Party status – joinder of claim group members

Kokatha Native Title Claim v South Australia [2005] FCA 836

Mansfield J, 24 June 2005

Issue

There were two issues examined in this matter:

- whether the applicant to a claimant application that was struck out, who was a respondent to an overlapping application, ceased to be a respondent because of the strike out; and
- whether other persons who would also have been members of the claim group for the application that was struck out could be joined as respondents.

Background

Two claimant applications, the Kokatha claim made by Daniel Clifton and Roger Thomas on behalf of the Kokatha people and the Kuyani claim made by Mark McKenzie on behalf of the Kuyani people, overlapped in respect of an area of land north-east of Port Augusta in South Australia.

The Kuyani claim was struck out on 27 January 2005. Prior to the strike out, Mark McKenzie had become a respondent to the Kokatha claim because he was a registered native title claimant: s. 84(3)(a)(i). The Kokatha claimants and the Aboriginal Legal Rights Movement (ALRM) contended that Mark McKenzie ceased to be a party to the Kokatha claim when the Kuyani claim was struck out.

Is Mark McKenzie still a party to the Kokatha claim?

Justice Mansfield held that:

- subsection 84(8) may be exercised to remove a party if the person no longer has interests that may be affected by a determination in the proceedings;
- however, it clearly contemplated no automatic removal of a party if the interests which previously led to that person becoming a party ceased to exist—at [6].

The Kokatha claimants submitted that s. 66(4)(b) applied directly to Mark McKenzie so that he ceased to be a party. Mansfield J held that it did not because:

- subsection 66(4) was intended to avoid the extensive notification requirements in the event that the relevant state or territory minister applies to the court within a limited time and succeeds in getting the native title determination struck out;
- the submission by the Kokatha claimants required that s. 66(4) be read so that the 'and' be read as a disjunctive 'or';
- there was no contextual or practical reason why the clear and normal meaning should not be given to that provision;
- the fact that a person has become a party by the eligibility criterion in s. 66(3)(a)(i) and s. 84(3)(a)(i) [i.e. because they were a registered native title party] and that native title claim has been struck out does not necessarily mean that the person

would not otherwise have been eligible for automatic party status under ss. 84(3)(a)(ii) or s. 84(3)(a)(iii)—at [7] to [8] and [10].

Applications to become a party

Three notices of motion were brought by persons seeking to become respondents to the Kokatha claim. They claimed:

- an interest in the area concerned either as Kuyani/Wilyaru or Adnya-Kuyani men under the Wilyaru-Kuyani traditional laws and customs; and
- that their interests were inconsistent with the rights claimed by the Kokatha claimants in the Kokatha claim.

The Kokatha claimants contended that:

- subsection 84(5) did not permit the joining of parties who assert native title rights and interests which were inconsistent with those claimed by the Kokatha claimants;
- persons with such an interest could only attain party status under ss. 84(3)(a)(i) and 84(3)(a)(ii) during the notification period;
- the court should decline to make the orders sought as the interests claimed to be affected were inherently communal in character, so that no one person (unless authorised under s. 251B) should be permitted to assert them.

Mansfield J held that:

- there was no provision in the NTA expressly limiting an authorised native title claimant from becoming a party to a competing native title claim, or requiring a non-authorised native title claimant from becoming a party to such a claim, only within the notification period;
- subparagraph 84(3)(a)(ii) should not be read to exclude persons who claim eligibility to party status under that provision but who are not by then authorised under s. 251B to pursue a claim for native title rights;
- the court has a discretion under s. 84(5) to join each of the 'party-applicants' as a party to the Kokatha claim notwithstanding that, as individuals, they were each asserting that their interests which were or may be affected by a determination of native title in the proceedings were apparently native title rights and interests;
- where there may be a competing native title group who claim communal rights and interests which may be affected by a determination, but there was no application by that group over the claim area, the members of that group should not be precluded from putting forward their claim in a defensive attempt to avoid the dilution of those interests;
- as power in s. 84(5) was discretionary, it would often be a matter for evidence as to whether any one individual has either a particular status or a particular perspective or particular circumstances which warrant that person's joinder as a party, including that person's status within the putative or competing claim group;
- it may be relevant to know the extent to which that person or persons has the support of, or is entitled to represent, the interests of the putative or competing claim group;
- no hard and fast rules could be laid down;

- in this case, there was no persuasive evidence that Michael McKenzie or Cecil Brady assert a particular status or perspective supporting their joinder as parties in addition to, or instead of, Mark McKenzie—at [19], [24], [26] and [27].

The court will further consider this matter on 8 September 2004—at [28].