Amendment to increase area covered by claimant application

Turrbal People v Queensland [2006] FCA 187

Spender J, 2 March 2006

Issue
The issue before the Federal Court was whether to grant leave to amend a claimant application to increase the area it covered. The increase would be as a result of including a number of reserves that were included in the original application but were subsequently removed when the application was amended.

Background
In *Turrbal People v Queensland* [2005] FCA 1796 (summarised in *Native Title Hot Spots* Issue 17), the court decided to split the proceedings for dealing with the claimant application brought on behalf of the Turrbal People. The result was that Part A was programmed to trial and would be heard and determined separately from, and ahead of, the area contained in Turrbal Part B. In relation to the application to amend dealt with in this case, Justice Spender noted that it 'had a somewhat unfortunate history'—at [2].

In the original application, filed in May 1998, the boundary of the area covered by the application (application area) was described. The application stated that native title was claimed only in relation to areas within that boundary that were unallocated State land, state forests, reserves (including timber reserves), national parks and areas held by the local city and shire councils used, or set aside for parks or similar purposes. However, any parts of those areas that were or had been 'subject to a valid grant of exclusive possession to a private party' or 'validly used in a manner that is wholly inconsistent with the continued existence of native title' were excluded from the area subject to the application (the exclusion clause). Subsequently, the application was amended to excise the reserves from the application area. A motion seeking to reinstate the reserves was later filed but then abandoned during the course of the hearing.

In relation to the proposed amendment to the application dealt with here, the applicant sought to include 68 of the reserves previously excluded but formally included in the application as lodged in 1998. It was proposed that the 'exclusion clause' in amended application would state that:

- the area covered by this application does not include any area where native title has been validly extinguished except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B;
- this application does not include any areas subject to a previous exclusive possession act defined under s. 23B of the NTA save where the NTA and/or the

common law allows those lands to be part of a native title determination application;
- the application does not include a claim for exclusive possession over previous non-exclusive possession act areas as defined in s. 23F of the NTA save where the NTA and/or the common law allows such a claim to be part of a native title determination application.

Spender J was of the view that there was 'no identity' between what is said to be 'not claimed' in the amended application and what was said to be expressly excluded in the original application i.e. those parts that: 'are or have been ... validly used in a manner that is wholly inconsistent with the continued existence of native title'. The latter described 'operational inconsistency', which the court found was not 'co-terminus with a previous exclusive possession act', a point that may have 'significance' because s. 64 of the NTA deals with the amendment of applications—at [6] to [7].

Amendment of applications under s. 64

Subsection 64(1A) of the NTA provides that:

> An application may be amended to reduce area covered by an application. (This subsection does not, by implication, limit the amendment of applications in any other way.)

The court noted that ss. 64(1) and (2) provide that an amendment of an application must not result in the inclusion of any area that was not covered by the original application unless, in the case of a claimant application, it is an amendment to combine that application with another claimant application or applications. It is noted in s. 64(1) that the Federal Court Rules provide for the amendment of application.

It seemed to Spender J that, having regard to s. 64(1), 'the possible difficulty' that flowed from the way the exclusion clause was expressed in the original application compared with the way it was expressed in the amended application, could be met by granting the application to amend in the terms sought but adding the proviso that: 'No area or land that was not covered by the original application is to be included in the amended claim'—at [8].

In his Honour's opinion:

> [T]he reference to 'application' in s 64 (1) (a) [sic, presumably a reference to s. 64(1A)] means the application as the application is from time to time. This is an application to restore to...a claim...[areas] which were in the original application but which are not in the application as it presently is before the court. There is therefore, in the present application, no right in the applicant to amend relying on s 64 (1) (a) [sic, read s. 64(1A)]. This application falls to be determined, it seems to me, on the more general provisions of amendment under the Federal Court Rules, in particular O 13 r 2.
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> That conclusion is reinforced, in my view, by the reference in s 64 (1) to the *'original application'*—at [9] to [10], emphasis in original.

His Honour noted that there was nothing in *Walker v Queensland* [2004] FCA 640 (summarised in *Native Title Hot Spots* Issue 10) which 'pointed away from' that conclusion—at [11].

In his Honour's opinion;

> [A]s in s. 64 itself, the word '*application*', unrelieved by the adjective '*original*' or '*claimant*', means the ambulatory application, that is, the application as it is at any particular time—at [12], emphasis in original.

