Determination of native title

Thudgari People v Western Australia [2009] FCA 1334

Barker J, 18 November 2009

Issue

The issue here 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.

Background

In 1997, a native title determination application was made on behalf of the Thudgari People. It was amended in 1999 to, among other things, further particularise the native title claim group. The court proceeded on the basis of an agreement that this made no change to the actual composition of the native title claim group. The application covered around 11,000 sq kms situated at the northern edge of the Gascoyne region of Western Australia, between the Ashburton and Gascoyne Rivers. It encompassed all or part of 16 pastoral stations and the Barlee Nature Reserve. The Dampier to Bunbury Natural Gas Pipeline and De Gray-Mullewa and De Gray-Mingenew Stock Routes traversed the application area and there was a very small portion of unallocated Crown land on the southern boundary.

In September 2000, the application was referred to the Tribunal for mediation pursuant to s. 86B but mediation did not formally commence until early 2007. With the Tribunal's assistance, the parties reached agreement as to the terms of a determination and they sought court orders in those terms in relation to part of the application area (the determination area). The parties consented to the application being discontinued over the remainder of the area it covered, with no order as to costs.

Description of native title holders – application v determination

During the course of negotiations, the applicant and the state agreed that the description of the native title claim group in the application was problematic. Subsequently, they settled on what was apparently a more accurate description for the purposes of the draft consent determination. The application was not further amended to reflect this. However, Justice Barker was satisfied that, provided the application itself was valid, the court 'may proceed to make a determination in such form as it sees fit based on the evidence'—at [12], referring to *Patch v Western Australia* [2008] FCA 944 (summarised in *Native Title Hot Spots* Issue 28) at [18].

While it appears to be of no relevance here, there may be cases where the description of the native title claim group in the application would need to be amended if reliance was

placed upon ss. 47A(3) or 47B(3). The chapeau to each of ss. 47A(3) and 47B(3) states that: 'If the determination on the application is that the *native title claim group* [i.e. as described in the application] holds the native title rights and interests claimed', then the effect of determination recognising native title is as prescribed in ss. 47A(3) and 47B(3) e.g. the non-extinguishment principle applies to the creation of certain prior interests. It may also be necessary in certain circumstances because of the findings in *Commonwealth v Clifton* (2007) 164 FCR 355; [2007] FCAFC 190, summarised in *Native Title Hot Spots* Issue 27.

Requirements of s. 87

Section 87 provides that the court may make a determination of native title by consent without holding a hearing where:

- the period specified in the notice given under s 66 has ended;
- the terms of an agreement, in writing signed by or on behalf of the parties, are filed with the court;
- the court is satisfied that an order in, or consistent with, those terms would be within its power; and
- it appears appropriate to the court to make the orders sought.

The first two conditions were met. The court accepted an order in or consistent with the proposed determination was within power.

Appropriate to make the determination?

On this issue, his Honour noted (among other things) that:

- the discretion conferred by s. 87(1) must be 'exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose' of the NTA, which included that native title 'disputes' be resolved by mediation and agreement;
- the court was not required to undertake an inquiry into the merits of the claim and provisions such as s. 87 'recognise that the court adopts a different approach' to deciding whether it was appropriate to make a determination by consent than it 'brings to the task of deciding if native title should be recognised after a contested hearing';
- although there needs to be some 'foundation upon which' the court's jurisdiction is exercised, where the parties reach agreement on the terms of a determination, particular regard would be had to whether the agreement was 'freely entered into on an informed basis';
- if so, the fact that an agreement had been reached weighed 'in favour of the making of the determination of native title' and, in some cases, may even be 'a sufficient basis' for the making of consent orders;
- however, the requirement was usually met where the state, via 'competent legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely'; and

- generally, this would not involve the court 'making findings on the evidence' the state considered, at least for the purpose of being satisfied the state was 'acting in good faith and rationally'—at [22] to [25], referring to the relevant cases.

In this case, the state played an active role in the negotiations and, in doing so, had acted on behalf of the 'State community generally'. It also had regard to the requirements of the NTA and had 'plainly ... conducted a thorough assessment process'. In doing so, it had 'satisfied itself that the determination is justified in all the circumstances'. According to the evidence before the court, among other things, the state was 'confident that the connection material indicates that the Thudgari claimants acknowledge and observe a shared set of normative rules for determining group membership' and it had considered the system of law and custom under which native title is held. The other respondents had considered the state's assessment—see [26] to [44].

Comment on extinguishment issues

As was noted at [45], it is 'important and relevant' that questions concerning extinguishment of native title were addressed 'so that the rights of respondents are also properly indicated by the consent determination'. The proposed consent determination did not contain deal with any extinguishment brought about by the construction of improvements on the areas subject to the various pastoral leases. This was relevant because of *De Rose v South Australia (No 2)* (2005) 145 FCR 290; [2005] FCFCA 110 (summarised in *Native Title Hot Spots* Issue 15).

However, Barker J took the view this issue was resolved because there was to be an Indigenous Land Use Agreement (ILUA) made 'upon or shortly after' the determination of native title and 'the vesting of native title' in the Wyamba Aboriginal Corporation. According to the court, the determination 'together with' the proposed ILUA 'deals with the topic of extinguishment of native title in such a manner' that the court could be satisfied that it was 'relevantly "appropriate"... to make the determination on the terms agreed to by the parties'—at [47] to [47], referring to *Hunter v Western Australia* [2009] FCA 654, summarised in *Native Title Hot Spots* Issue 31.

With respect, it is not clear from the judgment how an ILUA could deal with the issue of extinguishment of native title by the improvements that had already been constructed on pastoral leases as at the date of the determination. The determination by the court is that there has been no such extinguishment. A different approach was taken in *Adnyamathanha No 1 Native Title Claim Group v South Australia (No 2)* [2009] FCA 359. In that case, in addition to determining that improvements identified in order 12 had extinguished native title, the possibility of lawful post-determination extinguishment by the construction of new improvements was acknowledged in order 13 and, in order 24, the parties were granted liberty to apply in relation to that issue.

Decision

On the basis of the informed consent of the parties and the materials before the court, his Honour thought it appropriate to make an order under s. 87(2) consistent with the agreement reached by the parties as to the terms of a determination without holding a hearing. Any part of the application outside of the external boundaries of the determination area was to be discontinued and no determination was made in relation to that area.

Determination

It was determined that native title does not exist over some parts of the determination area. Over the remainder, the Thudgari People, as defined in the determination, are recognised as the native title holders. The native title rights and interests recognised in relation to that part of the determination area are comprised of non-exclusive rights to:

- access, enter, live and remain on the area;
- camp, erect shelters and light fires for 'cooking, heating and lighting purposes';
- take flora, fauna, fish and other natural resources;
- take and use water, other than water captured or controlled by pastoral lessees;
- engage in ritual and ceremony, care for, maintain and protect sites and areas of significance;
- be accompanied by people who, although not native title holders, are spouses, parents or descendants of the native title holders.

The Wyamba Aboriginal Corporation was determined to be the prescribed body corporate to hold native title in trust pursuant to s. 56(2) of the NTA. It is now registered on the National Native Title Register and so, pursuant to s. 224, is the 'native title holder' in relation to the relevant area.

The native title rights and interests do not include rights to minerals, petroleum or geothermal energy resources, as defined in specified state legislation, and are subject to, and exercisable in accordance with, Commonwealth and state law. As required under s. 225 and 94A, the other interests held in relation to the area where native title exists (such as those held under a pastoral lease) are set out in the determination, as is the relationship between those interests and the native title rights and interests.