Lennon v South Australia [2011] FCA 474

Mansfield J, Decision date

Issue

The main issues before the Federal Court were whether to make a determination recognising native title exists under the *Native Title Act 1993* (Cwlth) (NTA) and is held by the Antakirinja Matu-Yankunytjatjara Native Title Claim Group. The court decided it was within power and appropriate to do so. The determination itself is not summarised here.

Background

The Antakirinja Matu-Yankunytjatjara (AMY) application was made in 1995 and amended in October 2009 to avoid an overlap with the Arabunna Peoples' claim. Most of the area claimed was subject to pastoral leases 'over which there has been partial extinguishment of native title'. The town of Coober Pedy was within the external boundary of the application area—at [54].

Section 87

Section 87 was relied upon for the consent determination because it covered the whole AMY application area. The court was satisfied the pre-conditions to the making of the proposed orders were met. Therefore, Justice Mansfield considered whether the orders sought were within its power and whether it was appropriate to make them. On the basis of the evidence provided, the court was satisfied that the requirements of ss. 223 and 225 of the NTA were satisfied. In particular, his Honour was satisfied that:

- 'the consent of the State and the other respondent parties to the proposed determination is a fully informed and conscientious one';
- the 'level of detail provided by the applicant to identify the native title claim group and its society satisfies the requirements' of the NTA;
- 'contemporary AMY society is directly linked to the native title holders at sovereignty';
- a 'not insignificant number of the claimants are still actively engaged in and affected by their traditions' and 'adhere to, and actively participate in those traditions' and it is 'by those traditions that connection to country is established';
- there was 'sufficient evidence of continued connection to the claim area by the claim group's laws and customs' despite 'significant interaction of claimants with the dominant Anglo-Australian society';
- AMY People 'practise all of the rights and interests included' in the proposed determination—at [14] to [42].

Further, among other things, it was noted that:

- all relevant interest holders in the area had an opportunity to take part in the proceeding;
- all but three 'minor' respondent parties had 'independent and competent legal advice in the proceeding';
- the determination area contains 'a detailed description of the claim area' and, while no areas 'are specifically excluded ... surrender of certain areas will be included in the separate ILUA negotiations'—at [49] to [50].

His Honour had 'no doubt that it is appropriate to make a final determination over the Determination area on the basis of the evidence presented by the applicant'—at [50].

Native title holders

In the determination, the native title holders are described as follows:

> Under the relevant traditional laws and customs of the Western Desert Bloc, the native title holders comprise those Aboriginal people who have a spiritual connection to the Determination Area and the Tjukurpa associated with it because:
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> (a) the Determination Area is his or her country of birth (also reckoned by the area where his or her mother lived during the pregnancy); or
>
> (b) he or she has had a long-term association with the Determination Area such that he or she has traditional geographical and religious knowledge of that country; or
>
> (c) he or she has an affiliation to the Determination Area through a parent or grandparent with a connection to the Determination Area as specified in sub-paragraphs (a) or (b) above;
>
> and are recognised under the relevant Western Desert traditional laws and customs by other members of the native title claim group as having rights and interests in the Determination Area.

According to Mansfield J, this not only complies with s. 225(a) (because it defined 'the group of native title holders and the criteria by which they have group membership' and reflected 'the evidence about relevant ancestors through whom individuals hold rights and interests in land'), it also fulfils the requirements of s. 61(4) because 'it is possible to ascertain whether any particular individual is within the native title claim'—at [43].

Comment - ss. 61(4)(b) and 190B(3)(b)

At [43], Mansfield J appears to be referring to s. 61(4)(b), which relevantly provides that a claimant application must 'describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons' i.e. the persons 'in a native title claim group' who authorised the making of the application. Paragraph 190B(3)(b) (one of the 'merit conditions' of the registration test) is on similar (but not identical) terms. It provides that the Registrar '*must be satisfied that* ... the persons in ... [the native title claim group] are described sufficiently clearly so that it can be ascertained whether any particular person *is in that group*' (emphasis added). If a claim group description is used that is similar to the definition of the native title holders in this matter, his Honour's findings indicate there would need to be 'evidence about relevant ancestors through whom individuals hold rights and interests in land' in order for that description to satisfy s. 190B(3)(b).

Comment - generic exclusion of extinguishment areas, liberty to apply

Schedule 3 is a list of the 'areas which have been excluded' from the determination area 'because native title has been extinguished'. However, this is mostly done by way of 'the generic exclusion by the applicant from the application of any area over which native title has been extinguished'. Extinguishment via public works is also provided for by way of a generic statement that 'native title to be wholly extinguished over public works constructed, established or situated, or commenced to be constructed or established, prior to 23 December 1996'. The effect of public works constructed, established or situated after 23 December 1996 is left to 'Part 2 Division 3' of the NTA 'to determine'. The same is true in relation to extinguishment via the construction of improvements on a pastoral lease up to the date of the determination—at [44], [54] and [56].

The parties have liberty to apply on 14 days notice to:

- establish the precise location and boundaries of any public works and adjacent land and waters for the purposes of s. 251D of the NTA (i.e. to determine the extent of extinguishment);
- determine the effect on native title rights and interests of post-23 December 1996 public works;
- determine whether a particular area is a 'house, shed or other building or airstrip or any dam or other stock watering point constructed pursuant to' a pastoral lease included in the determination area;
- determine whether a particular area is one of the 'generic' areas excluded from the determination area pursuant to Schedule 3 because native title is extinguished.

The town of Coober Pedy is within the boundaries of the determination area. Save for a few specific areas (such as public roads), the tenures within the town that are excluded from the determination area are not identified. At [54], his Honour commented that there was no need 'to inquire further into that question' (i.e. extinguishment within the town) at this stage because 'Coober Pedy is to be dealt with in a separate ILUA', presumably one dealing with surrender mentioned at [50].

This 'generic' approach to extinguishment may conflict with the comments made by Justice North in *Mullett v Victoria* [2010] FCA 1144, where liberty to apply in relation to areas where native title was extinguished by certain 'acts and facts' or by an 'Unidentified Extinguishing Public Work' was sought. His Honour was prepared to make the order in that case because of 'certain special circumstances'. However, North J noted that orders contemplating the possibility of further applications to resolve extinguishment issues 'are undesirable because they lack the finality which should be achieved when a determination is made'—at [29].

Decision

For the reasons summarised above, it was found that the determination was appropriate and 'should be made in this proceeding'. Orders were made accordingly. In so doing, the court recognised 'once and for all the native title rights and interests of the Antakirinja Matu-Yankunytjatjara People in this area'—at [57].