions on behalf of the state and the claimants filed by the state—at [19] to [24].

Native title claim group and relevant society

The court was satisfied that the level of detail provided by the applicants to identify the native title claim group and its society satisfied the requirements of the NTA, including s. 223 of the NTA—at [26].

The term 'Adnyamathanha' now refers to a much larger group than the term originally described and there was some difference of views regarding the composition of the group. However:

> Despite this, the interviews and witness statements substantiate contemporary custom of claimants to identify as Adnyamathanha whilst acknowledging they are also, for example, Kuyani, Pirlatapa, Wailpi or Yadliyawara. ... The Ellis Report shows that the contemporary Adnyamathanha society is comprised of those traditionally closely related groups, and that the ethnographic records suggest those groups have a long history of inter-marriage, co-residence and joint ceremonial activities allowing them to be characterised as an appropriate traditional society for native title purposes—at [25].

The evidence also traced the earliest recorded ancestors for the contemporary Adnyamathanha society back to the mid-19th century and showed they were living in the area and observing traditional laws and customs at that time. Therefore, it was: '[E]asy to infer that ancestors of those persons occupied the proposed determination area at sovereignty and that the current claim group [is] directly linked to them'—at [27].

Substantially uninterrupted observance of traditional law and custom

According to Mansfield J, the evidence showed a substantially uninterrupted observance of traditional laws and customs since sovereignty, albeit not necessarily homogenous in the level of its observation and notwithstanding varying levels of knowledge and enforcement among the Adnyamathanha people—at [28].

The court was of the view that the evidence provided adequately addressed requirements of ss. 223 and 225. Mansfield J was also satisfied that:

- the parties likely to be affected by the proposed consent determination had sufficient access to independent legal representation; and
- the state had given appropriate consideration to the evidence and to the interests of the community generally and, in particular, had assessed that material as part of the process outlined in *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*—at [35] to [36].

The proposed determinations were 'carefully worded' and:

- defined the native title holders in a satisfactory way;
- were specific about the native title rights and interests that could be recognised by the laws of Australia;
- spelled out the nature and significance of other interests; and
- adequately addressed extinguishment issues—at [37].

The court was satisfied, therefore, that it was within its power and appropriate in the circumstances to give effect to the proposed determinations without a full hearing of the native title applications—at [39].

Native title holders

In all three determinations, the native title holders are those 'living' Aboriginal people who:

- are the descendants (whether biologically or by adoption) of certain apical ancestors; and
- identify as Adnyamathanha; and
- are recognised by other native title holders under the relevant Adnyamathanha traditional laws and customs as having maintained an affiliation with, and continuing to hold native title rights and interests in, the determination area.

Native title rights and interests

Identical non-exclusive rights and interests were determined in the relevant areas of all three determinations as being rights to:

- access and move about the area
- live, camp and erect shelters, cook and light fires for cooking and camping;
- hunt, fish, gather and use natural resources such as food, water plants, timber, resin, ochre and soil;
- distribute, trade or exchange the natural resources;
- conduct ceremonies and hold meetings, engage and participate in cultural activities including those relating to births and deaths, carry out and maintain burials of deceased native title holders and of their ancestors;
- teach the physical and spiritual attributes of locations and sites, visit, maintain and preserve sites and places of cultural or spiritual significance;
- speak for, and make decisions about, the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders;
- be accompanied by those people who, though not native title holders, are spouses of native title holders or are required by traditional law and custom for the performance of ceremonies or cultural activities or have rights in relation to the determination area according to the traditional laws and customs acknowledged by the native title holders; or
- people invited by native title holders to assist in, observe, or record traditional activities.

The native title rights and interests confer a right to exclusive possession in parts of determination area 2 where s. 47A applies. Otherwise, they do not confer exclusive possession. They are for personal, domestic and non-commercial communal use only and are subject to, and exercisable in accordance with, the traditional laws and customs of the native title holders and the valid laws of the state and Commonwealth, including the common law. Native title rights and interests do not exist in:

- minerals as defined in section 6 of the *Mining Act 1971* (SA) or petroleum;

- a naturally occurring underground accumulation of a regulated substance, other than petroleum; or
- a natural reservoir.

In relation to this, the determination states that, to avoid doubt:
- a geological structure on or at the earth's surface or a natural cavity which can be accessed or entered by a person through a natural opening in the earth's surface is not a natural reservoir;
- 'geothermal energy', petroleum, 'regulated substance' and 'natural reservoir' have the same meaning as in section 4 of the *Petroleum Act 2000* (SA);
- the absence of any reference to a source of geothermal energy is not, of itself, to be taken as an indication of the existence, or otherwise, of native title rights and interests in a source of geothermal energy.

Liberty to apply re public works, improvements extinguishment and water
The parties have liberty to apply in relation to several matters, including:
- the location of any public works and adjacent are for the purposes of s. 251D and to establish the effect of works created after 23 December 1996;
- whether any 'improvements' constructed pursuant to a pastoral lease have been undertaken, thereby extinguishing native title;
- whether any proposed act relating to underground water, as defined in the H*Natural Resources Management Act 2004* (SA), may affect native title rights and interests in natural water.

Prescribed body corporate
The native title is not to be held in trust. Within six months (or later if the court allows), a representative of the native title holders must nominate a prescribed body corporate. When that occurs there will, without the need for a further order, be a determination that there is a prescribed body corporate for the purposes of s. 57(2)and perform the functions referred to in s. 57(3) of the NTA.

Comment on exclusions
Schedule 2 of the determination sets out areas that are excluded from the determination area by reference various categories of acts, e.g. subject to Schedule 4, areas where a category A past act has been done are excluded. Further, save for those areas listed in Schedule 4, any areas where native title is otherwise extinguished are excluded. While it is understandable that the parties wished to resolve this matter in an expedited fashion, the use of formulaic exclusions does not finally resolve where native title exists and where it does not. It will not be possible to map the actual determination area. The prescribed body corporate for the area where native title was found to exist will not have certainty in relation to identification of the area for which it is determined. The state will not have certainty in relation to the areas where the relevant future act regime applies and where it does not. While this issue may not be significant where the tenure history is simple, it is likely to be more problematic in relation to those areas where it is not.