BODNEY V BENNELL

Full Court of Federal Court of Australia (Finn, Sundberg and Mansfield JJ)
23 April 2008
[2008] FCAFC 63

Native title – continuity of traditional laws and customs – whether laws and customs of the Noongar community have been observed 'substantially uninterrupted' since sovereignty – effect of European settlement on continuity – communal title – whether the finding of one community or society entails one community title – application of s 223(1)(b), *Native Title Act 1993* (Cth) – connection to land or waters – how connection is established – whether respondents established a connection to the Perth Metropolitan Area – appellant Christopher Bodney's claims to native title over the Perth Metropolitan Area

Facts:

The respondents, who were the applicants at first instance, made an application for a determination of native title over a large part of Western Australia ('WA') in the south-west of that State, including the Perth Metropolitan Area. All areas of land and waters where native title had been extinguished (including all areas of freehold and many areas of leasehold land) were excluded by the respondents from their claim. In their application, which was filed in 2003, the respondents claimed that there existed a single Aboriginal community, the single Noongar community, across the claim area in 1829, which was the date of European settlement in WA; that the Noongar community, of which the respondents are a part, continues to exist; and that, notwithstanding the profound effect upon Aboriginal people in south-western WA brought about by settlement, the members of the Noongar community continue to observe a number of the traditional laws and customs practiced by the Noongar community in 1829.

The appellants in this appeal were the State of Western Australia, the Commonwealth, the Western Australian Fishing Industry Council, and Christopher Bodney, who had lodged a number of competing native title claims over the areas claimed by the respondents.

At trial, Wilcox J created a separate proceeding dealing only with the Perth Metropolitan Area to discern the separate question of whether native title existed, and, if so, to determine who the native title holders were and which rights and interests they possessed.

There were three main issues raised by the State and Commonwealth on appeal from the separate proceeding: firstly, whether there has been, since sovereignty, continuity of the traditional laws and customs of the single Noongar community until recent times; secondly, whether a finding of one society, or one community, entails one communal title; and thirdly, whether the primary judge had erred in his approach to the issue of connection between the Noongar people and claim area of the separate proceeding. In addition, Mr Bodney appealed the primary judge's dismissal of Mr Bodney's claims over the Perth Metropolitan Area.

Held, allowing the State and Commonwealth appeals and remitting the matter to the docket judge:

(i) as to whether there has been, since sovereignty, continuity of the traditional laws and customs of the single Noongar community until recent times:

1. In determining whether there has been continuity of the traditional laws and customs of the single Noongar community from sovereignty until recent times, the primary judge applied the wrong test by asking whether the society or community that existed at sovereignty had continued to exist until recent

times. The correct test is whether acknowledgement and observance of traditional laws and customs has continued substantially uninterrupted since sovereignty: [46]–[47], [70]–[83]; *Risk v Northern Territory* [2006] FCA 404 cited, *Risk v Northern Territory* (2007) 240 ALR 75 cited, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*') applied.

2. Change or adaptation of laws and customs will not necessarily be fatal to native title claims. Provided that the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional: [74]; *Yorta Yorta* (2002) 214 CLR 422 cited.

3. The primary judge's disregard of anthropologists' evidence concerning the observance of laws and customs between sovereignty and the present on the ground that it was not relevant to the position at sovereignty or at the present time was a serious error. The common law basis rule, on which the primary judge relied, has not been imported into s 79 of the *Evidence Act 1995* (Cth). The anthropologists' evidence is clearly relevant to whether the claimants have established the continued observance of their laws and customs between sovereignty and the present time: [88]–[95]; *Neowarra v Western Australia (No 1)* (2003) 134 FCR 208 cited, *Borowski v Quayle* [1966] VR 382 cited, *Gumana v Northern Territory* (2005) 141 FCR 457 cited.

4. The reason for a change to traditional laws and customs, such as the impact of European settlement, is irrelevant for the purposes of inquiring into continuity. European settlement is what justifies the expression 'substantially uninterrupted' rather than 'interrupted' in the inquiry into continuity: [81]–[82], [97]; *Yorta Yorta* (2002) 214 CLR 422 cited.

5. The primary judge was entitled to conclude on the evidence that a gradual shift in reliance from patrilineal to matrilineal descent did not mean that the Noongar descent rules were no longer traditional: [116]; *Griffiths v Northern Territory* [2007] FCAFC 178 considered.

6. The proper inquiry in ascertaining whether rights and interests are traditional is whether they originate in pre-sovereignty law and custom, not whether those rights and interests are the same as those in existence at sovereignty. Laws and customs that have altered and developed post-sovereignty can still be traditional. Rights and interests that are the product of such developed laws and customs may also change and still be recognised: [120]; *Yorta Yorta* (2002) 214 CLR 422 cited.

