

Determination of native title

Hunter v Western Australia [2009] FCA 654

North J, 11 June 2009

Issue

The issue in this case was whether the Federal Court should make a determination of native title pursuant to s. 87A of the *Native Title Act 1993* (Cwlth) (NTA) in terms of proposed consent orders. The court decided to do so. The rights recognised in relation to pearl oyster shell and the native title 'right to be accompanied' are noteworthy.

Background

The Nyangumarta People, who are descendants of twelve sets of apical ancestors, made two claimant applications that covered 39,931 sq km in northwest Western Australia, including the coast along Eighty Mile Beach and extending east into the Great Sandy Desert. Most of the area is unallocated Crown land. Part is subject to pastoral leases. The respondents were the State of Western Australia, the Western Australian Fishing Industry Council (Inc) (WAFIC), the Commonwealth, the pastoral lessees, Telstra Corporation Limited, certain persons on behalf of the Njamal People and the Yamatji Marlpa Barna Baba Maaja Corporation. In February 2007, the applications were referred to the Tribunal for mediation pursuant to s. 86B of the NTA. With the Tribunal's assistance, the parties reached agreement as to the terms of a determination of native title and orders in respect of part of the area covered by the first application and all of the area covered by the second in February 2009. The balance of the area covered by the first application is now overlapped by a claimant application made on behalf of the Karajarri People and will be finalised at a later date. Section s. 87A was relied upon in relation to the first application and s. 87 in relation to the second. However, as Justice North noted, in this case the 'substance' was the same—at [11].

Should the orders be made?

North J was satisfied that the court had power to make determinations in the terms sought by the parties. The question was whether it was 'appropriate' to do, referring to ss. 87 and 87A. According to the court:

- this requirement 'must be construed in the context' of the NTA 'as a whole and in conformity with' its purpose;
- given 'mediation and ultimate agreement' are the primary means for resolving claims under the NTA, the court's 'main concern' was 'whether there has been a genuine agreement which was made freely and on an informed basis';
- whether the parties had independent and competent legal representation and whether the state parties had given appropriate consideration to the applicant's claims was relevant;

- the emphasis on mediation towards agreement is designed to minimise cost and delay’ —at [16] to [17].

According to his Honour:

In most circumstances the fact of agreement will be sufficient evidence upon which the Court may act... . It will not ordinarily be necessary for the Court to be provided with evidence of the primary facts substantiating native title—at [17].

In this case, all parties were legally represented. As to the state’s consideration of the applications, Gary Hamley (from the state’s Office of Native Title or ONT) gave evidence by affidavit that (among other things) agreement was reached via the process set out in ONT’s connection guidelines. The connection report, which was also provided to the court subject to some deletions to maintain confidentiality, was 240 pages in length. North J thought it was ‘clearly appropriate to make the orders and the determination sought by the parties’ because the evidence demonstrated both that the state had given ‘detailed and comprehensive’ consideration to the claim and that the applicant had provided ‘a strong basis’ to support the claim—at [26].

Evidence required for consent determination

In the light of a ‘recurring concern’ about the ‘undue burden’ being placed on claimants, the court wrote to the parties. The state responded with ‘a helpful and constructive submission which explained ... that the detail of the report in this case was provided by the applicants as a matter of ... choice’. However, North J hoped the state would ‘give careful consideration’ in future ‘to easing the present unnecessary burden either placed on or assumed by native title applicants’ —at [24] to [25].

Prescribed body corporate

The court was satisfied it was appropriate to determine that the Nyangumarta Warrarn Aboriginal Corporation be the trustee prescribed body corporate for the common law holders of native title pursuant to s. 55 of the NTA because:

- the evidence showed it was registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cwth) and so it was a prescribed body corporate for the purposes of ss. 56(2) and 56(3) and pursuant to reg 4(1) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwth);
- as required by s. 56(3), the corporation’s ‘rule book’ satisfied the court that it holds the relevant native title rights and interests in accordance with the regulations;
- the Nyangumarta People filed a written nomination as required by s. 56(2)(a)(i) and the corporation filed a written consent to the nomination in accordance with s. 56(2)(a)(ii)—at [27] to [30].

Decision

For the reasons summarised above, his Honour decided it was appropriate to make the orders sought—at [33].

Determination

The Nyangumarta People were determined to be the native title holders in relation to the determination area. However, as Nyangumarta Warrarn Aboriginal Corporation was determined to be the prescribed body corporate to hold the native title in trust, and it is now registered on the National Native Title Register, pursuant to s. 224 the corporation is the 'native title holder'.

Subject to some qualifications, the nature and extent of the rights and interests in relation to areas where native title had not been extinguished, or where extinguishment must be disregarded, are:

- an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and waters of that part to the exclusion of all others (except in relation to flowing and underground water); and
- the right to use and enjoy the flowing and underground waters, including the right to hunt, fish and gather for personal, domestic or non-commercial communal needs.

Subject to the same qualifications, over the remainder of the determination area (except inter-tidal areas, see below), the native title rights and interests confer specified non-exclusive rights on the native title holders (including the right to conduct activities necessary to give effect to those rights) such as:

- the right to access and move freely within that area;
- the right to live, 'being [the right to] to enter and remain on the land, to camp and erect shelters and other structures for that purpose';
- the right to do specified activities, including the right to be accompanied by people who, although not native title holders, are spouses, parents and children of native title holders or are required by traditional law and customs for the performance of ceremonies or cultural activities or who have rights in relation to any part of the area according to the traditional laws and customs acknowledged by the native title holders.

In inter-tidal areas, the rights recognised are rights to:

- access, remain within, and move freely through and within those areas;
- do specified activities, e.g. fish and hunt, take flora, fauna and traditional resources and share and exchange natural resources for personal, domestic and non-commercial communal needs, engage in cultural activities and protect places and sites of importance from physical harm.

The nature and extent of the native title rights and interests in relation to pearl oyster (*P maxima*) are specifically addressed and are:

- the right to take live adult *P maxima* for the purposes of sustenance and using its shell for traditional ceremonial activities (including the ceremonial exchange of goods);

- the right to take shell of dead *P maxima* for the purpose of using it for traditional ceremonial activities (including the ceremonial exchange of goods).

However, this does not include taking *P maxima* when using breathing apparatus (other than a snorkel or its equivalent) or using it for sale, barter or exchange other than exchanges made in accordance with traditional ceremonies.

The native title rights and interests include rights to ochre only to the extent that it is not a mineral pursuant to the *Mining Act 1904* (WA) and do not include other minerals and petroleum as defined in the *Mining Act 1904* (WA), the *Mining Act 1978* (WA), the *Petroleum Act 1936* (WA) and the *Petroleum and Geothermal Energy Resources Act 1967* (WA). The native title rights and interests are subject to, and exercisable in accordance with, the laws of the state and the Commonwealth and the traditional laws acknowledged and traditional customs observed by the native title holders. Other interests in relation to determination area are recognised, such as those held under the pastoral leases and by fishing, pearling and mining parties.