Strike out under s. 84C – Kokatha Nation Claim

Reid v South Australia [2007] FCA 1479

Finn J, 21 September 2007

Issues
The main issue in this case was whether the Federal Court should strike out a claimant application pursuant to s. 84C of the *Native Title Act 1993* (Cwlth) (NTA). The court decided to do so because there were fundamental deficiencies in the application.

Background
In May 2007, Richard (Ningil) Reid filed a claimant application pursuant to s. 61(1) of the NTA, called the Kokatha Nation Claim (KNC). The area it covered overlapped (among others) the area covered by the Kokatha claimant application (Kokatha claim).

Mr Reid then purported to file two amendments to the KNC application. Justice Finn proceeded as if leave to amend was given in relation to first amended application. If the court did not do so, then the original KNC application would have to be stuck-out. This was because Mr Reid (the person named as 'the applicant' in KNC) was specifically excluded from the native title claim group contrary to the requirement in s. 61(1) that the applicant (among other things) must be a member of the native title claim group—at [6].

Finn J noted that Mr Reid appeared to have made the KNC as a result of his long standing dispute with those making the Kokatha claim. Mr Reid was an acknowledged Kokatha elder and was also both a member of the native title claim group in the Kokatha claim and a respondent to it. Material before the court showed Mr Reid had been involved with the Kokatha claim. He had, for example:

- participated in a meeting held in January 1999, when the Kokatha people authorised the Kokatha claim without dissent;
- been present at a meeting held in May 2004 where he (and others) signed a document (the Spear Creek agreement) recording that Roger Thomas was to be responsible for the Kokatha claim and related matters and Messrs Reid and Starkey were to be 'responsible for all Aboriginal law, culture and heritage'—at [4].

Later, Mr Reid retracted his approval of Mr Thomas and unsuccessfully sought to have the Kokatha claim struck out for want of authorisation—see *Thomas v South Australia* [2004] FCA 951, summarised in *Native Title Hot Spots* Issue 11.

In this case, a notice of motion was filed by the State of South Australia seeking either strike-out under s. 84C of the NTA or dismissal under the *Federal Court of Australia Act 1976* on the grounds that:

- the native title claim group description was unclear;
- the claims were made impermissibly on behalf of a sub-group;
- the claimed bases of authorisation did not meet the requirements of the NTA; and
- the application failed to comply with the requirements of ss. 61A and 62 of the NTA—at [3].

On 17 August 2007, Finn J ordered that the KNC be struck out pursuant to s. 84C. However, the operation of that order was suspended pending the publication of the reasons for decision summarised here. His Honour was at pains to point out that:

> Both the State and the ALRM [the representative body] ... sought a costs order ... for the purpose of providing a clear message to any further potential native title claimants that it is necessary to ensure that matters of form and procedure are strictly to be adhered to when lodging claimant applications ... . I do not regard deterrence to be a permissible reason for a costs order. This said, the fact and circumstances of this successful strike out motion ought be of no little interest to persons who have made, or who are contemplating making, claimant applications in relation to claim areas that overlap that in the Kokatha overlap proceedings—at [63].

Statutory framework

Finn J considered the nature of authorisation under ss. 61(1) and 251B and the tie between membership of the native title claim group and authorisation. Reference was made to the well accepted principles that:

- proper identification of the claim group is central to a native title determination application;
- it is the native title claim group that provides the authorisation under s. 251B;
- a subset or part of what truly constitutes a native title group cannot itself be a native title claim group under s. 61(1);
- where the class membership is described for the purposes of s. 61(4)(b), the application must describe the persons who are within the class 'sufficiently clearly so that it can be ascertained whether any particular person is one of those persons';
- non-compliance with the authorisation requirement of s. 61(1) is fatal to the success of an application (but note the new discretionary power of the court in s. 84D(4) on this point);
- authorisation must be by all the persons who constitute the native title claim group in respect of the common or group rights and interests comprising the particular native title claimed—at [23] to [29], referring to *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 at [1171] to [1172] and [1186]; *McKenzie v South Australia* [2005] FCA 22 (*McKenzie*) at [41] to [43]; *Colbung v Western Australia* [2003] FCA 774; *Landers v South Australia* (2003) 128 FCR 495; [2003] FCA 264 at [35], summarised in *Native Title Hot Spots* Issue 24, Issue 14, Issue 6 and Issue 5 respectively) and *Risk v National Native Title Tribunal* [2000] FCA 1589 at [30] and [60] to [61].

As his Honour noted: 'A clear purpose of the s 84C procedure is to avoid the further incurring of expenses in relation to an application that is fatally flawed'—at [60].

Claim group description did not comply with s. 61

His Honour noted the native title claim group description in the KNC application consisted of a list of 103 people, followed by the reference to 'other living Kokatha persons as described in Attachment A' to the application. Attachment A stated that the native title claim group 'also has the capacity to contain':

- 'descendents of prior attendees and participants in KPC [the Kokatha Peoples Community Inc, a body incorporated under the *Associations Incorporation Act 1985* (SA)] meetings and activities, (if they are not already in the claim group) and if they are have the necessary ancestry relating to inheritance (i.e. if they are valid Kokatha). Such live persons or live descendents will be included in the claim group in due course (at the discretion of KPC Elders and Advisors)';
- 'live descendents of prior Custodians over parts of the Kokatha Nation Territory. Such persons will be included in the claim group in due course (at the discretion of KPC Elders and Advisors)';
- 'adopted persons from other tribes (and their Kokatha descendents) using criteria such as whether such people acknowledge and are schooled in Kokatha law and custom, participate in Kokatha activities, or have valid interests in part of Kokatha Nation territory. (The exact criteria that [*sic*] used will be up to the Elders to decide)'—emphasis in original.

