

***Nelson v Northern Territory* [2010] FCA 1343**

Reeves J, 8 December 2010

Issue

The main issue was whether the Federal Court should make a determination by consent pursuant s. 87 of the *Native Title Act 1993* (Cwlth) recognising non-exclusive native title in relation to the area subject to a perpetual pastoral lease referred to as Newhaven. Justice Reeves decided to do so because the orders sought were within power and it was appropriate to make them but, by agreement, the determination will not take effect until a prescribed body corporate determination is made under s. 57(2).

Background

The claimant application relevant to this determination, which covered about 2,160 square kilometres, was filed in December 2000. On 13 November 2010, an agreement between the parties was filed in the court and an order sought under s. 87 in the terms agreed by the parties.

Appropriate to make orders – free and informed consent

Subsection 87(1A) provides that the Court may, 'if it appears to the Court to be appropriate to do so, act in accordance with' (in this case) s. 87(2) which in turn provides that:

If the agreement is on the terms of an order of the Court in relation to the proceedings, the Court may make an order in, or consistent with, those terms without holding a hearing or, if a hearing has started, without completing the hearing.

Reeves J noted that this confers an unfettered discretion on the court provided other pre-conditions are met and it is exercised judicially. In so doing, the court must 'have regard to the objects' of the NTA and 'one of the most important' was 'the resolution of disputes by negotiation an agreement, rather than litigation'. According to his Honour:

- 'the critical issue' was 'whether the existence of a free and informed agreement is founded in fact';
- the court would 'infer the existence of the native title that is at the heart' of that agreement if 'the material filed ... in support of the consent determination establishes a free and **informed** agreement';
- the emphasis is the word 'informed' because 'the process the ... government respondent party follows to inform itself is critical to this issue' – at [7], [10] to [11], emphasis in original.

'Connection' assessment by State party and other critical factors

His Honour acknowledged the difficulties a State party faced in striking the right balance between 'protecting the community's interests' and ensuring it 'takes a flexible approach ... aimed at facilitating negotiation and achieving agreement'. However, since the 'central issue' under s 87 is 'whether there exists a free and informed agreement between the parties', the way in which the State party assessed 'the underlying evidence as to the existence of native title, is critical'. Other critical factors include whether:

- the parties have independent and competent legal representation;
- the terms of the proposed order are unambiguous and clear; and
- the agreement has been preceded by a mediation process—at [13] to [15].

Connection in this case

The proposed determination area was surrounded by Aboriginal Lands Trust lands and is in 'a remote part' of the territory. His Honour noted that:

The anthropological material produced for the land claims adjacent to the determination area as well as the historical ethnographic material of Baldwin Spencer and Frank Gillen, Norman Tindale, Ted Strehlow and others was studied and analysed by Dr Sackett and Ms Meltzer for the current claim. Importantly, the anthropologists also conducted fieldwork with claimants in order to gain an understanding and formulate expert opinions on the claimants' laws and customs—at [16].

Both the steps taken by the parties and the fact that all had 'competent legal representation' indicated to his Honour that 'their agreement is free and informed'. Further, Reeves J was satisfied that 'the terms of the proposed orders are unambiguous and clear'—at [17].

Section 94A

Section 94A requires that any order in which the court makes a determination of native title must set out 'details of the matters mentioned' in s. 225. Reeves J was satisfied that the proposed determination contained these details and, in addition, that the native title rights and interests described therein were all 'capable of being recognised by the common law of Australia'—at [30].

Decision

The court made an order determining that, under the laws of Australia: '[N]ative title exists according to the traditional laws and customs of the claimants' society, and is held by the five landholding groups'—at [33].

Conditional on determination of prescribed body corporate

The determination is ineffective until a prescribed body corporate is determined by the court.

Upon the determination taking effect, native title is not to be held in trust—at [31].