Right to negotiate – transitional provisions

Koara People v Western Australia [2006] FCA 66

Nicholson J, 9 February 2006

Issue

The issue in this case was whether the right to negotiate applied in relation to notices given under s. 29 of the 'old Act' in circumstances where the relevant claimant application had been amended to combine it with a number of other claimant applications after the commencement of the amendments i.e. under the 'new Act'. 'Old Act' is a reference to the *Native Title Act 1993* (Cwlth) (NTA) as it stood prior to the 1998 amendments and 'new Act' means the NTA as amended by the *Native Title Amendment Act 1998* (Cwlth) (Amendment Act). The answer to the question was not academic; 234 tenement applications would be affected by the outcome of this case.

Background

The Koara People relied on s. 39B(1A) of the *Judiciary Act 1903* (Cwlth) and sought:

- a declaration that, at all material times, there were registered native title claimants within the meaning of NTA with respect to the old Act s. 29 notices that affected any of the 'pre-combination' applications made on their behalf; and
- permanent injunctions restraining the State of Western Australia from doing the future acts described in those notices unless or until one of the requirements under s. 28 of NTA was satisfied.

Six claimant applications were made on behalf of the Koara People under the old Act in the period 23 December 1994 to 10 August 1995 in the Goldfields region of Western Australia. Each was registered on the Register of Native Title Claims prior to 27 June 1996.

On 20 November 1998, s. 29 notices were issued under the new Act that affected areas covered by one or more of the pre-combination claims. As a result, sub-item 11(3) of Schedule 5 to the Amendment Act (the transitional provisions) applied, which meant that the Native Title Registrar was required to use 'best endeavours' to finish considering the applications under s. 190A of the new Act (i.e. apply the new 'registration test') by the end of a prescribed four month period.

Sub-item 11(8) of the transitional provisions relevantly provides that, in considering the claims made in the six applications in accordance with sub-item 11(3), the Registrar was required to:

- have regard to any information provided by the applicant after the application was made in addition to having regard to information in accordance with subsection 190A(3) of the new Act;
- apply section 190A of the new Act as if the conditions in ss. 190B and 190C requiring that the application contain or be accompanied by certain information or other things or be certified or have other things done in relation to it also

allowed those things to be provided done by the applicant or another person after the application is made; and
- advise the applicant that the Registrar is considering the claim and allow the applicant a reasonable opportunity to provide any further things or have any things done in relation to the application.

If the claims did not satisfy all of the conditions in sections 190B and 190C of the new Act, then the Registrar was required, among other things, to remove the details of the claims from the Register—see sub-item 11(9)(a).

Pre-27 June 1996 claims
Sub-item 11(11) of the transitional provisions relevantly provides that, if the claimant application was made before 27 June 1996 (as was the case with the Koara People's applications) and the Registrar removes the details of the claim from the Register under sub-item 11(9), then the new 'right to negotiate' provisions (including as modified by the transitional provisions) or the old 'right to negotiate' provisions, as the case requires, apply in relation to any old Act s. 29 notices 'as if the details of the claim had not been removed from the Register'.

In other words, if sub-item 11(11) applies, then the right to negotiate is preserved in relation to future acts covered by old Act s. 29 notices despite the fact that the relevant claim is no longer registered. The reason for 27 June 1996 being the 'cut-off' date is that this is the date on which the Commonwealth Attorney-General introduced the Native Title Amendment Bill 1996 into the House of Representatives, i.e. the date at which it became clear there was an intention to introduce the registration test.

Amended to combine
In January 1999, the Federal Court made orders to combine the six Koara applications in accordance with s. 64(2) of the new Act. The Federal Court Registrar then referred the amended application (i.e. the combined application as further amended in February 1999) to the Native Title Registrar (the Registrar) pursuant to s. 64(4), which gave rise to a second obligation to apply the test i.e. under s. 190A(1) of the new Act.

In March 1999, the combined application was found to satisfy the registration test but that decision was later set aside on review and the matter remitted to the Registrar- see *Western Australia v Native Title Registrar* [1999] FCA 1594. The combined application was retested and the Registrar decided it could not be accepted for registration. An application for review of that decision was dismissed. Consequently, the combined application was not accepted for registration and all six pre-combination applications were removed from the Register of Native Title Claims in August 2003.

In these proceedings, the Koara people sought a declaration that the right to negotiate was preserved by operation of sub-item 11(11) in relation to the pre-

combination applications for all notices issued under s. 29 of the old Act that affected the area covered by the pre-combination applications.

