Determination of native title

Eden Local Aboriginal Land Council v NTSCORP Limited [2010] FCA 745

Jacobson J, 15 July 2010

Issue
The issue before the Federal Court was whether to make a determination under the *Native Title Act 1993* (Cwlth) (NTA) on a non-claimant application that native title did not exist in relation to a block of land in Bega Valley Shire, New South Wales.

Background
The non-claimant application was supported by an affidavit of Oswald Cruse, Chairperson of the Eden Local Aboriginal Land Council (Eden LALC). In it, he deposed to the fact that he is 77 years of age and has been acquainted with the land for most of his life. Mr Cruse said he was not aware of any hunting, fishing or food gathering, or the exercise of native title rights, by Indigenous people on the land concerned. The court was satisfied that Eden LALC was the registered proprietor of the land and that it had a non-native title interest in relation to it. A copy of the title search for the area comprised in NSW Department of Lands Certificate of Title folio identifier 98 of Deposited Plan 1036338 was annexed to Mr Cruse's affidavit—at [20].

Justice Jacobson had made two previous native title determinations in relation to nearby land—see *Cruse v New South Wales Native Title Services Ltd* [2006] FCA 1124 and *Eden Local Aboriginal Land Council v Minister for Lands* [2008] FCA 1934.

Proposed use of the land
Eden LALC proposed to lease part of the land to Telstra Corporation Limited (Telstra) for three years. At an extraordinary general meeting of Eden LALC in July 2008, it was decided the land was not of cultural significance to the Aboriginal people of the area and the lease of the land to Telstra was endorsed. While there was some doubt as to whether Telstra wished to proceed with the lease, Eden LAC wished to proceed with the non-claimant application.

Relevant provisions of the *Aboriginal Land Rights Act 1983* (NSW) (ALR Act)
In *Hillig v Minister for Lands for New South Wales* [2005] FCA 1713 (*Hillig*), Bennett J explained that:

> [T]he effect of Schedule 4 Part 9 cl 51 of the *Aboriginal Land Rights Act* as in effect from March this year, is that the present application is governed by the provisions of ss 42 and 42E of the *Aboriginal Land Rights Act* rather than the repealed provisions of ss 40 and 40AA, even though the present application was made before the new provisions came into force—at [10].

Jacobson J found similarly, i.e. that ss. 42, 42E and 42G of Pt 2, Div 4 of the ALR Act applied in this case. A determination under s. 61 of the NTA was a prerequisite to the

NSW Aboriginal Land Council (NSWALC) dealing with the matter. Eden LALC was preparing an application for approval from NSWALC in accordance with s. 42G of the ALR Act for the proposed land dealing with Telstra—at [10] to [16] and [18].

Consideration

The court was satisfied that:

- the requisite notices under s. 66(3) of the NTA had been given and that the notice period had expired;
- no native title claimant sought to appear or notified an interest;
- a search of the National Native Title Register confirmed there was no determination of native title over the area within the meaning of s. 13(3) of the NTA;
- the application was unopposed by the respondents within the definition in s. 86G(2) of the NTA;
- the court had power to make the orders sought and the jurisdiction under s. 81 of the NTA to hear and determine the application—at [21] to [29].

It was noted that orders of the kind sought were made in *Hillig, Deniliquin Local Aboriginal Land Council* [2001] FCA 609 and *Kennedy v Queensland* [2002] FCA 747.

Decision

The court determined that native title does not exist in relation to the relevant land—at [30].