BROWN (ON BEHALF OF THE NGARLA PEOPLE) V STATE OF WESTERN AUSTRALIA

Federal Court of Australia (Bennett J)
30 May 2007
[2007] FCA 1025

This matter dealt with three conjoined applications for a consent determination over 'Determination Area A' in the Pilbara region of Western Australia (First Schedule): Ngarla application (WAD 6185 of 1998); Ngarla #2 application (WAD 77 of 2005) and Njamal #10 application (WAD 6003 of 2000). Determination Area A comprises part of the land and waters covered by the two Ngarla applications and an area of overlap with the Njamal #10 application. The parties agreed that other land and waters within the Application Area had been subject to extinguishing acts (Third Schedule). It was also agreed that no determination should be made over Determination Area B, an area of geographical overlap with the ongoing Waararn application and also subject to mineral leases (Second Schedule).

By consent of the parties Bennett J, present at De Grey Station, ordered that there be a determination of native title in the three subject applications over Determination Area A. It was affirmed that no determination was to be made at the present time in relation to Determination Area B or the unclaimed areas subject to previous extinguishing acts. The Court confirmed that the native title rights held by the claimants pursuant to the determination comprise: non-exclusive rights to access and camp on the subject land and waters; rights to take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters; to engage in ritual ceremony; and care for, maintain and protect from physical harm particular sites of significance. These rights do not confer possession, occupation, use and enjoyment to the exclusion of all others; nor do the determined rights enable control over access to the land and waters. It was ordered that the Wanparta Aboriginal Corporation act as trustee over the determined native title areas for the holders pursuant to section 56(2) of the *Native Title Act 1993* (Cth) ('*NTA*').

At issue in the determination was whether the Court should affirm the Minute of Proposed Consent Determination of Native Title pursuant to section 87 or section 87A of the *NTA*. The commencement of section 87(1)(d) on 14 April 2007 means that an order cannot be made under section 87 unless the Court is satisfied that the order cannot be made under section 87A. Justice Bennett was satisfied that the preconditions for an order pursuant to section 87A had been met since all parties had consented to the orders sought and all parties with proprietary interests in Determination Area A signed the proposed consent orders. This left only a determination as to the appropriateness of a determination order. Justice Bennett emphasised the judicial nature of the discretion according to the subject matter, scope and purpose of the *NTA*, along with the need for flexibility pursuant to the ultimate goal of encouraging parties to take responsibility for the resolution of native title proceedings; *Hughes (on behalf of the Eastern Guruma People) v State of Western Australia* [2007] FCA 365 and *Ward v State of Western Australia* [2006] FCA 1848 affirmed. After considering the claimants' continuous connection with Determination Area A, as acknowledged by all parties, Bennett J concluded that it was indeed appropriate to make the proposed orders and declaration in the terms sought by the parties. Her Honour did so pursuant to section 87A of the *NTA*, or in the alternative under section 87, the requirements of which her Honour adjudged had also been met. Justice Bennett noted in conclusion that the order 'does not grant native title; it recognises what has long been held'.

The full text of this determination is available at: <http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/1025.html>.