Determination of native title — consideration of s. 87A

Adnyamathanha No 1 Native Title Claim Group v South Australia [2009] FCA 358

Mansfield J, 19 March 2009

Issue

The issue before the Federal Court was whether it was appropriate to make several native title determinations by consent in relation to a single application pursuant to s. 87A of the *Native Title Act 1993* (Cwlth) (NTA). In the circumstances of this case, the court decided it was appropriate to do so.

Background

The Adnyamathanha No 1 claimant application covered a substantial area of South Australia. Two consent determinations under s. 87A were sought in relation to Adnyamathanha No 1. The first was to cover a single pastoral lease (Angepena station). It was anticipated that an Indigenous Land Use Agreement and management plan would be executed in relation to it. The second determination would cover a much larger part of the area covered by the claimant application but there would still be an undetermined part, consisting of an area of overlap with a claim made by the Dieri People and other areas where negotiations were ongoing. The parties informed the court they were confident that the balance of Adnyamathanha No 1 would proceed to consent determination in the coming months. A third consent determination was sought under s. 87 in relation to the area covered by the Adnyamathanha No 2 native title claim, which covered the Flinders Ranges National Park.

The State of South Australia supported the applicant and no other respondent party opposed them. In these reasons, Justice Mansfield explained why he was willing to:

- make the determinations in Adnyamathanha No 1, notwithstanding a consent determination was likely over the whole of the claim area in the next few months;
- make a separate determination over Angepena station—at [5].

Section 87A

Section s. 87A was introduced by the *Native Title Amendment Act 2007* (Cwlth) and then amended by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth), both of which commenced some time after Adnyamathanha No 1 was filed. However, as was noted, this was of no significance because s. 87A applies regardless of when an application was made—at [7], referring to the relevant schedule to each amendment Act.

His Honour was of the view that s. 87A was intended to:

> [F]acilitate resolution of part of a claim by agreement, where those whose interests are directly affected by part of a claim have agreed upon a determination being made. Those whose interests are in other parts of the claim area are ... entitled to be notified of the proposed consent determination over part of the claim area ... and may object to the Court ... . That notification has been undertaken, and no objections ... received—at [8].

The benefits of s. 87A according to Mansfield J, were that:

- pursuant to s. 64(1B), the area subject to the claim was automatically amended so that the unresolved area remained as the claim area; and
- the claim as amended, if it was registered at that time, did not have to through the registration test again and remained on the Register of Native Title Claims—at [10], referring to ss. 190(3)(a)(iii) and 190A(1A).

In this case, the court had 'no hesitation' in deciding that (subject to the other requirements of the NTA) it was appropriate to make the determination over the larger area because this would 'result in a mutually satisfactory outcome to that portion of the claim', from the point of view of both the applicant and the respondents, 'in as timely and efficient a manner as possible'. His Honour also saw there were 'good reasons' why the balance of the application area was not able to be the subject of a consent determination at this time, e.g. the overlapping claim—at [11].

As to the separate determination over the station, Mansfield J was of the view that it was 'not routinely desirable' that an agreement to resolve the whole or part of a claim should be 'splintered' into a series of separate determinations because (among other things) there were 'obvious efficiencies' in having only one consent determination that reflected the agreement. However, his Honour emphasised that his observations were not 'intended to inhibit the full use of s. 87A' but were made to indicate that 'once a proposed determination in respect of an area included in the wider claim area is proposed, there should be a sound reason for any further "subdivision" of the area'—at [12] to [13].

Decision

In this case, the parties sought a separate determination over the station because discussions about complex and varying proposed land uses over that area were the subject of ongoing discussions and the agreements and management plans being negotiated were unlikely to be in a form that would apply beyond that area. For these reasons, Mansfield J was satisfied that it was appropriate to make a separate consent determination over Angepena station—at [14] to [15].