(ii) as to whether a finding of one society, or one community, entails one communal title:

7. Section 223(1) of the *Native Title Act 1993* (Cth) ('NTA') envisages three possible entities capable of 'owning' native title: the community or society under whose laws and customs native title is possessed, a group or groups, and an individual or individuals: [146]; *De Rose v South Australia (No 2)* (2005) 145 FCR 209 followed; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)* (2003) 130 FCR 424 ('*Wongatha*') cited.

8. In any given matter, the determination of whether the existence, character and extent of native title rights and interests are communal, group or individual will depend upon the traditional laws and customs of the community in question: [148]; *Northern Territory v Alyawarr* (2005) 145 FCR 442 cited, *Wongatha* (2003) 130 FCR 424 cited.

9. For a claim of communal title in a community to be properly made out, there must be evidence capable of supporting an inference of communal ownership derived from the community's laws and customs: [152]; *Neowarra v Western Australia (No 1)* (2003) 134 FCR 208 cited.

10. Where a claim of communal title is made out, this will not necessarily result in the communal rights and interests being held in common by community members. How those communal rights and interests are enjoyed is a matter to be determined by the title holders according to the currently acknowledged and observed tradtional laws and customs: [154]; *Western Australia v Ward* (2000) 99 FCR 316 cited, *Wongatha* (2003) 130 FCR 424 cited.

11. The 'fundamental principle' developed in a number of cases that native title is ordinarily communal should not be disturbed, although there may be some tension between that principle and s 223(1) of the NTA. It was legitimate for the primary judge to invoke and rely on the fundamental principle that native title is ordinarily communal: [150], [158]–[159]; *Western Australia v Ward* (2000) 99 FCR 316 followed, *Northern Territory v Alyawarr* (2005) 145 FCR 442 followed.

(iii) as to whether the primary judge erred in his approach to the issue of connection between the Noongar people and Perth Metropolitan Area:

12. The inquiries raised by ss 223(1)(a) and 223(1)(b) of the NTA are distinct, the former relating to rights and interests in relation to land or waters and the latter relating to connection with land or waters. Connection is not given by, or an incident of, the claimed rights and interests, but is given by the claimants' traditional laws and customs: [161], [165]; *Western Australia v Ward* (2002) 213 CLR 1 cited, *Yorta Yorta* (2002) 214 CLR 422 cited.

13. Because the connection to land or waters required under s 223(1)(b) is provided by 'traditional' laws and customs, the acknowledgment and observance of those laws and customs must have continued 'substantially uninterrupted', and the connection must have been 'substantially maintained', since sovereignty: [168], [187]; *Yorta Yorta* (2002) 214 CLR 422 cited, *Western Australia v Ward* (2000) 99 FCR 316 cited.

14. The inquiry into connection requires an identification of the content of the traditional laws and customs, and the characterisation of the effect of those laws and customs as constituting a connection of the claimants with the land: [169]; *Western Australia v Ward* (2002) 213 CLR 1 cited.

15. The primary judge did not undertake an inquiry into the Noongars' laws and customs as they relate to the general claim area or the Perth Metropolitan Area specifically: [170], [185].

16. To satisfy the requirement of connection, claimants must show that they have, by their actions and acknowledgment, asserted the reality of the connection to their land or waters as defined under their laws and customs. While this connection may be expressed through physical presence, it may also subsist at a cultural or spiritual level where physical presence has ceased: [171]–[174]; *Western Australia v Ward* (2000) 99 FCR 316 cited, *Neowarra v Western Australia (No 1)* (2003) 134 FCR 208 cited, *Yanner v Eaton* (1999) 201 CLR 351 cited, *Sampi v Western Australia* [2005] FCA 777 cited.

17. Where connection in relation to a particular part of the claim area is in issue, there must be an examination of the traditional laws and customs as they relate to that area, and a demonstration that connection to that area has been substantially maintained since sovereignty: [175]–[179]; *Neowarra v Western Australia (No 1)* (2003) 134 FCR 208 considered, Griffiths v Northern Territory of Australia [2006] FCA 903 cited.

18. The primary judge erred in finding that the claimants had a connection to the Perth Metropolitan Area by virtue of a connection to the general claim area: [167], [180]–[181].

19. The descent of current Noongars from ancestors who lived in the Perth Metropolitan Area at the time of sovereignty, does not, of itself, provide evidence of the connection of current Noongars to that area: [189].

20. The primary judge misapplied s 223(1)(b) and thereby failed to answer a question necessary in deciding the separate proceeding: [190].

Held, dismissing Mr Bodney's appeal:

21. The evidence before the primary judge would not permit a finding that the laws acknowledged and customs observed by Mr Bodney and his family group were 'traditional'. It has not been demonstrated that those laws and customs had originated in the laws and customs of a particular, identified society that had acknowledged and observed that body of laws and customs prior to sovereignty: [233]; *Yorta Yorta* (2002) 214 CLR 422 applied.