

# Future act regime - injunctive proceedings

## *Ngunawal People v Australian Capital Territory* [2004] FCA 785

Emmett J, 19 March 2004

### Issue

The issue before the court was whether the provisions of the *Native Title Act 1993* (Cwlth), particularly subdivision K of Part 2, Division 3 (part of the future act regime), could be used to obtain interlocutory relief in aid of a native title claim.

### Background

Dean Bell, the applicant in an unregistered claimant application in the Australian Capital Territory made on behalf of the Ngunawal People, sought interlocutory relief in relation to the proposed Gungahlin Drive Extension (the extension). Mr Bell was unrepresented.

Approximately 12 months prior to the hearing, Mr Bell had been contacted about, and participated in, a cultural heritage walk of the proposed site of the extension. During the cultural heritage walk, he identified a significant site which was recorded by Environment ACT. Evidence produced at the hearing indicated that no immediate threat was posed to the site identified by Mr Bell, because the works that were due to commence would start some kilometres away.

### Grounds of interlocutory relief

Mr Bell sought interlocutory relief as part of proceedings on the claimant application, including an injunction to stop all development on the extension immediately until consultation and discussion with the Aboriginal traditional owners about cultural heritage issues had taken place. In his submission to the court, Mr Bell relied on the provisions of the NTA, the terms of the Ngunawal People's claimant application and the decision of Drummond J in *Fourmile v Selpam Pty Ltd* [1998] FCA 67.

### Subdivision K

Justice Emmett considered the provisions of subdivision K, particularly s. 24KA, noting that:

[T]he provisions of the Act ... indicate that, even if there is a threat to native title heritage sites by reason of the construction of the...Extension, any grant of native title would not necessarily stand in the way of the construction. Section 24KA ... applies to a future act if the future act permits and requires the construction, operation, use, maintenance or repair by or on behalf of any person of any of the things listed in s 24KA(2) to be operated, for the general public. Section 24KA(2) provides that, for the purpose of that provision, the things in question include a road.

Section 24KA(3) provides that, if those provisions apply to a future act, the future act is valid—at [10] to [11].

### Application misconceived

His Honour concluded that:

- even if there was a threat to native title heritage sites by reason of the construction of the extension, any grant of native title would not necessarily stand in the way of the construction;
- while native title claimants do have limited procedural rights and rights to compensation under subdivision K, the native title of the Ngunawal People, whatever it might comprise, would not extend to preventing the construction of the extension;
- the notice of motion was misconceived insofar as it was filed in the native title proceeding and claimed interlocutory relief in aid of the native title claim—at [9] to [12].

### **Decision**

It was held that the notice of motion filed by Mr Bell be dismissed and (on application by the Commonwealth) that Mr Bell pay the Commonwealth's costs—at [15].