Determination of native title—non-claimant application

Hillig v Minister for Lands (NSW) [2005] FCA 1713

Bennett J, 28 November 2005

Issues
The question was whether to make a determination that native title did not exist in relation to the area covered by a non-claimant application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (the NTA).

Background
A non-claimant application was made by the administrator of the Worimi Local Aboriginal Land Council (the council) and dealt with parcels of land in New South Wales transferred in the council under the *Aboriginal Land Rights Act 1983* (NSW) (the ALR Act). The transfer was subject to s. 36(9) of the ALR Act, which provides that it was subject to any existing native title rights and interests. Sections 40 and 40AA of the ALR Act prevent Aboriginal land councils from dealing with the land in question unless it is the subject of an 'approved determination' of native title, as defined by ss. 13 and 253 of the NTA. The administrator of the council sought a determination that native title did not exist in relation to the area covered by the non-claimant application.

Justice Bennett noted that there was evidence before the court showing that:
- the Native Title Registrar had given notice in accordance with s. 66 of the NTA;
- searches of the 'National Native Title Tribunal Register' (which is, presumably, a reference to the Register of Native Title Claims) disclosed no claimant application over the areas concerned;
- while the representative body for the area (New South Wales Native Title Services Ltd) was joined as a respondent to the application, no native title claimant had sought to appear or given the court notice of any interest in the proceedings; and
- the notice period specified in the notice given under s. 66 had expired—at [8] and [9].

Unopposed applications—s. 86G
Bennett J referred to s. 86G of the NTA, which empowers the court to make the orders sought by the applicant at any stage of proceedings after the expiration of the period specified in the s. 66 notice if:
- the application is unopposed; and
- the court is satisfied it is within its power to make the order sought.

An application is 'unopposed' if either the applicant is the only party or all other parties give the court written notice that they do not oppose the making of the orders

sought by the applicant. The court was satisfied that it had power to make the orders sought because:

- the required notice had been given and the period specified in the notice had expired;
- pursuant to s. 81 of the NTA, the court had jurisdiction to hear and determine applications that relate to native title;
- an application may be made under Part 3 of the NTA for determination of native title, including an application by the holder of a non-native title interests for a determination that native title does not exist in relation to a particular area (see ss. 61(1) and 225);
- therefore, the applicant here, as a holder of non-native title interests in relation to the areas concerned, may apply for a native title determination;
- the solicitors for the respondents to the application had notified the court in writing that the application was unopposed—at [10] to [13].

Bennett J noted that orders of the kind sought by the applicant were made in *Deniliquin Local Aboriginal Land Council* [2001] FCA 609 , *Kennedy v Queensland* (2002) 190 ALR 707 and *Application for Determination of Native Title made by the Metropolitan Local Aboriginal Land Council* [1998] FCA 402—at [14].

Decision

The court made orders that no native title exists over the areas in question—at [15].