Appeal against non-claimant determination dismissed

Worimi v Worimi Local Aboriginal Land Council (2010) 181 FCR 320; [2010] FCAFC 3

Moore, Mansfield & Perram JJ, 2 February 2010

Issue

The issue for the Full Court of the Federal Court was whether to overturn a determination by the primary judge that native title did not exist over an area of land held in fee simple by the Worimi Local Aboriginal Land Council (the land council) under s. 36(9) of the *Aboriginal Land Rights Act* 1993 (NSW)(the ALRA). The appeal was dismissed.

Background

The relevant area was transferred to the land council under s. 36(9) of the ALRA on 16 March 1998. This transfer was subject to any native title rights and interests existing in relation to the lands immediately before the transfer. On 11 October 2004, the land council resolved that the land was not of cultural significance to Aborigines of the area and should be disposed of. On 14 September 2007, the land council entered into a conditional contract to sell the land. A non-claimant application was filed by the land council seeking a determination that native title did not exist over the relevant area. Worimi (aka Gary Dates) sought to be, and was, made a respondent to the non-claimant application. He also filed two claimant applications outside the notification period but both were dismissed for failure to comply with s. 61. The court made a determination that native title did not exist over the area in *Worimi Local Aboriginal Land Council v Minister for Land for New South Wales (No 2)* (2008) 181 FCR 300; [2008] FCA 1929, summarised in *Native Title Hot Spots* Issue 30.

Grounds of appeal

Worimi appealed from that judgment on the grounds that the primary judge erred in concluding that:

- there was evidence upon which an inference was capable of being drawn that there was no native title in relation to the land; and
- the land council bore no onus to demonstrate the nature and content of the pre-sovereignty native title rights and interests in relation to the land; and
- where the formal requirements for a non-claimant application for a determination of the absence of native title had been met, then in the absence of any evidence as to the existence of native title in relation to the land, the land council would be entitled to the determination it sought.

Evidence to draw a conclusion that native title did not exist

Justices Moore, Mansfield and Perram held that, in reaching her conclusion, the primary judge did not divert from her (correct) view that the onus of proof of the

negative proposition – that no native title rights and interests existed in relation to the land – remained throughout on the land council. The primary judge considered the evidence provided by 11 persons (three of whom were cross examined), including eight who identified as Worimi people. This evidence was to the effect that the land was not considered to be subject to native title rights and interests. The evidence of Worimi was not of such weight as to cast doubt on the overall assessment of the evidence to that effect. Their Honours held that:

- there was sufficient evidence to support the conclusion of the primary judge and that the primary judge had not fallen into error in reaching it;
- upon the evidence, and having regard to the assessment of significance of Worimi's evidence, the primary judge's conclusion was the correct one—at [74], [76] to [77] and [81].

Onus to demonstrate the nature and content of pre-sovereignty rights and interests

The court held that the approach contended for by Worimi would involve a 'roving inquiry' into whether any person, and if so who, held any, and if so what, native title rights and interests in the land and waters at settlement, and chronologically to the time of the application. The court considered that such an approach was expressly rejected by the Full Court in *Jango v Northern Territory* (2007) 159 FCR 531. Further:

- it was not necessary routinely for a non-claimant applicant such as the land council to prove that native title rights and interests existed at settlement, the community or group that possessed and enjoyed them, and their detailed content, and then to prove the circumstance or circumstances that led to each of those rights ceasing to be possessed or enjoyed by any contemporary Aboriginal persons or groups;
- this might be necessary in certain circumstances but that would depend on the nature of the evidence which is sought to be adduced by the non-claimant applicant and by any respondents—at [56] and [58].

The court held that no circumstances were identified by counsel for Worimi to show that the approach of the primary judge in this matter was incorrect—at [60].

Entitlement to determination sought if formal requirements are met

The court held that this ground of appeal was misconceived. The primary judge expressly held that, while compliance with the formal requirements for a non-claimant application may entitle the land council to the determination sought in the absence of evidence as to the existence of native title in relation to the land, it did not necessarily follow automatically that, 'without more', the court will make a declaration that native title does not exist—at [83].

The court considered that, in any event, the primary judge did not simply make the declaration sought on the basis that the formal requirements for a non-claimant application were met and that there was no evidence as to the existence of native title in relation to the land. Her Honour embarked upon a detailed consideration of the evidence, from both the land council and from Worimi, and concluded that the evidence lead to the finding that no native title rights and interests existed in relation

to the land and that the evidence adduced by Worimi had failed to cast doubt on the absence of native title—at [84].

Decision

The court ordered that:

- the appeal be dismissed; and
- Worimi pay the costs of the appeal—at [88].

Court's observations about 'connection' for future reference

The court thought it 'desirable' to note (among other things) that it is 'self-evident' that:

- an Aboriginal community or group may have an ongoing connection with land, 'even though their access to, or use of, that land is restricted or spasmodic';
- such a connection may be mainly spiritual rather than physical and may have evolved over time to a less specific use of all or many parts of that land;
- it may not involve physical access to each and every part of the land—at [86] to [87].

According to the court:

> At least in each contested non-claimant application for the determination of native title, it is necessary to bear in mind that the particular area of land in question may be part only of a larger area of land over which there may be existing native title rights and interests. That is a matter to be determined on the facts of each case—at [87].