Strike-out of claimant applications - s. 84C

Briggs, on behalf of the Gumbangirri People v Minister for Lands for NSW [2004] FCA 1056

Moore J, 18 August 2004

Issues

In this application for strike-out, the main issue was whether a claimant application lodged before commencement of the new Act and amended after commencement of that Act must comply with ss. 61 and 62 of the new Act, with the question of the description of the claim group being at the heart of the proceedings. The question of using the membership of an Aboriginal corporation to describe a native title claim group was also in issue.

Background

Under the old Act, a claimant application was made on behalf of the 'Gumilaroi People of the New England Tablelands', later amended to be the 'Gumbangirri People of the New England Tablelands'.

In 1999, after the new Act commenced, the application was amended to (among other things) clarify 'on whose behalf the application is brought'. The description of the native title claim group was amended to the 'Members of the Dorodong Association Inc', an incorporated association. To be eligible for membership, a person had to be, among other things, 'an adult Aboriginal person who is a Traditional Land Owner'. From the evidence, it was clear that there were a number of people considered to be members of the claimant group who were eligible to become members of the association but who had not yet applied for membership.

Registration irrelevant

Justice Moore noted that the fact that the application had been accepted for registration under s. 190A did not preclude a finding that it had not been made on behalf of a properly constituted native title claim group: 'The actions of a delegate [of the Native Title Registrar] do not impact upon the role of the Court'—at [26], citing *Landers v South Australia* (2003) 128 FCR 495; [2003] FCA 264 (*Landers*) at [28], summarised in *Native Title Hot Spots* Issue 5, and *Phillips v Western Australia* [2000] FCA 1274.

Importance of claim group description

His Honour referred to the comment by Mansfield in *Landers* at [35] that the proper identification of the native title claim group under the new Act was:

> [T]he central or focal issue of a native title determination application. It is the native title claim group which provides authorisation under s. 251B, and it is the group on whose behalf the claim is then pursued and, if successful, in whose favour a determination of native title is then made.

In relation to s. 61 of the old Act, Moore J noted that the description of a claim group by reference to membership of a body corporate had previously been found to give rise to uncertainties: see *Ford v Minister of Land & Water Conservation* (NSW) [2000] FCA 1913 at [23].

Old or new Act?

The NSW Native Title Services Ltd applied to strike-out the application pursuant to s. 84C(1) of the new Act on the ground that it did not comply with provisions concerning the identification of the native title claim group found in s. 61(4) of the new Act: see *Quall v Risk* [2001] FCA 378 (*Quall*) at [65]; *Dieri People v South Australia* (2003) 127 FCR 364; [2003] FCA 187 at [18]; and *Bodney v Western Australia* [2003] FCA 890 at [9] (summarised in *Native Title Hot Spots* Issue 5 and Issue 7 respectively). However, the court noted that *Quall* was not adopted without qualification in *Wharton v Queensland* [2003] FCA 1398 (*Wharton*, summarised in *Native Title Hot Spots* Issue 8).

Further, as his Honour noted, two things emerged from the judgment of the Full Court in *Branfield v Wharton* [2004] FCAFC 164 (summarised in *Native Title Hot Spots* Issue 10):

- 'fairly plainly', the Full Court entertained doubts about whether *Quall* had been correctly decided on this point;
- whether regard is had to s. 61 in the old or new Act, the party seeking relief under s. 84C(1) bears the burden of establishing non-compliance—at [21].

Moore J adopted his Honour Justice Emmett's analysis in *Wharton*, i.e. that s. 84C(1) directs attention to s. 61 of the old Act in relation to an application made under that Act unless the application has been amended and the application as amended can fairly be characterised as a fresh application.

Was this a fresh application?

In this case, Moore J considered that the amended application could be fairly characterised as a fresh application:

> Whatever may have been the outer limits of the claimant group described in the original application, the 1999 amendment transmogrified that group into an incorporated association. It is an admitted fact that the membership of the Association does not correspond with members of the claimant group ... .
>
> As is generally the case with any...association, the existing members from time to time determine ... who else will be admitted to membership...Such an association does not provide a stable identification of a group on whose behalf a native title determination application is ... made. The only common characteristic defining...the group should be that the members hold native title (...the old Act) or hold, according to their traditional laws and customs, the common or group rights and interests comprising the particular native title claimed (... the new Act). The other limits ... imposed [on membership of an association] ... are ... alien to the notion of a group with a sole defining characteristic of sharing, having or enjoying native title—at [28] to [29].

Therefore, his Honour was of the view that the 1999 amendment 'created a group different in substance to that named in the original application' and, therefore, the provisions of the new Act applied.

Decision

His Honour considered the application did not, as required by s. 61(4)(b) of the new Act, describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons:

> Persons who are members of that group may be members of the Association. However, it does not follow ... that the members of the Association exhaust...the class which is the native title group—at [30].

However, even if s. 61 of the old Act was the relevant provision, his Honour was of the view that 'for the same reasons the amended application does not describe or otherwise identify, in addition to the applicants, the persons who hold native title'—at [30].

Strike-out ordered

While it was not mandatory to do so, Moore J ordered that the claimant application be struck out in any case because:

- the matter had not progressed in any material way since it was filed in 1997; and
- it was 'problematic' as to how 'the vice ... identified in the way the group is ... described' could be removed—at [31].

If the members of the group wished to bring a fresh application, that was 'a matter for them'—at [31]. See also *Bodney v Bropho* [2004] FCAFC 226, summarised in *Native Title Hot Spots* Issue 11.