Determination of native title

Kowanyama People v Queensland [2009] FCA 1192

Greenwood J, 22 October 2009

Issue

The issue in this case was whether the Federal Court should make a determination of native title in terms of proposed consent orders pursuant to s. 87A of the *Native Title Act 1993* (Cwlth) (the NTA). The court decided to do so.

Background

The proposed determination covered part of the area subject to the Kowanyama People's claimant application, which was made over part of the Western Cape in Queensland in 1997. The proposed determination area would include part of the area subject to the Kowanyama Deed of Grant in Trust (DOGIT) and a coastal strip. Over the relevant part of the DOGIT, it was proposed that 'exclusive' native title rights be recognised. Non-exclusive rights were proposed in relation to the coastal strip. In the east, that strip was bounded by a line that generally followed the high water mark. However, on the west, it was defined by a line in the Gulf of Carpentaria which approximated the water depth in which a grown Kowanyama person could wade at low tide, i.e. approximately 1.5 metres.

The respondents included the State of Queensland, the Commonwealth of Australia, three shire councils, Queensland Seafood Industry Association, energy supply companies and those holding pastoral leases. The legal representative for the Kowanyama People, the Cape York Land Council (CYLC), was also the Aboriginal/Torres Strait Islander representative body for the area concerned. The applicant, the state and the Commonwealth agreed to prioritise mediation of the application in several parts. Agreement was reached in relation to Part A, which represents about 13 per cent of the application area. The agreement was signed by those three parties and the other parties who hold an interest in Part A. CYLC, on behalf of the applicant, filed the agreement, with draft orders attached, pursuant to s. 87A(2) in October 2009.

Requirements of s. 87A

Among other things, s. 87A provides that if agreement is reached on a proposed determination of native title in relation to a part of the area covered by a native title determination application, the court may make an order in, or consistent with, the terms of the proposed determination without holding a hearing if it is satisfied that:

- an order in, or consistent with, the terms of the proposed determination would be within power; and

- it would be appropriate to do so.

Within power

Justice Greenwood was satisfied the orders were within power because the four 'factors' prescribed by s. 87A(1) were satisfied:

- there is a proceeding for a determination of native title on foot;
- an agreement has been reached on a proposed determination in relation to a part of the area subject to that application after the s. 66 notice period expired;
- the agreement was made by all of the requisite parties, in this case being the applicant, the representative body, the Commonwealth, the state, local government bodies and 'each person who holds an interest in relation to' the proposed determination area who 'is a party to the proceedings at the time the agreement is made'; and
- the terms of the proposed determination were in writing and signed by, or on behalf of, those parties—at [15].

Although it is not mentioned, presumably the court registrar gave notice to the other parties that the proposed determination had been filed, as required under s. 87A(3), but no objections were received—see s. 87A(8).

Appropriate

His Honour then identified the following considerations to be taken into account when deciding whether it would be appropriate to make the orders sought:

- the NTA 'recognises and encourages the resolution of applications' without the need for a hearing, including via the making of a determination in relation to only a part of the area covered by an application;
- the court 'will ... place emphasis upon' whether the agreement 'is freely made on an informed basis by all parties' and whether those parties are 'represented by experienced independent lawyers';
- in the case of a state party 'representing the public interest', the court will look to the consideration given to the issues raised by the proposed determination;
- it is recognised that the state, via its archival materials and long engagement with Aboriginal communities, is 'likely to be familiar with the historical arrangements within those communities';
- the court 'ought to have regard to sufficient material' to demonstrate the agreement and the proposed orders are "rooted in reality"' and, in that sense, should be satisfied that the proposed orders are 'prima facie appropriate'—at [20] to [24], referring to Chief Justice French in 'Native Title – A Constitutional Shift?' (University of Melbourne Law School, JD Lecture Series, 2009) and *Wik and Wik Way Native Title Claim Group v Queensland* [2009] FCA 789, summarised in *Native Title Hot Spots* Issue 31.

In this case, the state had been given 'extensive material' between May 1996 and August 2009, some of which had been considered by other respondents with an interest in the proposed determination area. The court was 'entirely satisfied' that the parties to the Part A agreement have been 'represented by lawyers experienced in these issues and that the parties have come to a fully informed agreement'. In addition, the state 'had a long engagement with the Aboriginal people' of the relevant area. It was also noted that, Dr John Taylor, the anthropologist who assisted the applicant and provided a report filed in the court, had worked with members of the native title claim group 'and their predecessors' since 1971. Based on the material before it, the court was 'entirely satisfied' that it was appropriate to make the orders sought by the parties—at [25] to [26], [29] and [45] to [46].