The source of the Registrar's obligation to apply the test was in dispute. The Koara People said the obligation arose under sub-item 11(3) of the transitional provisions. The state contended the obligation arose under ss. 64(4) and 190A(1) of the new Act and that sub-item 11(11) had no operation i.e. upon amendment of the applications under the new Act, the obligation to test under sub-item 11(3) was supplanted by the obligation arising under s. 190A(1)—at [7], [24] to [25] and [30] to [31].

The *Bullen* decision

The Koara People submitted (among other things) that there was an identity of legal issues between their situation and French J's decision in *Bullen v Western Australia* (1999) 96 FCR 473; [1999] FCA 1490 (*Bullen*). The state contended that *Bullen* was wrongly decided and should not be followed. *Bullen* was a case where the facts were similar. The main difference was that while the application considered in *Bullen* had also been amended under the new Act, there was no amendment to combine as was the case in this matter. Justice French considered the source of the Registrar's obligation to apply the test:

> The issue of the new Act s 29 notices gave rise to an obligation on the Registrar under Item 11(3), to consider the claim under s 190A of the new Act. ... It is a condition of the existence of the obligation that "no such notice has previously been given in relation to an act affecting any of the land or waters covered by the claim". This derives from par (c) of Item 11(3). The "such notice" referred to here is "a notice ... given under section 29 of the new Act ...". So when the Registrar proceeded to consider the application in this case under s 190A it was a consideration mandated by Item 11(3)—*Bullen* at [39].

As in this matter, the state argued in *Bullen* that sub-item 11(3) did not apply if the application was amended under the new Act on the basis that, post-amendment, the Registrar 's obligation to apply the registration test arose under ss. 64(4) and 190A(1)—*Bullen* at [40].

After framing the issue of the application of Item 11 as a 'narrow question of construction', French J went on to find that:

> Where the Native Title Registrar is required to consider a claim under s 190A of the new Act by virtue of the issue of new s 29 notices and the operation of subitem 11(3) and the application is amended before that consideration is concluded, is his removal of the details of the claim from the Register, where the claim fails to pass the registration test, still able to be described as removal "under subitem (9)"? If it is, then the condition for the operation of subitem 11(11) which is imposed by par (b) of that subitem is satisfied. Paragraph (a) is also satisfied as the application was made before 27 June 1996.
>
> The obligation imposed by sub-item 11(3) to consider the application under s 190A in this case is the relevant obligation. The obligation to consider the application under s 190A by virtue of amendment under s 64(4) is subsumed by it. On this construction it is open to amend an application in order to meet the requirements of the new registration test when it is to be applied because of the issue of new s 29 notices without losing the protection of the transitional provisions—*Bullen* at [42] to [43].

The state's contentions

The state contended, among other things, that:

- in *Bullen*, French J had overlooked sub-item 11(8);
- rather than amending the old Act applications to address the registration test, the applicant should have relied on the 'huge liberty' that sub-item provides and instead provided further information to bring their application 'up to standard';
- as sub-item 11(8) provided an opportunity to update the application without amendment, French J was wrong in taking the view that, if no step was taken to amend the claim, it would fail the registration test—at [32], [41] and [45].

Findings on the transitional provisions

Justice Nicholson found (among other things) that:

- French J's reasoning in *Bullen* was not clearly or plainly wrong and there was an identity of legal issues between this case and *Bullen*;
- the pre-combination Koara applications were not 'qualitatively different' from the combined application because the amendment to combine was made in order to satisfy the new Act requirements rather than change the nature of the claim and so this was not a reason to distinguish the reasoning in *Bullen*;
- French J's decision took the language of the transitional provisions at face value whereas the state's arguments required a 'great deal of subtle understanding of a range of provisions and do not represent either the immediately apparent intention of the statutory language';
- the interpretation accepted in *Bullen* 'does not result in the giving of carte blanche to applicants who cannot pass the registration test to have the right to negotiate' because sub-item 11(11) only applies to claimant applications made before 27 June 1996 and only in relation to s. 29 notices given under the old Act—at [54] to [56] and [58] to [59].

Decision

Orders were made:

- declaring that there were, at all material times, registered native title claimants with respect to any s. 29 notices issued prior to the commencement of the new Act that affected any area covered by the pre-combination Koara applications; and
- permanently restraining the state from granting any of the interests mentioned in those notices unless or until one of the requirements of s. 28 of the new Act was satisfied.