

Party status — joinder of claim group members

Rubibi v Western Australia [2002] FCA 876

Merkel J, 11 July 2002

Issue

The main issue before the Federal Court was whether persons who were part of the native title claim group but claimed different native title rights and interests to those claimed by the applicant should be joined as respondents to a claimant application. It was decided they should be. The court's jurisdiction to make a determination of native title in favour of a party who has not made a claimant application under s. 61 of the *Native Title Act 1993* (Cwlth) (NTA) was also considered.

Background

A group of people, referred to as the Walman Yawuru claimants, applied under s. 84(5) of the NTA to be joined as respondents on the ground that they were persons whose 'interests may be affected by a determination in the proceedings'. The first and second applicants (referred to as the Rubibi and Leregon claimants respectively) opposed their joinder. The Walman Yawuru claimants were persons on whose behalf native title rights and interests were being claimed by the Rubibi and the Leregon claimants in accordance with s. 61(1).

As there was evidence that the native title rights and interests they were claiming differed from those claimed by the Rubibi and Leregon claimants, Justice Merkel was satisfied that the Walman Yawuru claimants were claiming 'a competing communal native title claim in respect of part of the claim area'. They also proposed to adduce evidence to dispute the nature and extent of the native title rights and interests claimed by the Rubibi and Leregon claimants respectively.

Justice Merkel distinguished the decision in *Yarmirr v Northern Territory* (unreported, 4 April 1997), where Justice Olney refused an application by a person claiming native title to be joined as a respondent on the basis that the court lacked jurisdiction because that person had not made a claimant application.

Jurisdiction v discretion

His Honour:

- rejected the Rubibi applicant's submission that the proper course of action for the Walman Yawuru was to either make an application under s.61 or apply to replace the existing applicant under s. 66B;
- found that the absence of any such application was a consideration that went to discretion rather than jurisdiction;

- was satisfied that the court had jurisdiction to resolve the dispute between the members of the claimant communities as to the existence, nature and extent of the native title rights and interests that are being claimed;
- considered it unnecessary to finally determine whether, as part of its resolution of that dispute, the court has jurisdiction or power to make a determination of native title in favour of the respondents—at [17] to [18].

Note that Merkel J was of the view that, if a member of the claimant community sought joinder for the purpose of ‘merely disputing the manner in which a claim is being contested or some incidental aspect of it, rather than to oppose the claim on substantive grounds’, then the discretionary issues raised by the Rubibi claimants, including that the proper course is to apply for a replacement of the applicants under s. 66B, may have some force. However, his Honour was of the view that this was not such a case—at [22] to [23].

Decision

Merkel J found that the Walman Yawuru claimants were persons whose interests may be affected by the determinations sought by the Rubibi and Leregon claimants and ordered that they be joined as respondents to the proceedings.