A brief outline of the evidence

Greenwood J went on to say 'a number of things' about the elements of the proposed determination 'on behalf the Kownayama People' including that:

- archaeological evidence demonstrated over 37,000 years of Aboriginal occupation of Cape York Peninsula and first European contact with Aboriginal people in the application area was recorded in the 1623;
- permanent European settlement for pastoral purposed began in the 1880s but, in 1897, steps were taken to set aside 'significant' areas stretching from below the Mitchell River to the tip of Cape York Peninsula as Aboriginal reserves;
- at the turn of the 20th century, an Anglican mission dedicated to the 'pastoral and physical care' of Aboriginal people was set up between the Mitchell and Nassau Rivers;
- this was abandoned in 1915 but a new site was chosen, called Kowanyama, an English rendering of the Yir Yoront *kawn yama* ('many waters');
- in the 1950s, the church began to 'critically examine its role in the advancement of the Aboriginal communities' of Cape York Peninsula and in 1967, 'transitioned the administrative control' of the Kowanyama mission to the state;
- Aboriginal people had 'consistently asserted access to their homelands for traditional owners which, on the anthropological evidence, has not been denied by station managers';
- in 1987, the vesting of title to the Mitchell River Aboriginal Reserve (aka Kowanyama) in the Kowanyama Aboriginal Council under the DOGIT 'initiated a period of increasing community autonomy and control over lands and resources'—at [29] to [34].

After outlining this history of the area and the anthropological studies done during more recent times, Greenwood J stated that:

> The anthropological material demonstrates that the laws and traditions of the Kowanyama People flow from a totemic ideology constituting a normative system that is widely shared and has been reproduced over generations. ... . The interests of the claimants ... are acquired through *descent* which is why identifying family lines (patrilines) associated with parcels of

> land (estates) in the claim area has been important to identifying the scope of the claimant group—at [37], emphasis in original.

Prescribed body corporate

For the purposes of s. 59, the court was satisfied that the requirements of r. 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwlth) were met i.e. that the Abn Elgoring Ambung Aboriginal Corporation was a prescribed body corporate. It was noted (among other things) that:

- it was a registered Aboriginal and Torres Strait Islander corporation and one of its objectives was that it act as an 'agent' prescribed body corporate pursuant to a native title determination made under s. 55 of the NTA;
- claim group members met in Kowanyama and nominated the corporation to act as a prescribed body corporate;
- at its first annual general meeting, the corporation consented to being nominated to do so and two directors subsequently signed a notice of consent on behalf of the corporation to so act;
- the only people eligible to hold membership are people of at least 15 years of age who are also native title holders as defined in the proposed determination—at [48] to [52].

Interestingly, the parties sought, and the court made, a specific order giving 'liberty to apply in relation to matters arising out' of the determination of the PBC (see order 14).

Decision

Greenwood J was satisfied the making of the proposed determination was within the court's power and it was appropriate to make them—at [53].

Determination

The Kowanyama People, as described in the determination, are recognised as the native title holders. Their native title is not to be held in trust. Abn Elgoring Ambung Aboriginal Corporation is the prescribed body corporate (PBC) for the purposes of s. 57(2). It will perform the functions mentioned in s. 57(3). Subject to some qualifications, the nature and extent of the native title rights and interests in relation to part of the determination area (other than in relation to water) are the rights to possession, occupation, use and enjoyment of that area to the exclusion of all others. In relation to the remainder of the determination area (other than in relation to water), they are non-exclusive rights to:

- be present on the area, including by accessing, traversing and camping (but with 'camping' not to include either permanent residence or the construction of permanent structures or fixtures);
- light fires on the area for cultural, spiritual or domestic purposes (including cooking) but not for the purpose of hunting or clearing vegetation;

- take, use, share and exchange 'traditional natural resources' (as defined in the determination) for non-commercial, cultural, spiritual, personal, domestic or communal purposes; and
- maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from harm.

Subject to some qualifications, the nature and extent of the native title rights and interests in relation to water are the non-exclusive rights to hunt and fish in or on, and gather from, the water and to take and use the water but only for non-commercial cultural, spiritual, personal, domestic or communal purposes.

There are no native title rights in, or in relation to, minerals as defined in the *Mineral Resources Act 1989* (Qld) and petroleum as defined in the *Petroleum and Gas (Production and Safety) Act 2004* (Qld). 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. The nature and extent of non-native rights and interests in relation to the determination area (or respective parts thereof) are also set out in the determination, as is the relationship between the two sets of rights (native title and non-native title), as required by s. 225.