Strike out under s. 84C – appeal

Branfield v Wharton [2004] FCAFC 138

Ryan, Finn and North JJ, 21 May 2004

Issue

The applicants sought (among other things) leave to appeal against Justice Emmett's decision to dismiss their application to strike out a claimant application made by Wayne Wharton on behalf of the Kooma people—see *Wharton v Queensland* [2003] FCA 1398, summarised in *Native Title Hot Spots* Issue 8.

Background

At first instance, Emmett J found that:

- item 21 of Schedule 5 of the *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions) provided that, if an application was made under the old Act, then references in s. 84C of the new Act to ss. 61 or 62 are references to ss. 61 or 62 of the old Act;
- an amendment to the main application does not give rise to a new application;
- the scheme of the *Native Title Act 1993* (Cwlth) (NTA) recognises that applications may be amended; and
- there is nothing to suggest that, when an application is amended, it should thereupon be treated as a new application so as to lose the protection afforded by item 21.

Quall v Risk [2001] FCA 378 (*Quall*) was relied upon by the appellants, where it was said that if a claimant application made under the old Act is amended by changing the composition of the claimants, then s. 61 of the new Act applies to the consideration of a strike out application made under s. 84C of the new Act (the *Quall* principle). The Full Court distinguished *Quall* on the basis that, while the amendment to the description of the native title claim group in this case described the group with greater particularity and considerably more certainty, it did not change the persons or group on behalf of whom the application was bought, as was the case in *Quall*.

Decision

After noting that one of the important matters to be considered in deciding whether or not to grant leave to appeal is the chance of success on the appeal, the court found that the applicants were 'bound to fail on appeal'. This was because, even if the principle said to have been established in *Quall* was assumed, the applicants had not established any error made by the primary judge in the application of that principle—at [12]

Therefore, the application for leave to appeal was dismissed.

The *Quall* principle questioned

On these facts, the court was prepared to assume the existence of the *Quall* principle. That said, the court acknowledged that 'there is scope for questioning the correctness of the principle' but felt that this should await a case in which its determination was required by the facts of the case—at [13] to [14].

In relation to arguments by the appellant in relation to *Landers v South Australia* [2003] FCA 264 (*Landers*); *Dieri People v South Australia* [2003] FCA 187 (*Dieri*), *Bodney v Western Australia* [2003] FCA 890 (*Bodney*) and *Colbung v Western Australia* [2003] FCA 774 (*Colbung*) which followed *Quall*, the court also observed 'in passing' that:

> [I]n *Landers*, *Dieri* and *Bodney* there was no argument addressed to the effect of an amendment to the application of a determination of native title. In both *Landers* and *Bodney* the parties agreed that the approach in *Quall* should be taken. In *Colbung*, although *Dieri* was approved, the *Quall* reasoning was unnecessary for the determination of the application before the Court because the application for a determination of native title was found to comply with the new s61 in any event—at [14].