When is an application made under ss. 47-47B?

Rubibi Community v Western Australia [2004] FCA 1019

Merkel J, 6 August 2004

Issue
The question to be determined in this case was whether the non-extinguishment principle found in s. 238 of the *Native Title Act 1993* (Cwlth) (NTA) was to be applied on the basis of the facts in existence at the date at which a claimant application is filed in the court or at the date at which such an application is the subject of a determination of native title by the court.

Background
In the proceedings before the court, eight claimant applications had been combined, with one being nominated as the lead application and the seven other applications being 'continued in and under' the heading in that application: see s. 64(2). The eight pre-combination applications were filed at various times from February 1994 to December 1997 (i.e. under the old Act).

There were areas within the boundaries of the area covered by the applications where it appeared native title had been extinguished, completely or partially, before the pre-combination applications were filed. However, the applicants argued that, since the filing of the applications, facts had arisen which required the application of the non-extinguishment principle (found in s. 238) to those areas, with the consequence that extinguishment of the native title rights and interests in the relevant areas must be disregarded.

The applicant's 'dilemma' was:
- whether those areas were claimed in their current applications and, therefore, able to be the subject of a determination of native title; or
- whether those areas were not able to be the subject of their current applications because of the extinguishment of native title prior to the filing of the applications.

If they were not able to be the subject of a determination, then the applicants would have to amend to ensure that those areas were not being claimed and file new applications over those areas.

The application for a determination of native title had been heard and was awaiting determination, subject only to the imminent hearing of extinguishment issues. In order to resolve the 'dilemma', the applicants were granted leave under O 29 r 2 of the Federal Court Rules to have the question of the operation of ss. 47, 47A and 47B of the NTA (the remedial provisions) decided separately. Under those provisions, prior extinguishment must be disregarded in certain circumstances, provided those

circumstances existed 'when the application is made', and the non-extinguishment principle found also in s. 238 applies. The applicants contended the application was made as at the time of the determination or, alternatively, at the date of the combination application.

The statutory scheme

Justice Merkel set out the relevant provisions of the NTA, noting in particular that:

- a claimant application must not be made over an area where native title has been completely extinguished by a 'previous exclusive possession act' as defined in s. 23B or the analogous state/territory provision: see ss. 61A(2) and 23E;
- a claimant application must not claim rights and interests conferring exclusive possession over any area subject to a 'non-exclusive possession act' as defined in s. 23F or the analogous state/territory provision: see ss. 61A(3) and 23I;
- however, neither of these limitations apply if the remedial provisions also apply to the area: see s. 61A(4).

Merkel J went on to note that:

> It is clear from the statutory scheme that the area covered by the native title application is the area in which native title rights and interests are claimed; and that the areas within the boundaries of the area covered by the application that are not covered by the application [see s. 62(2)(a)] include ... areas within the boundaries of the claimed area where native title rights and interests have been completely extinguished ... . [I]t is common for applicants to include ... areas that may have been extinguished but to state that the inclusion of those areas is subject to ... ss 47, 47A and 47B...That form of claim was adopted by the applicants in the present case. However, it is relevant to note that, subject to such a reservation, the statutory scheme prohibits an application being made that claims native title in relation to an area in which native title has been completely extinguished—at [17].

Decision

His Honour noted that the applicant's submissions were superficially attractive because they would:

> [G]ive effect to harmonious goals ... by ensuring that the date of determination is the date at which *all* native title and extinguishment issues in relation to the land claimed can be determined [referring to ss. 223, 225 13(5) and 68] ... . If the determination was to be based on the events that have taken place as at the date of filing, rather than as at the date on which the determination is made, it could be expected that events since the filing, rather than since the determination, would be relevant for the purposes of a revocation or variation order under s 13(5)—at [24], emphasis in original.

However, Merkel J rejected the submissions, finding that:

- the applicable principle of construction was that the meaning of a provision must be determined 'with reference to the language of the instrument viewed as a whole'; and
- the operation of the remedial provisions was dependent upon the prescribed factual situation existing at the time specified in those provisions—at [26] to [27], referring *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

It was noted that the ordinary meaning of the words of the remedial provisions is that an application in relation to an area is made when it is 'made' to the Federal Court upon filing in that court—at [28], referring to ss. 60A and 61A and *Strickland v Native Title Registrar* (1999) 168 ALR 242 at [35].

His Honour was of the view that:

- the non-extinguishment principle was intended to operate in light of the facts existing at the time of filing and not any later time;
- the filing date gives rise to certainty of the areas that are claimed in the application;
- the notification provisions found in s. 66 and 66A would effectively be by-passed in respect of areas claimed on the basis of events continuing up to the date of determination;
- on the other hand, native title claimants could be disadvantaged when the factual basis in support of the application of the non-extinguishment principle ceased prior to a determination by the court—at [30] to [35].

The contention that the application is made when the combination order was made was rejected because:

> It is clear from the terms of the combination order that it is combining the eight applications, each of which is continuing. Also ... the date at which an application...is made has important consequences. There is nothing in the legislative scheme that suggests that an order combining applications may override those consequences—at [36].

Therefore, it was held that, for the purposes of the remedial provisions, the application is made at the time that the initiating application under ss. 13 and 61 is filed in the Federal Court.

Comment

As the eight applications in question were made under the old Act, they were not filed in the court but 'given' to the Native Title Registrar. Therefore, item 6 of Schedule 5 of the *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions) appears to be relevant. However, it was not addressed in the reasons for decision and, in any case, nothing appears to turn on it.