

Representative body's facilitation & assistance function – injunction sought

Taylor v Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation [2004] FCA 1010

Lee J, 26 November 2004

Issues

This case examines the role and responsibility of Aboriginal/Torres Strait Islander native title representative bodies in performing their assistance and facilitation functions and the position of people who can 'speak for particular country' in authorising agreements.

Background

The three applicants, members of the Njamal native title claim group in Western Australia, sought an urgent interlocutory injunction against Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (Yamatji), a representative body under the *Native Title Act 1993* (Cwlth) (NTA) that represents the claim group in the claimant's application.

Two of the three applicants in this case are authorised by the claim group to make the Njamal native title claim as required by s. 61(1) of the NTA. They are, therefore, persons who, with others, jointly comprise the applicant and the registered native title claimant see s. 61(2) and 253. However, they claimed a superior right, under traditional law and custom, to speak for a part of the area covered by the application that included the Woodie Woodie Mine.

The native title claim group instructed Yamatji to assist it in the conduct of negotiations with the operator of the mine, Consolidated Minerals Ltd (CML), about future operation of the mine site. In June 2004, those attending a meeting of the native title claim group instructed Yamatji to 'liaise' with CML and to prepare an agreement to be signed by the registered native title claimant. A meeting was scheduled for November 2004 for the claim group to consider the proposed agreement—at [8] and [9].

The applicants seeking the injunction claimed that:

- under the traditional law and custom of the claim group, they have the sole right to speak for the use of that part of the claim area that included the mine site;
- the representative body had failed to inform the claim group that the decision must be obtained in accordance with traditional law and custom and not by another process not consistent with that law and custom—at [10] and [11].

Pending determination of an application for judicial review of the respondent's decision in relation to s. 203BC(2) of the NTA, the applicants in this case sought,

among other things, an interlocutory injunction to restrain the respondent from representing or assisting the native title claim group by advising that they may direct the registered native title claimants to execute the proposed agreement with CML—at [12].

Obligations of the representative body

The applicants contend that the respondent has failed to carry out the facilitation and assistance functions under s. 203BC (1) by allowing the native title claim group to use a decision-making process that is not consistent with their traditional laws and customs—at [11].

Justice Lee reviewed ss. 203BB(1), 203BC(1) and 203BI of the NTA which deal with a representative body facilitation, assistance and internal review functions. His Honour was satisfied that:

- on the material before him, there was a serious issue to be tried, i.e. that Yamatji failed to carry out the facilitation and assistance functions required by the NTA;
- there was an arguable case that Yamatji had not consulted with, or given due regard to, the interests of persons who may hold native title who are affected by the negotiations and proposed agreement with CML;
- it was arguable that Yamatji had failed to properly advise the claim group on the consequences of entering the agreement without the consent of the applicants;
- it was arguable that Yamatji had failed to carry out the internal review functions as required by ss. 203B(1)(f) and 203BI of the NTA;
- the material filed in these proceedings showed that there was no action taken on the applicants' request for internal review of the decision to advise and represent the native title claim group and suggested that Yamatji may not have in place a process for review of its decisions or actions—at [16] to [18].

Decision

Lee J held:

- the balance of convenience weighed in favour of the applicants
- a potential result of the conduct of the proposed November meeting would be an irreversible circumstance under the NTA for which the applicants could not obtain redress if they succeeded in their substantive application—at [19].

Therefore, Yamatji was restrained from:

- providing representation or assistance to the claim group by convening the November meeting; and
- advising the claim group that it could hold such a meeting and engage in decision-making at that meeting that may not be in conformity with their traditional laws and customs—at [20].