

***Mullett v Victoria* [2010] FCA 1144**

North J, 22 October 2010

Issue

The main issue in this case was whether the Federal Court should make a determination of native title by consent pursuant s. 87 of the *Native Title Act 1993* (Cwlth) (NTA) recognising the Gunai/Kurnai people as the holders of native title in relation to parts of the Gippsland region in Victoria. Justice North decided to do so because the orders sought were within power and it was appropriate to make them.

Background

Two claimant applications were filed in 1998 and 2009 respectively on behalf of the Gunai/Kurnai people seeking recognition over around 8,000 specific parcels. The claim group in both applications consisted of the Gunai/Kurnai people being the descendants of 25 named apical ancestors. Some evidence was heard in support of the applications, followed by negotiations that resulted in an agreement. The parties subsequently sought orders reflecting that agreement, including a determination recognising the existence of native title, pursuant to s. 87 of the NTA.

Should orders be made?

The first and second conditions for s. 87 were met because the rights and interests included in the proposed determination were 'recognisable by the common law of Australia, and there is no other determination in existence over the determination area'. As to the third, Justice North noted that:

The primary consideration ... is ... whether there is an agreement and whether it was freely entered into on an informed basis. ... The Court will usually need to be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for an application—at [7].

In this case:

[I]t is clear that the State has taken an active role in the proceeding in the interests of the Victorian community generally, and has conducted a very thorough investigation into the validity of the application—at [20].

Relevance of background negotiations leading to terms of determination

The submissions explained how the wording of certain clauses in the determination had been agreed upon 'to accommodate the common ground' where the parties otherwise had disagreed. North J found that:

The construction of a consent determination should not be governed by extraneous materials such as explanations for the wording contained in submissions to the Court. Consequently, the background negotiations which gave rise to the form of words ultimately chosen is of limited relevance to an application under s 87—at [25].

Extinguishment issues should not be left for later resolution as a rule

The consent orders sought included liberty to apply in relation to areas where native title was extinguished by certain 'acts and facts' or by an 'Unidentified Extinguishing Public Work. This

raised 'a different issue'. North J was prepared to make the order sought in this case because 'it responds to certain special circumstances', including that:

- the tenure analysis was 'particularly daunting and time consuming', i.e. over 8,000 individual parcels of land were involved;
- the agreement came after a long and complex negotiation and so, after 'such a long and difficult road', it would be 'a disproportionate response' for the court to refuse to make the order — at [29].

However, his Honour noted that:

- orders that 'contemplate the possibility of further applications ... to resolve' outstanding extinguishment issues 'are undesirable because they lack the finality which should be achieved when a determination is made';
- 'the form of order made in this case should not be regarded as a precedent in future applications for determinations of native title' — at [29].

Prescribed body corporate

Native title is to be held on trust by the Gunai/Kurnai Land and Waters Aboriginal Corporation, a body corporate 'which, on making the determination naming it as the holder of native title, will be a prescribed body corporate' for the purposes of s. 56—at [31], referring to s. 59 and reg 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwlth).

Decision

North J was satisfied that the requirements of the NTA had been met and that the court should make the orders sought by the parties. According to his Honour:

Today is a day of tremendous joy for Gunai/Kurnai people. The successful outcome is a testament to the determination, persistence, energy and belief in, and commitment to, the tradition and living heritage of the Gunai/Kurnai people.

As noted, the determination relates to 45,000 hectares of Crown land, i.e. almost 20% of the Crown land in Victoria.