

# Determination of native title – Ngaanyatjarra lands

## *Mervyn v Western Australia* [2005] FCA 831

Black CJ, 29 June 2005

### **Issue**

This case concerns a consent determination recognising the existence of native title in relation to some 187,000 sq km in Western Australia (the Ngaanyatjarra Lands determination). Before making it, Chief Justice Black considered whether it was appropriate to make the determination in the terms agreed by the parties.

### **Section 87 of the NTA**

Section 87 of the *Native Title Act 1993* (Cwlth) (the NTA) provides that the Federal Court make an order in the terms agreed between the parties without holding a hearing if it is appropriate to do so. Black CJ noted that the preconditions to the exercise of the court's discretion are:

- the terms of the agreement must be in writing and signed by or on behalf of the parties;
- the agreement must be filed with the court; and
- the court must be satisfied that the order in those terms would be within its power—at [8].

In this case, the pre-conditions were met. The court was satisfied that:

- there was nothing in the agreed terms to suggest that the court's power would be exceeded;
- s. 94A was satisfied because the proposed order set out the matters required by s. 225, which defined 'native title determination'.

Thus, it only remained to decide whether it would be 'appropriate' to make the order sought. Black CJ considered that the discretion conferred by s. 87(1) must be: exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose of the NTA. The matters to be taken into account in the exercise of the discretion, and the weight to be given to those matters, may very well vary according to the particular circumstances of each case—at [11].

The factors the Chief Justice considered relevant in this case were that:

- the parties had independent and competent legal advice;
- there was no suggestion that the agreement had not been freely entered into—at [12].

The court commended the applicants on the clear and comprehensive way in which their application had been prepared and noted that it was only 12 months between filing and settlement of the terms of the consent determination.

After reviewing uncontested information in the application, which set out the factual basis for the claimed native title and was not contested, Black CJ concluded that he was 'quite satisfied that it would be appropriate to make an order in the terms agreed between the parties' – at [13] to [16].

### **Decision**

The Chief Justice made the determination of native title in the terms sought by the parties. The claim group was defined as the men and women named in a schedule to the determination (some 2,700) and their descendants--the Peoples of the Ngaanyatjarra Lands. This description was adopted in the consent determination to define the common law holders of native title. It was then determined by consent that the Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation), a prescribed body corporate, is to hold the native title on trust for the common law holders of native title (see ss. 56, 57 and 224).

As the parties agreed there had been partial extinguishment of native title over an unvested reserve, in respect of that area, the native title rights and interests recognised were non-exclusive rights to:

- enter and remain on the reserved land;
- take flora and fauna;
- take water for personal, domestic, or non-commercial communal purposes;
- take other natural resources such as ochre, stones, soils, wood and resin; and
- care for, maintain and protect from physical harm, particular sites and areas of significance to the native title holders.

Over the remainder of the determination area, either there had been no extinguishment by the 'creation of any prior interest', or any such extinguishment must be disregarded for all purposes under the NTA (see ss. 47A and 47B).

Therefore, with exception of rights to flowing and subterranean waters, native title is comprised of the right of possession, occupation, use and enjoyment to the exclusion of all others. In relation to waters, native title recognised in the determination is comprised of a non-exclusive right to take those waters for personal, domestic, or non-commercial communal purposes.

None of the native title rights and interests recognised includes rights in minerals or petroleum as defined in the relevant Acts.