Vesting of Lake Victoria — previous exclusive possession act

Lawson v Minister for Land & Water Conservation (NSW) [2003] FCA 1127

Whitlam J, 17 October 2003

Issue
This was a case in which a single 'knock-out' question was asked in advance of the hearing of the matter. The question was whether the vesting of the area known as Lake Victoria for an estate in fee simple in the State of South Australia by gazettal was a 'previous exclusive possession act' attributable to the State of New South Wales, as defined in s. 20 of the *Native Title (New South Wales) Act 1994* (NSW) (the NSW Act). If it was, then native title to that area was wholly extinguished.

Background
A claimant application and a compensation application, both made under the old Act (i.e. the *Native Title Act 1993* (Cwlth) as it stood prior to the commencement of the *Native Title Amendment Act 1998*) on behalf of the Barkandji People, were said to cover 'land and water known as Lake Victoria'. The questions put to the court as separate questions for decision related to:

- the identification of the precise area covered by the applications;
- the characterisation of certain 'acts' attributable to New South Wales, in particular, did the appropriation, resumption and vesting of the area covered by the applications involve the doing of a 'previous exclusive possession act' as defined in s. 20 of the NSW Act; and
- the effect of s. 20 of the NSW Act.

Area covered by the applications
Justice Whitlam noted that the written description of the area covered by the claimant application as 'land and water known as Lake Victoria in the Parishes of Wangumma, Walkminga, Wannawanna, Victoria and Warpa in the County of Tara, New South Wales' was 'not very informative'. Two maps were attached to the application, one of which was a drawing made in 1984 by the South Australian Engineering and Water Supply Department depicting the general layout of the Lake Victoria Storage. The claimants acknowledged that the area covered by the application was that vested in the State of South Australia in fee simple pursuant to a notice in the New South Wales Government Gazette, No. 166 dated 1 December 1922 (the gazette notice).

Previous exclusive possession act
All of the parties accepted that the effect of the publication of the gazette notice was to vest the area taken in the State of South Australia for an estate in fee simple. However, New South Wales Native Title Services Limited argued that the vesting

was not a previous exclusive possession act because it conferred only a radical title and the resumptions were qualified by the reservation of certain rights under an agreement.

Among other things, his Honour found that:

> This submission pays no regard to the terms of s 23B of the Act (NTA) and completely fails to come to grips with the central proposition...that the vesting of an estate in fee simple in the Crown will extinguish any native title over the subject land—at [21], referring to *Western Australia v Ward* [2002] HCA 28 (summarised in *Native Title Hot Spots* Issue 1) at [204].

Whitlam J was of the view that it was 'perfectly plain' that the gazette notice satisfied the three requirements set out in ss. 23B(2)(a), (b) and (c)(ii) of NTA, namely:

- it was valid;
- it took place on or before 23 December 1996 (in fact, in 1922); and
- it consisted of the grant or vesting of a freehold estate — at [22].

The court noted that the exception found in s. 23B(9C) in relation to Crown to Crown grants did not apply because the gazette notice was:

> [V]alid and effective to extinguish native title at common law, that is, 'apart from this Act'. The Gazette notification was thus a 'previous exclusive possession act' within the meaning of s 23B—at [22].

Decision

His Honour held that:

- the area covered by the applications was the area notified in gazette notice on 1 December 1922 which appropriated and resumed the area under the *Public Works Act 1912* (NSW) for the Lake Victoria works;
- the gazette notice was a previous exclusive possession act within s. 23B NTA and extinguished native title in the claim area;
- there was no utility in answering the other questions stated; and
- no compensation was payable under the NTA for that extinguishment—at [22] to [25] and proposed answer 12 in NG6167 of 1998 (the compensation application).

The matter was stood over to a date when Whitlam J will make orders to give effect to his decision. The court noted that, while this matter has been dealt with in the absence of the applicants:

> The future conduct of these proceedings will doubtless be affected by the fact that the answers seem to provide ... a 'knock-out' point. Accordingly consideration will need to be given to the involvement of the applicants in their disposition—at [26].

Reserving separate questions

His Honour noted that the reserving of questions for separate decision may pose problems where findings of fact establish the ambit of any native title rights and interests have not been made. However, the court noted that it is possible to determine issues of extinguishment in advance of such findings where, as in this case, the extinguishing act relied upon is the grant of an estate in fee simple—at [26],

referring to the majority of the High Court in *Wilson v Anderson* [2002] HCA 29 (summarised in *Native Title Hot Spots* Issue 1) at [36].