

MULLETT ON BEHALF OF THE GUNAI/KURNAI PEOPLE V VICTORIA

Federal Court of Australia (North J)
22 October 2010
[2010] FCA 1144

Native title – application for consent determination of native title in Gippsland area – application for native title by Gunai/Kurnai people under *Native Title Act 1993* (Cth) – requirements of s 87 of *Native Title Act 1993* (Cth) – s 94A of *Native Title Act 1993* (Cth) – s 56 of *Native Title Act 1993* (Cth).

Facts:

This case considers an application for a determination of native title under the *Native Title Act 1993* (Cth) ('the Act') made by the Gunai/Kurnai people in the general area of Gippsland in Victoria. The application was initially made on 7 April 1998, when a determination of native title was sought in relation to over 8000 specific parcels of land in Gippsland. On 29 June 2009, a second application was filed which included a number of additional parcels of land. The size of the parcels of land collectively amounts to almost 20 per cent of Crown land in Victoria.

After a dispute regarding the proper claimants for the application, along with numerous consultations between the plaintiffs and respondents, the Gunai/Kurnai people and the State of Victoria agreed upon a proposed determination in 2010 which sought orders by the court to reduce the claim area of the application, to consolidate the two applications, and to make a determination of native title in relation to parcels of land in the application area. The general terms of the proposed determination consisted of non-exclusive native title rights, including: (a) the right to access, enter and remain on the land and waters; (b) the right to use and enjoy the land and waters; (c) the right to take the resources of the land and waters for the purposes of satisfying personal, domestic, or communal needs, but not for commercial purposes; and (d) the right to protect and maintain places and areas on the land and waters which are of importance according to Gunai/Kurnai traditional laws and customs. The proposed determination also identified areas in which the parties agreed that native title had been extinguished.

The issue that the Court needed to consider in this case was whether the agreement reached between the Gunai/Kurnai people and the State of Victoria adhered to the statutory requirements set out in the Act for the determination of native title claims. Under s 87 of the Act, the Court had to determine whether the agreement was freely entered into on a fully informed basis. Under s 94A, the court had to decide whether the claim being made for native title was clearly defined as to who was making the claim and the nature and extent of the determination area and any other interest in relation to the area. Under s 56, the Court was also required to determine whether the native title was to be held in trust, and if so, by whom. These statutory requirements needed to be satisfied before the Court could make orders for the determination of native title.

Held, ordering the determination of native title for over 8000 specific parcels of land in Gippsland in Victoria based on the terms set out in the proposed determination:

1. The proposed determination reached between the parties was entered into voluntarily and on an informed basis. Both parties participated in and had regard to evidence and conclusions submitted to the Court over 20 days of hearings, and the State conducted a very thorough investigation into the validity of the application, which was expressly adopted by the Gunai/Kurnai people: [8], [20].
2. While a clause in the proposed determination to allow for subsequent completion of the task of capturing those items of public work extinguishing native title is permitted, it

should not be regarded as establishing a precedent for future determinations of native title. Rather, the order is granted in this application because the scope of the task of identification of particular parcels of land and their tenure history is particularly daunting and time consuming because the area includes over 8000 individual parcels of land. Furthermore, the parties have had limited time to identify these parcels since the agreement was reached: [29].

3. The proposed determination of native title properly identifies the claimants and the nature and extent of the determination area in accordance with s 94A of the Act: [23].

4. The nomination of the Kurnai Land and Waters Aboriginal Corporation to hold the native title in trust fulfils the requirements of s 56 of the Act for a prescribed body corporate: [31].