

Determination of native title

Kuuku Ya'u People v Queensland [2009] FCA 679

Greenwood J, 25 June 2009

Issue

The issue was whether the Federal Court should make a determination of native title recognising the Kuuku Ya'u People as native title holders pursuant to s. 87 of the *Native Title Act 1993* (Cwlth) (the NTA). The court decided to do so. The determination became effective if, and when, the details of three Indigenous Land Use Agreements were entered in the Registrar of Indigenous Land Use Agreements. The last of those agreements was registered on 17 November 2009.

Background

The Kuuku Ya'u People's claimant application, which was made in 1995, covered land, waters, reefs and islands in Cape York, Queensland. Two further applications were made in April 1997 and May 1998. All three were consolidated in 1999. The respondent parties were the Commonwealth, the State of Queensland, the Australian Maritime Safety Authority, Cook Shire Council, Lockhart River Aboriginal Shire Council and two fishing licence holders. The parties reached an agreement to resolve the proceedings after mediation by the National Native Title Tribunal, supervised by the court. Three Indigenous Land Use Agreements (ILUAs) were made as part of the agreement to resolve the applications.

Orders within power and appropriate

Subsections 87(1) and (2) provide that the court may make orders in terms of an agreement reached by the parties only if the orders are within power and it appears 'appropriate' to do so. His Honour observed that this was (among other things) because:

An order ... made under the Native Title Act, recognising the traditional laws and customs of Aboriginal People, is an order made in the exercise of the judicial power of the Commonwealth in accordance with the Australian Constitution and ... reflects ... an independent determination of national inclusion that binds not only the parties to the claim but is good against the whole world—at [3].

As was noted, pursuant to s. 94A, the proposed order must set out details of the matters mentioned in s. 225. For the reasons set out below, his Honour was satisfied that the orders the parties sought in this case were within the court's power and that it was appropriate to make those orders—at [10] to [11] and [22].

Evidence required for consent determination

Four 'important things' to keep in mind when determining whether it appears appropriate to make the orders sought by the parties were noted:

- the NTA encourages resolution of claims by 'mediation ...and ... agreement without the need for a hearing' and so the court 'will not lightly second-guess' the agreement by requiring 'formal proof';
- the court will place emphasis on whether the agreement 'is genuine and freely made on an informed basis' by all parties, represented by experienced independent lawyers and in the case of a state party, whether appropriate consideration has been given to the claim;
- a state government is 'likely to be familiar with' the matters that 'might usefully inform aspects of a proposed agreement as to native title rights subsisting in Aboriginal people'; and
- in light of these three considerations, it was not necessary for the applicant to file 'a substantial body of evidence' as to the merits of the claim 'as though findings of fact were required to be made' — at [12] to [16].

Greenwood J acknowledged it may be necessary to provide some evidence showing the agreement is 'rooted in reality' and was of the view that a 'focused synopsis of the primary material' was 'helpful' in this context — at [15].

In this case, the affidavits of two anthropologists, David Thompson and Athol Chase, along with their report called 'Overview of Connection Materials' (the report) were before the court. Among other things, the report addressed evidence of contact, continuity of occupation and the content of normative laws and customs of the Kuuku Ya'u People and also drew on material gathered for land claims under the *Aboriginal Land Act 1991* (Qld). Three further 'extensive' reports were provided to the state and the Commonwealth governments between March 1999 and February 2006.

The court was satisfied the material before it demonstrated that:

- the Kuuku Ya'u People were descended from a society of Aboriginal people who were in occupation of the land and waters of the determination area at sovereignty and who formed a society united by their acknowledgement and observance of a normative body of traditional laws, customs and beliefs;
- through their continued acknowledgement and observance of these normative laws and customs, the Kuuku Ya'u People had, since sovereignty, maintained a connection to the determination area;
- the content of the native title rights and interests which derived from the practice of traditional laws and customs had been identified — at [21].

According to his Honour, the agreement provided for consent orders that were 'entirely consistent with the anthropological material'. His Honour was also satisfied that:

- the relevant materials were made available to the Commonwealth and the state;
- the state had given appropriate consideration to the claim; and

- the parties had reached an informed agreement with the assistance of ‘independent experienced legal advisers’ — at [20] and [21].

Determination

The Kuuku Ya’u People (defined as the descendents of named individuals and persons adopted by them according to Kuuku Ya’u traditional law and customs) are the native title holders. (In some cases, the determination specifies that the native title holders are the descendants resulting from a particular union of those named individuals.) In some parts of the determination area (and other than in relation to water), the native title consists of the right to possession, occupation, use and enjoyment to the exclusion of all others. Over the remainder, the non-exclusive native title rights (other than in relation to water) consist of the right to:

- be present on (including by accessing, traversing and camping on) the determination area, with ‘camping’ defined not exclude permanent residence or the construction of permanent structures or fixtures;
- take, use, share and exchange traditional natural resources from the determination area for non-commercial cultural, spiritual, personal, domestic or communal purposes;
- 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;
- light camp fires on the determination area for cultural, spiritual or domestic purposes (including cooking) but not for the purpose of hunting or clearing vegetation.

Native title in relation to water comprises the non-exclusive right to:

- hunt and fish in or on, and gather from, the water for non-commercial cultural, spiritual, personal, domestic or communal purposes;
- take and use the water for non-commercial cultural, spiritual, personal, domestic or communal purposes.

There are no native title rights in, or in relation to, minerals as defined by the *Mineral Resources Act 1989* (Qld) and petroleum as defined by the *Petroleum Act 1923* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld). The native title rights and interests are subject to and exercisable in accordance with both the laws of the state and the Commonwealth and the traditional laws acknowledged and traditional customs observed by the native title holders. Other interests recognised in the determination include the rights and interests of:

- the parties under three ILUAs;
- the state and public under the *Nature Conservation Act 1992* (Qld) in relation to the use and management of certain national parks and the state and others under the *Nature Conservation Act 1992* (Qld), the *Fisheries Act 1994* (Qld), the *Marine Parks Act 2004* (Qld) and the *Coastal Protection and Management Act 1995* (Qld);

- the Great Barrier Reef Marine Park Authority, the Australian Maritime Safety Authority and those with grants made under the *Fisheries Management Act 1991* (Cwlth).

Prescribed body corporate

Northern Kuuku Ya'u Kanthanampu Aboriginal Corporation was a 'prescribed body corporate' for the purposes of ss. 56(2) and (3) of the NTA and Reg 4(1) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwlth). Reg 4(2) was satisfied. Therefore, when the determination of native title became effective on 17 November 2009, it became the prescribed body corporate. Following the entry of its details in the National Native Title Register, it became a registered native title body corporate that holds the Kuuku Ya'u People's native title on trust—see [23] to [27].