Splitting proceedings under s. 67

Turrbal People v Queensland [2005] FCA 1796

Spender J, 9 December 2005

Issue

The State of Queensland sought orders separating the Turrbal People's claimant application into two separate proceedings. It was proposed that the proceeding in relation to Turrbal Part A would deal with that part of the area covered by the application where there was no overlapping claimant application. That would be set down for trial. The proceeding dealing with Turrbal Part B, the balance of the area where there were overlapping claimant applications, would be adjourned to a later date. Most of the other respondents and the applicants in the overlapping claims supported the state's submissions and none of the respondents opposed them. The Turrbal people opposed the making of the orders.

Background

The Turrbal People's application covered an area of approximately 1,485 square kilometres comprised of 330 specific parcels of unallocated state land, state forests and parklands in and around Brisbane i.e. it was 'lot specific'. The area the state proposed as Turrbal Part A comprised 96 lots covering 522 kilometres. Both the Jinibara People's claim and Jagera People's No. 2 claim, neither of which was programmed to trial and both which were 'country claims' (i.e. not lot specific), overlapped parts of the area covered by the Turrbal People's claim.

After significant unsuccessful attempts to resolve the Turrbal and Jinibara overlap via mediation, the court ordered that mediation cease —see s. 86C of the *Native Title Act 1993* Cwlth (NTA). Subsequently, programming orders were made and the Turrbal People made significant preparations for trial, including identifying points of claim and delivering the majority of their evidence to the state. The state's objections to the applicant's expert reports, the evidence it wanted led orally and its objections to the tender of documents or parts thereof had also been provided.

The state's submissions

In support of its application to have the two areas covered by the Turrbal People's application dealt with in separate proceedings, the state argued (among other things) that:

- the main steps for trial remaining to be taken by the respondents could be done expeditiously if the area covered by the hearing was confined to Turrbal Part A;
- a trial of Turrbal Part A would be relatively short and inexpensive e.g. only three Turrbal People apparently had a relevant connection with the claim area and it appeared the applicant proposed to call no more than four witnesses;
- apart from cross-examination, the time spent by the respondents at trial would be short, as their evidence was likely to be in documentary form;

- as Turrbal Part A covered only unallocated state land, state forests and parks, it was likely that fewer parties would be involved than would be the case if the whole of the Turrbal application area went to trial and the tenure research required for the extinguishment issues would be limited;
- if the whole of the Turrbal People's claim was heard at once, the involvement of overlapping claims would result in further delay and expense, primarily because of the nature and extent of the overlaps and the requirements of s. 67;
- the applicants in the overlapping claims had neither particularised their claims nor carried out the steps necessary to proceed to a trial; and
- because the overlapping applications were not lot specific, the state would have to carry out extensive tenure research and analysis—at [15] to [20].

The Turrbal People's submissions

The Turrbal People opposed the state's application, arguing that:

- subsection 67(1) required that the Jinibara, Jagera and Turrbal applications be dealt with in the same proceeding;
- dealing with their application in two separate proceeding was unjust because they had built their case for trial over the whole of the area and unreasonable because they would incur additional costs; and
- the notion of separating their traditional homelands into Part A and Part B was at odds with the principles of the Turrbal laws and customs—at [34] to [37].

Court's power to make the orders

Justice Spender noted that s. 67 (1) required that, where there are two or more proceedings before the court relating to native title determination applications that have overlapping areas, the court 'must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding'. The court noted that, 'importantly', s. 67(2) (headed ' Splitting of application area') provides that, without limiting s. 67(1), the order of the court 'may provide that different parts of the area covered by an application are to be dealt with in separate proceedings'—at [18].

Further, s. 68 provides that, if there is an approved determination of native title in relation to a particular area, the court must not conduct any proceeding relating to an application for another determination of native title or make any other determination of native title in relation to that area or to an area wholly within that area, except in the case of an application to revoke or vary the first determination (see s. 13) or a review or appeal of the first determination—at [19].

In the court's opinion:

- the effect of ss. 67 (1) and 68 was that, in relation to the overlapping area, the court could not hear and determine the Turrbal People's claim separately from the overlapping claims;
- it was unlikely the overlapping claims would be ready to be heard for some years;
- subsection 67(1) required overlapping applications to be dealt with in the same proceedings only to the extent that the applications covered the same area;

- it is possible to avoid the need to have the overlapping applications heard in the same proceeding by making an order that different parts of the area covered by the Turrbal People's application be dealt with in separate proceedings;
- by virtue of s. 67 (2) and O 78 r 5(3) and O 29 r 2(a) of the Federal Court Rules, the court had power to split the area covered by the Turrbal People's application into two proceedings, with the unoverlapped portion dealt with in one proceeding and the overlapped portion dealt with in separate, further proceedings;
- those further proceedings could only be heard and determined in the same proceeding as the hearing and determination of the claims in respect of the overlap area;
- the orders sought were consistent with s. 67 (2), notwithstanding a submission by the state that the orders involved only an 'administrative' separation;
- the orders would effectively split the Turrbal People's claim into two proceedings i.e. into two parts, one part in respect of the area contained in Turrbal Part A, heard and determined separately from, and ahead of, the Turrbal People's claim in respect of the area contained in Turrbal Part B—at [25] to [26] and [33] to [34] .

Conclusion

Spender J found:

- the court was empowered to make the orders the state sought and, on the evidence, it was just and convenient to do so, referring to similar orders made in other matters, e.g. *Wik Peoples v Queensland* [2004] FCA 1306 (summarised in *Native Title Hot Spots* Issue 12), *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229; and
- there were 'overwhelming reasons' why the court should make the orders sought, particularly since hearing the whole of the Turrbal People's claim, together with the overlapping claims, faced very considerable delay—at [28] to [32] and [40].

Comment

There have been unsuccessful attempts in the past to split a claimant application for the purposes of limiting the parties whose consent must be obtained for the purposes of s. 87 or to allow for parts of the area covered by overlapping claimant applications to be combined with parts of the area covered by other claimant applications: see *Munn and Champion v Western Australia* [1999] FCA 581. It should be noted that this case does not affect what was found in those cases. Subsection 67(2) only applies to overlapping applications and only provides for a splitting of the proceedings, not the application. So, in this case, there will be two proceedings that deal with one claimant application i.e. the Turrbal People's claimant application. And it is arguable that s. 87 will then only require to agreement of the parties to those proceedings (see s. 84 which makes it clear that persons are parties to proceedings rather than parties to the application). However, if amendment becomes necessary, then the application is still treated as a whole, as it is for the purposes of the application of the registration test under s. 190A(1). Indeed, there are no provisions in the NTA to deal with the registration of 'split applications' and if it were attempted it may produce a disjunction between the split applications in the Federal Court and the application as entered on the Register of Native Title Claims.