Respondent claiming native title seeking recognition of native title

Kokatha People v South Australia [2007] FCA 1057

Finn J, 16 July 2007

Issue
This case raised a 'controversial question of construction' of the *Native Title Act 1993* (Cwlth) (NTA), i.e. did the Federal Court have jurisdiction to make a determination of native title under s. 225 in favour of a person claiming to hold native title who had not made a claimant application under s. 61(1) but was a respondent to a claimant application brought by others?

Background
In 2005, in accordance with s. 67, the court made orders to ensure that each of the Kokatha, Barngarla and Arabunna people's claimant applications were dealt with in the same proceeding, to the extent that the area each application covered overlapped (the overlap proceedings).

At one time, an application brought by the Kuyani overlapped part of the area covered by the Kokatha application but it had been struck out because it was not authorised as required by s. 61(1)—see *McKenzie v South Australia* (2005) 214 ALR 214; [2005] FCA 22 , summarised in *Native Title Hot Spots* Issue 14.

One of the people who made the application on behalf of the Kuyani, Mark McKenzie, was a respondent to the Kokatha application—see *Kokatha Native Title Claim v South Australia* (2005) 143 FCR 544; [2005] FCA 836 (*Kokatha No. 1* , summarised in *Native Title Hot Spots* Issue 15) and s. 84(3).

In February 2006, Mr McKenzie and others filed a fresh Kuyani application that partly overlapped the area subject to the Kokatha application. This second Kuyani application 'suffered from the same vices' as the first and so a notice of discontinuance was filed in May 2006—at [9].

However, Mr McKenzie remained a respondent to the Kokatha application either because:
- he claimed to hold native title in relation to part of the area covered by that application; or
- he had a native title 'interest' that may be affected by a determination in the proceedings—see ss. 84(3)(a)(ii) and (iii).

Mr McKenzie did not file a fresh Kuyani application under s. 61(1). He did, however, file a draft statement of facts and contentions in the overlap proceedings, disputing the Kokatha claim to have inhabited the area he claimed an interest in prior to

sovereignty and asserting that the Kuyani people had, at that time, native title rights and interests in that area. The draft statement of facts and contentions concluded thus:

> In the event that a determination is made in these proceedings that only the Applicants, or any of them, hold the common or group rights as native title holders, and having regard particularly to s. 61A of the *Native Title Act 1993*, Mr McKenzie's lawful interest as native title holder (and those of other Kuyani in his position) will not be able to [be] adequately recognized, and such a determination is opposed.
>
> Again having regard particularly to s. 61A ..., and for the same reasons as advanced in the previous paragraph, Mr McKenzie opposes a determination that native title does not exist over the claim area.
>
> Mr McKenzie seeks a determination under section 225 ... that the common or group rights in respect of the hachured area on the attached map are held by the Applicants on a shared basis with Mr McKenzie and other Kuyani with ancestral connection to that area, in accordance with *Murranginhi* traditional law and custom.

It was the third paragraph that prompted the State of South Australia to file the motion that asked whether or not the court had jurisdiction to make a determination of native title in favour of a person such as Mr McKenzie, who did not have a claimant application under s. 61(1) on foot but was a respondent to the claimant application brought by the Kokatha People on the basis of his claim to hold native title.

Justice Finn noted that the third paragraph of the draft statement of facts and contentions was 'offensive', i.e. it sought a positive determination of native title in favour of Mr McKenzie and 'other' Kuyani, notwithstanding that they did not have a claimant application on foot—at [11].

Objectives of the NTA

His Honour noted that '[t]wo not altogether harmonious objectives' of the NTA were 'revealed' in the issue raised by the state's notice of motion, namely:

- getting a final determination under s. 225 as to whether or not native title existed in relation to a particular area and, if it did, who held it; and
- adherence to the processes and procedures chosen by Parliament for determining native title claims—at [36]

In the end, the issue was 'one of statutory interpretation having regard to the text, structure and purposes' of the NTA—at [37].

Provisions of the NTA

Finn J observed that significant procedural and substantive requirements for applications under s. 61 were introduced by the *Native Title Amendment Act 1997 (*Cwlth) (the 1998 amendments). One of those changes related to the authorisation of claims—at [17].

Under s. 61(1), as amended in 1998, a native title determination application may be made by:

> A person or persons **authorised** by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group [emphasis added].

As his Honour said:

> It is difficult to overstate the centrality of the requirement of 'authorisation' in the scheme laid down by the Act ... . Both s 61 and s 62 prescribe mandatory requirements in the application itself relating the fact of, and the basis of, the authorisation of the person or persons making the claimant application. Section 84C in turn permits any party to a ... determination application to apply at any time to this Court to strike out an application which does not comply with the requirements of s 61 ... or s 62—at [17] to [18].

The views expressed by Justice Lindgren in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith No. 9*) were 'gratefully' adopted. In that case, at [1170] to [1172], Lindgren J said:

> Proper authorisation is the foundation for the institution and maintenance of a native title claimant application under s 61 of the new Act ... . Authorisation is 'fundamental to the legitimacy of native title determination applications', and is 'not a condition to be met by formulaic statements in or in support of applications' ... . Where the authorisation requirement of s 61(1) is not complied with, the non-compliance is fatal to the success of the application.

