

# Determination of native title

## ***Brown (on behalf of the Ngarla People) v Western Australia (No 3)* [2010] FCA 859**

Bennett J, 6 August 2010

### **Issue**

The question in this case was whether the Federal Court, having determined the extinguishment issue that arose in these proceedings, should make a determination of native title in the form proposed by the parties and whether the Wanparta Aboriginal Corporation should be determined to be the prescribed body corporate in relation to that determination.

### **Background**

In *Brown (on behalf of the Ngarla people) v Western Australia* [2007] FCA 1025 (*Brown No 1*, *Brown No 2*, summarised in *Native Title Hot Spots Issue 25*), a determination was made recognising native title existed over part of the area covered by a claimant application made on behalf of the Ngarla people (Area A). The remainder of the area (Area B) included the area considered in *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* [2010] FCA 498 (*Brown No 2*, summarised in *Native Title Hot Spots Issue 32*), where the court determined that native title was extinguished over parts of the area covered by mining tenements known as the Mt Goldsworthy leases. Subsequently, the parties filed proposed determination of native title reflecting the reasons for decision in *Brown No 2*.

In order to have the issue of extinguishment dealt with in *Brown No 2*, the parties agreed that, subject to questions of extinguishment, the same native title rights and interests as had been recognised in *Brown No 1* existed in relation to the area covered by the Mt Goldsworthy leases. The evidence in support of that agreement included the State of Western Australia's connection assessment process. Having determined the extinguishment questions, Justice Bennett was satisfied that 'the applicant is entitled to a determination in terms of the proposed orders'.

Pursuant to s. 56(2) of the *Native Title Act 1993* (Cwlth) (NTA), the Ngarla applicant nominated the Wanparta Aboriginal Corporation (WAC) as the PBC to hold native title on trust following the determination in *Brown No 1*. The court was satisfied that the requirements of both the NTA and of the *Native Title (Prescribed Bodies Corporate Regulations 1999* (Cwlth) (PBC Regs) were met and so determined it should hold the determined native title in trust for the native title holders pursuant to s. 56(2) of the NTA.

In this matter, the applicant submitted the NTA and the PBC Regs were 'sufficiently satisfied to allow' the court to determine that WAC is to hold the native title in trust pursuant to s. 56(2)(b) in this case. In *Brown No 1*, the applicant had filed:

- a notice of nomination of WAC as a PBC pursuant to s. 56(2)(a)(i);

- the written consent of WAC to be the PBC pursuant to s. 56(2)(a)(ii).

It was found these documents were ‘applicable for a determination made in respect of these proceedings and that the requirements of NTA and PBC Regs were met in respect of the WAC ‘for the purposes of these proceedings’.

### **Decision**

A determination of native title was made in terms agreed by the parties. WAC is to hold native title in trust. There was no order as to costs.

### **Determination**

Native title was recognised over parts of the determination area. It was determined that native title does not exist in relation to the parts of the determination area where it was found to have been extinguished in *Brown No 2*. The native title holders are:

[T]hose persons who refer to themselves as Ngarla, being persons who ... are the cognatic descendants of persons recognised under traditional laws and customs to be members of the Ngarla language group (including persons who have been adopted into the group according to those laws and customs), in particular the descendants of the following individuals ... [gives a list of names]; and

[Those persons who] have been incorporated into the Ngarla group under traditional laws and customs, in particular [names two individuals].

The native title rights and interests are to be held in trust by WAC. As it is registered on the National Native Title Register, WAC is now the ‘native title holder’ in relation to the relevant area, pursuant to s. 224.

The non-exclusive native title rights and interests recognised are rights to:

- access, and to camp on, the land and waters;
- take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters;
- engage in ritual and ceremony; and
- care for, maintain and protect from physical harm, particular sites and areas of significance to the native title holders.

The native title rights and interests are exercisable in accordance with the laws of the State and the Commonwealth, including the common law, and the traditional laws and customs of the Ngarla People ‘for their personal, domestic and non-commercial communal purposes (including cultural or spiritual purposes)’. They do not include any rights in relation to minerals, petroleum or geothermal energy as defined in the relevant legislation.

The nature and extent of the other interests are recognised in the determination, as is the relationship between native title rights and those other interests. In this case, that is qualified by the fact that it was found in *Brown No 2* that the future exercise of the right to mine under the Mt Goldsworthy leases will extinguish native title.