

Determination of native title

Ampetyane v Northern Territory [2009] FCA 834

Reeves J, 7 August 2009

Issue

The issue in this case was whether the Federal Court should make a determination of native title pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA) in terms of proposed consent orders. The court decided to do so. The non-exclusive native title 'right to be accompanied' by non-native title holders recognised in this determination is noteworthy.

Background

This determination is in respect of approximately 117,600 hectares of land in the Northern Territory comprising the eastern half of the Pine Hill pastoral lease. The claimant application it relates to was made in July 1999. In 2004, the applicant provided the Northern Territory government with an anthropological report that was assessed by Emeritus Professor Basil Sansom, as was a supplementary anthropological report provided in October 2006. In February 2007, the territory indicated it was prepared to enter into an indigenous land use agreement and join in proposing a determination be made by the court to settle the proceedings. In March 2009, the territory Cabinet instructed the solicitor for the territory to agree to the proposed consent determination of native title. The applicant and the territory filed a statement of agreed facts, a joint tenure report and joint submissions and asked the court to make an order in the terms of a minute of proposed consent determination.

Requirements of s. 87 satisfied

Justice Reeves was satisfied that the requirements of ss. 87(1)(a) and (b) and 94A of the NTA had been met and that the court had power to make the consent determination sought. His Honour went on to consider whether it was appropriate to make the order 'reflecting the agreement reached by the parties' as contemplated by s. 87—at [10] to [17].

The court was satisfied that:

- the parties had had the benefit of independent, competent legal representation,
- the terms of the minute were unambiguous and clear;
- the agreement had been produced as a result of negotiation;
- the territory government had taken a real and significant interest in the proceedings;
- the joint submissions of the applicant and territory indicated that the parties were in agreement that there was adequate evidence to support the consent determination, with the term 'adequate evidence' taken to reflect the fact that there is a 'credible or

arguable basis for the application’ — at [18] to [19], referring to *Lovett v Victoria* [2007] FCA 474 at [37] to [38].

Decision

Therefore, his Honour found that it was appropriate to make the order sought by the parties. The court congratulated the parties on reaching agreement, noting that the order of the court did not grant something new to the Ilkewartn and Ywel peoples. It merely recognised what they had long held — at [20] and [22] to [24].

Determination

The persons holding the common or group rights comprising the native title in relation to the determination area are the Aboriginal persons who are:

- members of the Ilkewartn and Ywel Anmatyerr landholding groups by virtue of descent (including adoption) through father’s father, father’s mother, mother’s father and mother’s mother (with some further refinement as to what that means in any particular case);
- recognised and accepted as members of one or both of the Ilkewartn and Ywel Anmatyerr landholding groups by senior members of those landholding groups on the basis of one or more defined non-descent based connections including spiritual identification with, and responsibility for, the area, conception and/or birthplace affiliation with the area, long term residence of the area, close kinship ties (including intermarriage), shared sub/section and/or moiety affiliation and authority and responsibility for shared Dreaming tracks and sacred sites connected with the area.

The Ilkewartn Ywel Aboriginal Corporation is the prescribed body corporate pursuant to s. 57(2) of the NTA.

The native title rights and interests recognised include the right to:

- access, travel over and live on that area, including (for the latter purpose) to camp, erect shelters and other structures;
- hunt, gather and fish on that area, take and use the natural resources of that area, access, take and use natural water on or in that area and to light fires for domestic purposes but not for the clearance of vegetation;
- access, maintain and protect sites and places on or in the determination area that are important under traditional laws and customs;
- conduct and participate in certain cultural activities;
- make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves as being governed by the traditional laws and customs acknowledged by the native title holders;
- share or exchange natural resources obtained on, or from, the determination area (including traditional items made from the natural resources).

Also recognised is a non-exclusive right to be accompanied on the land and waters by persons who, although not native title holders:

- 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
- are required by the native title holders to assist in, observe or record traditional activities on the determination area.

There are no native title rights and interests in:

- minerals as defined in s. 2 of the *Minerals (Acquisition) Act* (NT);
- petroleum as defined in s. 5 of the *Petroleum Act* (NT); or
- prescribed substances as defined in s. 3 of the *Atomic Energy (Control of Materials) Act 1946* (Cwlth) and/or s. 5(1) of the *Atomic Energy Act 1953* (Cwlth).

The non-native title rights and interests recognised in the determination include:

- the territory's interests as the grantee of an energy supply easement under the *Crown Lands Act* and the interests of NT Gas Pty Ltd as the grantee of rights pursuant to that easement and as holder of a pipeline licence under the *Energy Pipelines Act* (NT);
- the rights of Aboriginal persons (whether native title holders or not) pursuant to ss. 38(2) to 38(6) of the *Pastoral Land Act 1992* (NT) and by virtue of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).