

# Determination of native title in *Ward* — remittal proceedings

## *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283

Wilcox, North and Weinberg JJ, 9 December 2003

### Issues

There were seven issues on which the parties sought clarification from the Full Court of the Federal Court in a proposed determination of native title:

- identification of the native title holders;
- statement of the native title holders' rights;
- the right to 'protect' sites;
- decisions about Aboriginal use and enjoyment of the determination area;
- rights and interests subject to traditional laws and customs;
- the use of the term 'include' in stating the nature and extent of the native title rights in relation to the determination area; and
- the right to water.

### Background

This matter was remitted by the High Court to the Full Court of the Federal Court to resolve certain issues—see *Western Australia v Ward* [2002] HCA 28 (*Ward HC*, summarised in *Native Title Hot Spots Issue 1*). The background is explained in *Western Australia v Ward* [2003] FCAFC 124, summarised in *Native Title Hot Spots Issue 6*.

After remittal, Justices Beaumont and von Doussa withdrew from the bench for reasons unconnected with this matter and the court was reconstituted so as to comprise the present bench.

At a hearing on 1 October 2003, the court was asked to defer dealing with the issues concerning the Western Australian part of the claim area, pending further negotiations, but the parties wished the court to deal with the outstanding issues in relation to the Northern Territory part of the claim area (NT determination area). The parties had agreed on the form of a determination, subject to seven issues being resolved by the court.

### The proposed determination—key elements

The proposed determination in relation to the NT determination area stated the common law recognition of non-exclusive rights 'to occupy, use and enjoy the land and waters in accordance with their traditional laws and customs, including, as incidents of that entitlement':

- the right to hunt on the land, to gather and use the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin, and to have access to and use of natural water on the land;

- the right to live on the land, to camp, to erect shelters, and to move about the land;
- the right to engage in cultural activities on the land, to conduct ceremonies, to hold meetings, and to participate in cultural practices relating to birth and death;
- the right to have access to, maintain and protect the sites of significance on the land of the NT determination area; and
- the right to make decisions about the use and enjoyment of the NT determination area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders—sub-clauses 5(a) to (e).

The draft then went on to state that there native title rights and interests ‘did not confer possession, occupation, use and enjoyment of the land or waters on the native title holders to the exclusion of all others’ — clause 5.

The proposed determination recognised native title rights and interests as being held by estate groups as follows:

The land and waters of the NT determination area are part of three estates, namely, the Damberal estate, the Bindjen estate and the Nyawamnyawam estate, each of which are held by the members of the three respective estate groups, namely the Damberal estate group, the Bindjen estate group, and the Nyawamnyawam estate group, who, together with the Aboriginal people referred to in clause 4 below, are collectively referred to as “the native title holders”.

Each of the three estate groups includes members by reason of patrilineal descent and matriliates, who are members by reason of descent from the mother and mother’s father (*djawidji*), and persons adopted into such descent relationships (the estate group members).

In accordance with traditional laws and customs, other Aboriginal people have rights in respect of the land and waters of an estate which is not their own, subject to the rights and interests of the estate group members including:

- (a) members of estate groups from neighbouring estates;
- (b) spouses of the estate group members; and
- (c) members of other estate groups with ritual authority—clauses 2 to 4.

Clause 9 provided that in relation to three specified Aboriginal freehold areas (Aboriginal freehold areas), each held under a grant of a fee simple estate, the native title holders enjoyed an entitlement to possession, occupation, use and enjoyment to the exclusion of all others.

### **Identification of native title holders**

The court noted that:

- paragraph 225(a) of the NTA requires determination of ‘the persons, or each group of persons, holding the common or group rights comprising the native title’;
- it is not necessary to identify the native title holders by name;
- it is sufficient that the persons be members of an identified group or groups;

- clause 4 of the proposed determination left open the ‘impermissible’ possibility that there are native title holders who are neither members of one of the three identified estate groups or of an identified group;
- clause 4 should be turned into an exhaustive identification of the secondary native title holders by omitting the word ‘including’ and substituting ‘such people being’ — at [14] to [15].

### **Statement of holders’ rights**

The term ‘occupy’ in the opening words of clause 5 was omitted as it tended to imply the notion of ‘control’ and was therefore not consistent with the consideration in *Ward HC* at [89] of s. 225(e)—at [16] to [17].

The words ‘including, as incidents of that entitlement’ in clause 5 were replaced with ‘being’, so as to make an exhaustive list of claimed rights and interests, which was considered to conform with the consideration in *Ward HC* at [51] of s. 225—at [19] to [22].

### **The right to ‘protect sites’**

Sub-clause 5(d) of the proposed determination was held not to imply any notion of entitlement to control access or exclude others and remains in the determination—at [24] and [25].

### **Decisions about Aboriginal use and enjoyment of the determination area**

The court determined that sub-clause 5(e) should remain. Their Honours noted that there is a clear distinction between a right to control access (generally and as a matter of law) and a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs. It was found that the continued existence of the former right is incompatible with a pastoral lessee’s right to determine access to the land but that the latter right is not—at [27].

### **Rights and interests ‘subject to traditional laws and customs’**

The court saw no merit in including this formula in clause 5. Their Honours considered that clause 5 as it stood ‘makes plain that the nature and extent of the activities that may be undertaken as incidents of the relevant native title rights and interests is governed by the native title holders’ traditional laws and customs’—at [29].

### **Use of the term ‘include’ in stating the nature and extent of the native title rights in relation to the determination area**

On the basis that s. 225(b) requires an exhaustive identification of the relevant rights, their Honours determined that the term ‘include’ in clause 6 be replaced with ‘are’—at [30].

### **The right to water**

All parties accepted that there were no exclusive native title rights and interests in flowing and subterranean waters. Specific reference to this in a separate clause 7B

was deleted and a similar proviso added to clause 9, which gave exclusive rights over the three Aboriginal freehold areas—at [31] to [32].

### **Variation of determination**

Their Honours noted the possibility of employing s. 13(5) of the NTA in the future if it was considered necessary to vary the determination by adding other native title holders or other specified rights and interests—at [15] to [22].

### **Decision**

The court made orders (including a determination of native title by consent) in the form agreed by the parties, subject to their Honours' rulings on the identified issues.