VICTORIA

THE TURNING OF THE TIDE: NATIVE TITLE IN VICTORIA*

Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria (2005) FCA 1795 (13 December 2005)

Proof of Native Title in Southern Australia – Consent Determination – Hunt, Fish, Gather, Camp – River banks not Waters – Consultative Mechanisms – Freehold blocks

When the High Court handed down its decision in *Yorta Yorta* in December 2002, a finding that native title was now gone in the claim area in Victoria/ New South Wales border country, it looked like it would be impossible for native title claimants to prove their native title. However, since *Yorta Yorta*, Federal Court decisions applying the case have found a remnant native title, for example, in the North West of Australia: *Daniel v Western Australia (2003) FCA 666 and Neil Neowarra v State of Western Australia (2003) FCA 1402*. It was felt that *Yorta Yorta* made it very difficult for claimants to get up on the strict elements of proof of native title. In addition, there is far less land in the southern parts of Australia that is available for native title claim, with a majority of land held as a freehold title in farming and urban areas. However, on 13 December 2005, a consent determination of native title by the Federal Court of Australia has now found native title in south eastern Australia.

The native title claim

The native title claim was lodged in 1995 and relates to an application for a determination of native title over certain Crown lands and waters in Western Victoria. The Victorian Government, and the multitude of other respondent parties to the claim, agreed upon the terms of a consent determination that native title exists in a portion of the claim area, and that it does not exist in the majority balance of the claim area.

The consent determination

The consent determination recognises the non-exclusive native title rights of the native title holders. These rights include to hunt, fish, gather and camp and are expressly subject to State and Federal laws and the terms of a coexistence protocol agreed between the parties. They are also subject to the rights of other people in the claim area who hold various forms of land rights such as licences, permits, leases and the rights of the general public to access lands. This is not new. It has been law in Australia for some time that native title rights bow before all other rights held by other people in the claim area, and this consent determination does not try to alter that legal reality. In addition, Justice Merkel plays down the precedent value of the consent determination when he states, "of course, the continued existence, and the nature and extent, of …native title can only be resolved on a case by case basis."[1] However, the approach taken by the Victorian Government and the other respondent parties led by the Victorian Government's example, does perhaps set a

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1 (2005) FCA 1795 [12].

precedent for similar approaches that could be adopted both in other areas of Victoria but also for other State and Territory Governments seeking to resolve native title by negotiation and mediation, rather than the combative approach of litigation.

In October 2002, the Victorian Government reached "agreement in principle" with the claimants and a year later the Federal Government followed suit, with the last two years being used to secure the consent of other respondent parties, totalling 400 people and organisations. These parties included the two governments, 8 local governments, telecommunications companies and Crown land title holders. While there are a further 16 active native title claims to be settled in Victoria, this approach certainly appears to set out a way forward.

The finding of native title is limited to portions of the Wimmera River area, with native title agreed to exist to Crown reserves of the River's banks but not to the River's waters. This amounts to some 2-3% of the original claim area, with 97% of the area being held to have no native title.

The consent determination involves a "prescribed body corporate" being established by the native title holders and an Indigenous Land Use Agreement providing an umbrella framework to set out consultative mechanisms. Based perhaps on the earlier Yorta Yorta cooperative protocol, and with similarities to Canadian models, the consent determination allows the native title holders an advisory role with respect to land use, cooperative management of national parks and wilderness areas, and the grant of three freehold blocks where a particularly strong cultural and historical connection has been established. In addition, the Victorian Government is providing funding for the prescribed body corporate for administrative costs and capital for establishment of an administration and cultural centre and improvements on the freehold blocks that have been granted as part of the consent determination. The Victorian Government has recognised that the native title holders have strong cultural connections and obligations to a larger area than has been determined for native title, and the agreements reflect this.

The impact of the consent determination

In many ways this is a historic decision, a fact highlighted by Justice Merkel in his reasons for judgment: "the orders I propose to make are of special significance as they constitute the first recognition and protection of native title resulting in the ongoing enjoyment of native title in the State of Victoria and, it would appear, on the South-Eastern seaboard of Australia. These are areas in which the Aboriginal peoples suffered severe and extensive dispossession, degradation, and devastation as a consequence of the establishment of British sovereignty over their lands and waters during the 19th century." [2] His Honour continues, "the outcome of the present claim is testimony to the fact that the "tide of history" has not "washed away" any real acknowledgment of traditional laws and any real observance of traditional customs by the applicants and has not, as a consequence, resulted in the foundation of their native title disappearing. Indeed, the evidence in, and the outcome of, the present case is a living example of the principle that is now recognised in native title jurisprudence that *traditional* laws and customs are not fixed and unchanging. Rather, they evolve over time in response to new or changing social and economic exigencies to which all societies adapt as their social and historical contexts change". [3]

It remains to been seen as to whether there is a precedent flow on effect of this consent determination, not only within Victoria but elsewhere within Australia, with respect to this as a

2 Ibid, [2].
3 Ibid, [11].

model for settling of native title. It is noteworthy that this model has emerged from a State where there is currently a very strong Indigenous heritage protection regime under the *(Cth) Aboriginal and Torres Strait Island Heritage Protection Act 1984,* and that perhaps dictates the approach taken.

For the native title holders themselves, the outcome is a compromise and one of the Senior Elders from among the native title holders has stated that "we have made a very big compromise to you Europeans within a system that is your own, not ours. In an imperfect system we are forced to trade off, agree over long disputed boundaries. We do this because we believe in a future for our children. Our past gives us this strength. We will never give up our identity, histories and cultures as long as one of us lives and breathes, however, there is a terrible trade off in terms of gaining realistic resource outcomes and cultural capacity for our endeavours."[4]

Certainly claimant groups in southern Australia continue to share the tenacity of their northern neighbours, a fierce determination to continue to look after country using a mixture of native title, indigenous heritage and environmental protection laws in order to do so.

ABORIGINAL CULTURAL HERITAGE BILL[*]

On 18 October 2005, the Victorian Government released an exposure draft of an Aboriginal Heritage Bill. The Government allowed 2 months for submissions on the draft and a number of submissions have now been made.

At present, Aboriginal Cultural Heritage in Victoria is regulated both by Victorian statute (the Archaeological and Aboriginal Relics Preservation Act 1972(the "Relics Act")) and Commonwealth legislation (the Aboriginal and Torres Strait Islander Heritage Protection Act 1984(the "HPA")). The HPA contains, most unusually for Commonwealth legislation, a Part applicable only in one State - Part IIA, which contains special provisions applying only in Victoria, under which (among other things) any one of about 35 licensed inspectors may issue emergency declarations of preservation (not revocable by the Minister) requiring the immediate shut down of any project in Victoria for a minimum period of 30 days.

The Commonwealth intends that Part IIA of the HPA will be repealed at the same time as the new Victorian Aboriginal Heritage Act becomes law.

From a mining and resources perspective, the principal features of the Bill (which will repeal the Relics Act, and contains no transitional provisions) are noted and discussed below.

It will be an offence "knowingly or recklessly" to do an act which harms *or is likely to harm* Aboriginal cultural heritage, unless the act is done –

> in accordance with a "cultural heritage permit" issued by the Secretary to the Department for Victorian Communities;
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> in accordance with a "cultural heritage assessment" approved by the Secretary;

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4 O'Bryan, K "The Tide has Turned – the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Consent Determination", Native Title Newsletter, November/ December 2005, 3–4.

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