Finn J noted that 'authorisation has been the rock upon which Mr McKenzie's two native title determination [applications] have foundered'—at [20].

Notification and party status

His Honour found that:

- the NTA contemplated that a person claiming native title in an area subject to a s. 61(1) application should be given notice of that application and was entitled to become a party to the proceedings in relation to that application;
- such a person was entitled, as a party (subject to the court's discretion), to oppose the making of a determination of native title;
- the notice required by s. 66 must include a statement that, as there could be only one determination of native title for an area (see s. 68), if a person 'did not become a party' to the application, there may be 'no other opportunity for the court' to take into account 'that person's native title rights and interests' in relation to the area concerned—at [21] to [22] referring to ss. 66(3), 66(10), 84(3)(a)(ii) and 84(8).

The phrase used in s. 66(10)(b) is 'become a party'. Finn J noted that:

- 'it does not stipulate' that a person should make an application under s. 61(1);
- this was notwithstanding the requirement in s. 67 that, to the extent that the area covered by two or more applications for a determination of native title made under s. 61(1) overlapped, the court must ensure those applications were dealt with in the same proceedings—at [23].

Section 84 deals with party status in relation to s. 61(1) applications. His Honour noted that it:

- allowed a person who claimed to hold native title to become a party without necessarily becoming an applicant by making a claimant application under s. 61(1);
- gave the court a general power to order that any person (other than an applicant) cease to be a party to the proceedings—at [25] to [27], referring to ss. 84(3)(a)(ii) and 84(8).

At [13], his Honour cited with approval Mansfield J's comment in *Kokatha No. 1* at [24] that:

> Where there may be a competing native title group who claim communal rights and interests which may be affected by a determination in [this] claim, but there is no application by that group over the claim area, the members of that group should not be precluded from putting forward their claim in a defensive attempt to avoid the dilution of those interests.

Character of a determination of native title under s. 225

Finn J noted that:

- while the requirement found in s. 94A that a determination of native title under s. 225 must be made in accordance with the procedures in NTA 'bordered on the pedantic', it emphasised an important characteristic of the NTA i.e. its 'insistence both on adherence to prescribed procedures and on compliance with prescribed requirements';
- an 'approved' determination of native title (see ss. 13 and 253) had a primary role in the scheme of the NTA and, being declaratory of rights (i.e. in rem), was 'absolute';
- however, an 'approved' determination also had an 'indefinite character' because application could be made under s. 61(1) to vary or revoke it on the limited grounds set out in s. 13(5);
- however, s. 61(1) prescribed that such an application could only be made by certain entities, namely the relevant Commonwealth, state or territory minister, a registered native title body corporate or the Native Title Registrar;
- importantly, an application to vary or revoke an 'approved' determination could not be made by a person claiming to hold native title—at [28] to [29], referring to ss. 61(1), 13(1)(b), 13(5) and s. 213(1) and *Western Australia v Ward* (2003) 213 CLR 1; [2002] HCA 28 at [32].

Must an approved determination be made?

Section 225 defines a determination of native title as a 'determination of whether or not native title exists in relation to' a particular area. His Honour was of the view that an order dismissing an application for a determination of native title on the grounds of failure of proof was not a 'determination of native title—at [31] referred to *Harrington-Smith No. 9* at [4005].

Finn J noted that, notwithstanding the either/or character of s. 225 (i.e. native title either exists or does not), previously the court had said it could decline to make a

determination of native title, as defined in s. 225, if the interests of justice so required, e.g. if the evidence failed satisfactorily to disclose, one way or the other, whether or not native title existed—at [31] referring to *Western Australia v Ward* (2000) 99FCR 316 at [219].

His Honour was of the view that it was 'by no means uncommon' for this to occur and that the discretion not to make an 'exclusive positive' determination may be more significant where native title is 'asserted defensively' by a respondent to s. 61(1) proceedings—at [32] referring to (among others) *Jango v Northern Territory* (2006) 152 FCR 150; [2006] FCA 318 at [791] and *Jango v Northern Territory* [2007] FCAFC 101 at [75]ff, *Quall v Northern Territory* [2007] FCAFC 46.

Comment

It may, with respect, be drawing a long bow to say it is 'by no means uncommon' for the court to exercise a discretion to decline to make a determination under s. 225 following the hearing of an application for a determination of native title (which, according to ss. 61(1) and 253, can be either claimant or non-claimant). This can be illustrated by the three decisions his Honour relied upon.

The two *Jango* decisions dealt with an application under s. 61(1) for a determination of compensation, not an application for a determination of native title. Subsection 13(2) of the NTA applied, which meant that a 'current' determination of native title was only required if the court was going to make a determination of compensation, which was not the case in *Jango*. This point of distinction was noted by his Honour Justice Sackville in the second decision cited by Finn J.

