

# Determination of native title

## *Wilson v Northern Territory* [2009] FCA 800

Reeves J, 31 July 2009.

### Issue

The issue in this case was whether the Federal Court should make a determination of native title pursuant to ss. 13 and 87 of the *Native Title Act 1993* (Cwlth) (the NTA) in terms of proposed consent orders. The court decided to do so. The recognition of differentiated rights and interests as between the native title holders is noteworthy.

### Background

The claimant application relevant to this case covered part of the town of Elliott in the Northern Territory. It was filed on 6 July 2001. A written agreement relating to the whole of the area was filed on 15 July 2009. The proposed determination area was part of Mudburra-Jingili country lying to the south and east of the area where native title was recognised in *King v Northern Territory* [2007] FCA 1498, summarised in *Native Title Hot Spots Issue 26*. The claimants in these proceedings were the same estate groups as those recognised as native title holders in that determination.

### Requirements of s. 87

Justice Reeves noted (among other things) that:

- the discretion conferred by s. 87(1) must be exercised judicially;
- the court must have regard to the objects and purposes of the NTA, one of the most important of which is the resolution of disputes by negotiation and agreement;
- section 87 should be regarded as the opportunity for the court to recognise the parties' success in reaching a negotiated outcome and facilitate the agreement reached by making an appropriate determination in accordance with its terms—at [12] to [14].

*Lovett v Victoria* [2007] FCA 474 at [37] (summarised in *Native Title Hots Spots Issue 25*) and *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229 at [29] were cited with approval.

### Decision

The court was satisfied both that the orders sought were within power and that it was appropriate to make them because:

- the court had jurisdiction to make the orders pursuant to s. 81 of the NTA and there was nothing to suggest that power had been exceeded;
- the parties had independent competent legal representation and the agreement had been reached by negotiation

- the agreement was in writing, signed by or on behalf of the parties and filed with the court;
- material, including two anthropological reports, supported the conclusion that the claimants had native title in the area concerned;
- the interests of the community generally had been properly considered by the territory government; and
- the proposed orders were clear and set out the matters in s. 225, thereby satisfying the requirements of s. 94A of the NTA—at [4], [7] to [10] and [17] to [19].

### **Determination**

Native title was determined to exist over part of the determination area (see Schedule C). Over the remainder, it was determined that native title did not exist (see Schedule D). The determination area comprises part of Mudburra-Jingili country. The native title holders are the members of the Elliott (Gurungu/Kulumintini) estate group, together with certain other Aboriginal people who, in accordance with traditional law and custom, have rights and interests in respect of the determination area, 'subject to the rights and interests of' the Elliott (Gurungu/Kulumintini) estate group members. Those 'other Aboriginal people' are the members of the 14 neighbouring Mudburra or Jingili estates specified in clause 6(a) of the determination and the spouses of the Elliott (Gurungu/Kulumintini) estate group. Each estate group includes persons who are members of that group by reason of:

- patrilineal descent;
- his or her mother, father's mother or mother's mother being or having been a member of the group by reason of patrilineal descent;
- being adopted or incorporated into these descent relationships.

In relation to that part of the area identified in Schedule C to which s. 47B of the NTA applies, and subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, native title is comprised of the right to possession, occupation, use and enjoyment to the exclusion of all others. In relation to the remainder of the area identified in Schedule C (the non-exclusive areas), the native title rights and interests of the Elliott (Gurungu/Kulumintini) estate group members are specified non-exclusive rights to use and enjoy the area, which include the right to do the following in relation to that area:

- travel over, move about and have access;
- hunt and fish, gather and use natural resources such as food, medicinal plants, wild tobacco, timber, stone and resin, take and to use natural water;
- live and camp (and, for the purposes of camping, erect shelters and other structures);
- light fires for domestic purposes but not to clear vegetation;
- conduct and participate in cultural activities and practices;
- maintain and protect sites and places of significance under traditional laws and customs;
- share or exchange subsistence and other traditional resources;

- be accompanied by persons who, although not native title holders, are people :
  - required by traditional law and custom for the performance of ceremonies or cultural activities on the areas;
  - who have rights in relation to the areas according to the traditional laws and customs acknowledged by the estate group members;
  - required by the estate group members to assist in, observe, or record traditional activities; and
- conduct activities necessary to give effect to these rights—at [9].

These rights and interests are subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders.

In relation to the non-exclusive areas, the other Aboriginal people who are native title holders (as defined in clause 6) have the following non-exclusive rights to use and enjoy those areas:

- travel over, to move about and to have access;
- hunt and fish on the land and waters;
- gather and to use the natural resources such as food, medicinal plants, wild tobacco, timber, stone and resin;
- take and to use the natural water;
- camp;
- light fires for domestic purposes but not the clearance of vegetation; and
- conduct activities necessary to give effect to these rights—at [10].

These rights are subject to both the rights and interests of the Elliott (Gurungu/Kulumintini) estate group members and the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders.

All of the native title rights and interests are subject to, and exercisable in accordance with, valid laws of the territory and the Commonwealth. In the non-exclusive areas, those rights and interests are 'for the personal or communal needs of the native title holders which are of a domestic or subsistence nature and not for any commercial or business purpose'. Other interests recognised in the determination area included those of Elliott District Community Government Council, NT Gas Pty Ltd and Aboriginal persons under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).

A prescribed body corporate for the purposes of ss. 57(2) and 57(3) of the NTA is to be nominated within 12 months. The parties have liberty to apply to establish:

- the precise location and boundaries of public works and adjacent areas; and
- to establish whether any of the improvements noted in the determination were constructed unlawfully.