

Determination of native title

Wik and Wik Way Native Title Claim Group v Queensland [2009] FCA 789

Greenwood J, 29 July 2009

Issue

The issue in this case was whether the Federal Court should make a determination of native title in the terms proposed by the parties pursuant to s. 87 of the *Native Title Act* 1993 (Cwlth) (NTA). The court decided to do so. The determination took effect on the registration of an Indigenous Land Use Agreement (ILUA) on 5 October 2009.

Background

This is the fourth consent determination of native title in favour of the Wik and Wik Way Peoples. (For the other determinations, see *Wik Peoples v Queensland* [2000] FCA 1443 and *Wik Peoples v Queensland* [2004] FCA 1306.) It covers an area on the western side of Cape York Peninsula landward of the high water mark bounded by the Embley and Edward Rivers and the upper reaches of the watercourses that drain into the Gulf of Carpentaria. The related claimant application was filed on 14 September 2001. The respondent parties were the State of Queensland, Ports Corporation of Queensland, Cook Shire Council, Albatross Hire Pty Ltd, 15 commercial fishing licence holders represented by the Queensland Seafood Industry Association and Rio Tinto. The application was amended in May 2009 to remove the sea component and this proposed draft consent agreement filed on 6 July 2009.

Requirements of s. 87 satisfied

Justice Greenwood was of the view that:

- the NTA recognises and encourages resolution by mediation, negotiation and agreement without the need for a hearing, assessment of evidence and fact-finding by the court;
- the court need not consider ‘the body of material that would be available’ in the course of a contested hearing but it ‘ought to have regard to sufficient material which is capable of demonstrating that the agreement and the proposed orders are “rooted in reality”’ – at [16], referring to Chief Justice French in ‘Native Title – A Constitutional Shift?’ (University of Melbourne Law School, JD Lecture Series, 2009).

His Honour concluded that:

- all parties were represented by experienced independent lawyers and the agreement was freely made;
- negotiations had been taking place since 1996 and the state had given appropriate consideration to the issues raised;

- there had been a long history of engagement with the Wik and Wik Way Peoples, with anthropological reports and affidavits being submitted in 1997, 2000, 2001 and 2004;
- the applicant had retained the experienced linguist and anthropologist, Professor Peter Sutton, who had worked with the claim group and their predecessors since 1976—at [18] to [23].

The court was satisfied that:

- there was extensive evidence of inhabitation of the area by Aboriginal people from at least 1606;
- the Wik language had evolved over at least 300 years in the area;
- the anthropological material demonstrated that the Wik and Wik Way Peoples were descended from a society of Aboriginal people who were in occupation of the 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 Wik and Wik Way Peoples had, since sovereignty, maintained a connection with the determination area;
- the content of those native title rights and interests which derive from the practice of traditional laws and customs had been established;
- the proposed consent orders were consistent with the anthropological material and addressed the elements of s. 225 of the NTA and
- it was within the court's power and appropriate to make a determination of native title in terms of the proposed consent orders—at [24] to [29].

Decision

As all of the requirements for doing so were found to have been met, the court made the orders and the determination of native title sought by the parties, noting that this was 'a proud day for the Wik and Wik Way Peoples'—at [43] and [44].

Determination

Native title is held by the Wik and Wik Way Peoples in accordance with the traditional laws acknowledged and traditional customs observed by them as common law holders. Native title is not to be held in trust. The Ngan Aak-Kunch Aboriginal Corporation, the prescribed body corporate in relation to the three previous Wik and Wik Way determinations, was determined to be the prescribed body corporate in relation to this determination—see s. 59A(2).

The following non-exclusive native title rights and interests were recognised in relation to the determination area (other than in relation to water):

- live on, camp and erect shelters and other structures;
- access, be present on, move about in and on and use area;

- take and use the natural resources of area for the purpose of satisfying the personal, domestic or non-commercial communal needs;
- maintain and protect from harm by lawful means sites and places of significance;
- conduct social, religious, cultural, spiritual and ceremonial activities;
- hunt and gather in, on and from area for the purpose of satisfying personal, domestic or non-commercial communal needs; and
- inherit and succeed to the native title rights and interests.

The nature and extent of native title rights and interests in relation to water, including tidal waters, are non-exclusive rights to hunt and fish in or on, gather and to take water, use and enjoy water for the purpose of satisfying the personal, domestic or non-commercial communal needs. The nature and extent of non-native title 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.