The citation Finn J gives for *Quall v Northern Territory* is a reference to Full Court's decision in *Risk v Northern Territory* [2007] FCAFC 46 (*Risk* , summarised in *Native Title Hot Spots* Issue 24). It is correct that, in that case, the court said at [178]:

> Bearing in mind both his Honour's observation that the only evidence directly supporting this claim came in effect from Mr Quall ... and the changing composition of the claim group to which we earlier referred in passing, the dismissal of the claim in this manner was unobjectionable. The case was in substance disposed of on the basis of insufficiency of evidence. His Honour's reasons make quite plain where that insufficiency lay.

What neither the Full Court in that case nor Finn J in this case seem to appreciate is that, shortly after publication of the reasons for decision on 13 April 2006, the primary judge in *Risk* made a determination pursuant to s. 225 that native title did not exist—orders made on 17 May 2006. Details of that determination have been entered in to National Native Title Register, as required by s. 193.

The decision in *Harrington-Smith No. 9* appears to be the only case in which, following the full hearing of applications for a determination of native title made under s. 61(1), the court declined to make a determination under s. 225 on the basis of a lack of proof. The existence of such a discretion in those circumstances is contested by the Commonwealth in its 'non-claimant' application (also, according to s. 61(1), an 'application for determination of native title' for the purposes of s. 67),

which overlapped the claimant applications the subject of that decision but was not 'dealt with in the same proceedings' as s. 67 seemed to required—see the last page of the summary of that case in *Native Title Hot Spots* Issue 24.

On this point, see also *Sampi v Western Australia (No 3)* [2005] FCA 1716 (summarised in *Native Title Hot Spots* Issue 14) at [3] to [4] and, in relation to a non-claimant application, *Kennedy v Queensland* [2002] FCA 747.

Was a determination in favour of Mr McKenzie within jurisdiction?

Finn J noted that, in *Kokatha No. 1* , Mansfield J found that persons claiming to hold native title who did not have a s. 61(1) application on foot could not get a 'positive' determination of native title because:

> [T]he prescriptive structure in the Act for the making of an application for the determination of native title under s. 61, with the procedural requirements of s. 62, and, since ... the 1998 amendments ... , the authorisation requirements under s. 251B are clear. They provide the only vehicle for the positive determination of native title rights and interests—*Kokatha No. 1* at [23].

Finn J found support for this view in the Full Court's decision in *Moses v Western Australia* [2007] FCAFC 78 at [18] (summarised in this issue of *Native Title Hot Spots*) , were it was said that:

> A determination of native title must be made in accordance with the provisions of the NTA, including its requirements regarding proof of the composition of the claim group and proper authorisation of the named applicants. In circumstances where the Kariyarra people participated as respondents only and made no attempt to satisfy the learned primary judge that all of the requirements of the NTA had been met in respect of their overlap claim, it would not have been appropriate to nevertheless make a determination of native title in their favour—at [43].

Section 67 not applicable

As s. 67 did not apply in this case, the state's notice of motion directly raised the question of whether or not the court had jurisdiction to make a determination of native title under s. 225 in favour of a person who did not, or group which did not, have a s. 61(1) application on foot.

It was found that the NTA, 'properly construed', required a negative answer:

> [A] s 61 native title determination application is required to enliven the Court's jurisdiction to make a determination of native title in relation to the determination area ... . [T]he language of s 225 does not detach the determination of native title from the application made for the determination. It is the determination made on the application that becomes the "approved determination of native title" which has such far reaching significance in the scheme of the Act—at [47].

Finn J found support for this view in:

> [T]he detailed prescriptive requirements of s 61 and s 62 and of s 251B in relation to authorisation, description of the claim group etc ... . It would be surprising if [after the 1998 amendments], having insisted upon an applicant's compliance with such requirements, the Legislature would leave a non-applicant respondent unconstrained in advancing a claim for a determination of native title. The lack of any express provision

> dealing with such a non-applicant respondent is in my view explicable. It is clear from the frame of the Act that a person or group that seeks a positive determination is required to make a s. 61 determination application under the Act—at [48].

However, his Honour pointed out that this was not intended to call into question the right of a 'non-applicant' claimant to either be joined as a party to an application for a determination of native title made under s. 61(1) or rely defensively on their native title 'interest' to oppose or to qualify a claim made in such an application. Rather:

> What a successful defensive use of such native title rights or interests can possibly secure is the exercise by the Court not to make either a positive exclusive determination of native title in favour of an applicant or a negative determination that native title does not exist in the claim area. What it cannot secure is a s 225 determination in the non-applicant's favour—at [50].

Any inconvenience that a successful 'defensive' use of a claim to native title could entail:

> [I]nheres in the scheme of the Act itself ... . [I]n the ability of the Court not to make a determination in the face of a successful defensive use of claimed native title rights, that scheme does not condemn a non-applicant claimant to the injustice of extinction of his or her rights and interests—at [51].

Decision

It was declared that a determination of native title could not be made in favour of Mark McKenzie and other Kuyani under the NTA—at [4] and [53].