The question of amendment therefore came down to one of discretion—at [13].

Factors going to discretion

There were a number of matters that the Court said were in favour of granting the amendment sought:

- the reduction in the number of reserves, from 935 in the original application to 67 or 68 in the amended application, was the consequence of a great deal of detailed and considered work; and
- there was no evidence before the court 'to contradict the material going to the bone fides and the merits of the amended claims'--at [14].

The Court concluded that:

> [T]he resolution of today's question is in the context of a bona fide, credible claim, a claim that is not devoid of any merits of ultimate success. The matter simply falls to be determined on the basis of discretionary factors—at [14]

The State of Queensland opposed the amendment, contending that there was nothing to stop the applicants making a fresh claim in respect of the 68 reserves. It was accepted that a new claim would need to have work done on it in respect of the requirements of the NTA, such as notification and the likely involvement by other parties. There would also be tenure history research in respect of those 68 claimed reserves which, according to the state, could take some 12 months. The state submitted it was better that the matter proceed unamended in respect of the Part A proceedings and then a second claim in respect of the proposed new reserves follow 'down the track'—at [15].

The applicant conceded that, should some of the reserves be reinstated, delays in the current programming orders bringing Part A to trial would occur. However his Honour was of the view that:

> The delays are, it seems to me, not inconsiderable and have to be weighed in the context of the whole history of the matter to date.
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> It seems to me that the fundamental matter to be considered is the desirability under the general law, and in particular by the provisions of the Act itself, to avoid a multiplicity of claims if that is at all possible—at [16] to [17].

The observations of Lee J in *Champion v Premier & Western Australia* [1999] FCA 581 (Champion) , including at [10] that 'that it would be undesirable for multiple separate determinations of the native title interests of a native title claim group to be

made in respect of the area over which native title is claimed in the application lodged by that claim group', were cited with approval, although his Honour noted the application to amend in Champion was not opposed—at [18] and [19].

It was also noted that Champion dealt with combining 18 overlapping applications to reduce them to three, whereas this case was:

> [C]oncerned ... with the probability of successive proceedings to parts of the same non-overlapped area by a single claimant [group]. That seems to me to reinforce the desirability of giving effect to the avoidance of multiplicity of proceedings, recognising, nonetheless, that there will be a postponement of the final resolution of the matters—at [20].

Decision

The court ordered (among other things) that leave be given to amend the application provided the amendment was not to include any area of land or waters that was not covered by the original application and, after the correction of typographical errors, the amended application should be filed and served on the parties to the Part A proceedings.

Additional notice

The court exercised the power available under s. 66A(4) to direct the Native Title Registrar to give 'additional' notice i.e. in addition to any notice of an amended application that the Registrar must give under ss.66A(1) and (2). So, in this case, the Registrar must give notice of the amended application to those referred to in s. 66 (3)(a) who are not already parties to the application and notify the public 'in the determined way' i.e. as set out in the Native Title (Notices) Determination 1998 (the Notices Determination). There is no 'determined way' to give additional notice as directed by the court under s. 66A (4) in the Notices Determination but, presumably, notice given in accordance with Item 6(1) would suffice.

Comment

Walker's case dealt with an application to reduce the area covered by the application, with the applicant relying on the 'right' to do so under s. 64(1A). Further, no mention was made of *Kogolo v Western Australia* [2000] FCA 1036 (Kogolo). That was also a case where the applicant in a claimant applicant sought to reinstate an area that was included in the 'original' application but subsequently excluded by amendment. In Kogolo, Lee J held that:

- the ordinary meaning of the term 'original application' in s. 64(1) is 'a source proceeding or initiating process';
- therefore, 'on its face', s.64(1) permits an amendment to include areas so long as they were included in the original application i.e. the application in the form it was first lodged or filed;
- if the draftsperson of the NTA had intended that s. 64(1) should not permit an amendment to an application to increase the claim area, 'that intention could have been effected by stating in simple terms that an amendment to an application must not result in the inclusion of any additional area of land or water'--at [9] and [16].

With respect, it appears that Lee J's view in Kogolo is to be preferred i.e. that s. 64(1) rather than s. 64(1A) is the relevant provision in the circumstances.