Strike-out under s. 84C – revised native title determination application

In re Yoren [2004] FCA 916

Beaumont J, 13 July 2004

Issue
The question here was whether, where there are multiple registered native title bodies corporate (RNTBsC) in relation to an approved determination of native title (approved determination), only one of them can make an application for a revised determination of native title (revision application).

Background
The applicant, the Walmbaar Aboriginal Corporation (WAC), brought a revised native title determination application under s. 61(1) of the *Native Title Act 1993* (Cwlth) for variation of the Hopevale native title determination: see s. 13(1)(b). The Hopevale determination was an approved determination, as defined in ss. 13 and 253. WAC was one of three RNTBsC in relation to the Hopevale native title determination.

Provisions for revision application
The NTA provides that an application may be made to the Federal Court to revoke or vary an approved determination if:

- events have taken place since the determination was made that have caused the determination to no longer be correct; or
- the interests of justice require the variation or revocation—see ss. 13(1)(b) and 13(5).

Subsection 61(1) provides that 'the registered native title body corporate' is one of the limited classes of persons who can make a revision application.

Strike-out application
The respondents, Cape Flattery Silica Mines Pty Ltd, applied for strike-out of the revision application under s. 84C(1) raising (among other things), as a preliminary point whether, as a matter of statutory construction, only one RNTBC could make a revision application when there were multiple RNTBsC in relation to the approved determination.

Justice Beaumont, having had regard to the evident purpose of s. 61(1) in limiting the scope of those who can make a revision application, held that the word 'the' in the expression 'the registered native title body corporate' in s. 61(1) does not mean 'any'; it must include the plural i.e. s. 61(1) requires that all of the RNTBsC in relation to the approved determination must make a revised application under s. 61(1)—at [13].

Beaumont J stated:

> Where, as here, several bodies corporate hold the native title, it is plain that the evident object sought to be achieved by s. 61(1)(b) in not permitting any of them to move, on a free-standing basis, for a revision, is the fact that all of those bodies initially joined in, and together became, parties to the approved determination. On the face of it, it would be wrong for any one of them to proceed, independently, to apply to revise their joint determination, unless of course all of them later agree to join in the claim for revision. This accords with general (and universal) practice...that a person shall not be added as an applicant without consent— at [15].

Decision

His Honour concluded that the form of the revised application plainly failed to comply with s. 61(1) and that there was no indication that the other RNTBCs for the Hopevale determination wished to apply for a revision. The revision application was struck out. In the light of both the terms of s. 85A of the NTA and the novel circumstances of the application, his Honour found it was inappropriate to make any order as to costs—at [17].

Comment

With respect, his Honour's comment at [15] appears to misconstrue the procedure for determining prescribed bodies corporate. A PBC is not a party to a determination of native title. Where the court makes a determination that native title exists, a PBC is determined by the court under s. 56 (where the native title is held on trust) or s. 57 (where the native title is held by the common law holders).

Appeal filed

An appeal against Beaumont J's decision was filed on 20 July 2004.