These paragraphs of the KNC application, which are of significance to the decision, are referred to below as 'paragraphs 4 to 6 of Attachment A'.

The court noted that:

- in written submissions, Mr Reid was said to be able 'to add thousands to the claim group' and have the ability to make the native title claim group 'representative of all Kokatha people';
- Mr Thomas and Mr Starkey, both of whom were acknowledged by Mr Reid in the Spear Creek agreement to be 'representatives of the Kokatha people', were not included in the native title claim group for the KNC application—at [8] to [9].

During the hearing of the state's application, Finn J asked Mr Reid's legal representative whether Mr Reid was asserting he was the only person who had native title rights or interests in the claim area. The court was told by the legal representative that it could properly proceed on the assumption there were other people who had native title rights or interests in the area covered by the KNC—at [11].

Subsequent to the hearing, Mr Reid's legal representative sought leave to file further submissions on authorisation on the basis that he had 'mistakenly and un-intentionally [sic] conceded points' when answering his Honour's questions. Mr Reid then filed an affidavit in which he claimed to 'hold all the native title rights or interests of the Kokatha people'. Further, in submissions filed on the issue of costs, is was said that it was only when Finn J asked questions during the hearing that Mr

Reid 'came to realise that he alone held all the common or group native title hence, his difficulty in settling his claim group'—at [12].

His Honour refused to grant leave:

> Apart from illustrating the continually evolving character of yet a further application, it would have served no useful purpose. I ... also note that the claimed native title rights and interests described in the application clearly envisage their being held and enjoyed by a community or group and not entirely by a single individual—at [13].

While his Honour declined to draw a conclusion on the state's argument that the description of the native title claim group was 'descriptively' uncertain and so did not comply with s. 61(4)(b), he did make the comment that there was 'an arguable case of uncertainty' because of paragraphs 4 to 6 of Attachment A:

> Leaving to one side the arresting character of the stated criteria of cl 4 (prior attendance and participation in KPC meetings etc), there is nothing to suggest that the discretions given are a product of, and are to be informed by, the traditional laws acknowledged and the traditional customs observed by the aboriginal [sic] peoples holding the native title rights and interests in question. The clauses may well be vulnerable at this point for this reason—at [32].

His Honour decided to strike out the application pursuant to s. 84C because paragraphs 4 to 6 of Attachment A revealed that the native title claim group did not contain all of the persons who were said to be the actual holders of native title as required by s. 61(1). In the court's view:

> The metes and bounds of the claim group membership - who must comprise all the actual holders of the native title rights and interests - are fundamentally uncertain on the material before me and made the more so by the acknowledged "capacity" to enlarge the group membership under ... [paragraphs] 4 to 6 of Attachment A. What is clear is that the presently listed members of the claim ground [sic, read group] are not perceived to be all the persons who actually hold native title. The best that can be said is that they are part of such a group. Neither the application nor the evidence provide certain guidance to permit ascertainment of who are the other actual native title holders who, together with the listed members, are said to be all of the holders of native title rights and interests in the claim area.
>
> I would add that it is unsurprising that the definition of the group itself suffers the above vices. Mr Reid's claim seeks to replace the Kokatha ... claim. The claim group itself reflects a house divided. The consequences of this becomes the more apparent when one turns to the authorisation requirement—at [34] to [35].

For these reasons, and for the purposes of s. 84C, it was found that the application did not comply with the requirements of s. 61 of the NTA—at [36].

Application not properly authorised

The state also argued that the application was not properly authorised. In the application, Mr Reid's entitlement to make the application was put on the following three bases:

- as custodian of 'native title over the Kokatha Nation', he was given 'by each preceding head lawman', authority to 'take-over their custodianship in a series of

'once off decisions' that were 'traditional (like a Futures Act)' which 'all descendents who acknowledge traditional law and custom' would also 'adhere to' and, as 'head lawman' (*Buddoo*) with 'highest ceremonial status' (*Wilyura*) , he had the authority 'to make decisions for the Kokatha people, so automatically he can make himself applicant on their behalf' (self-authorisation);
- if there were any doubt about the above, the elders of the surrounding Western Desert tribes, in accordance with tradition, 'have testified to his ability to do this, and recently expressly authorized him to deal with Native Title matters before the court', (authorisation by surrounding Western Desert elders);
- the claim group 'are also members of the KPC ... and the KPC has authorized the bringing of this claim by' Mr Reid in March 2007 'at [a meeting of KPC held at] Yorkeys Crossing Pt Augusta' (authorisation by KPC)—at [14].

In three affidavits before the court from members of the Kokatha claim's management committee, it was stated that the deponents did not authorise Mr Reid to make the KNC application and that Mr Reid needed authority from the general Kokatha community. Two of the deponents (including Mr Starkey) said they were unaware of the March meeting of the KPC that Mr Reid relied upon.

In relation to self-authorisation, it was noted (among other things) that:
- there was no evidence provided by Mr Reid that 'the enumerated claim group acknowledge his power of self-authorisation'; and
- his attempt to secure the signatures of some of the 103 people listed in the claim group description both to a copy of the list and to an attached claim map were both 'unnecessary steps if Mr Reid could self-authorise';
- Mr Reid's legal representative submitted that, while the person who 'fundamentally holds the common or group rights of all Kokatha people is the Custodian himself (*wadi miri wadi*)', counsel's opinion was needed 'as to the extent to which this means Mr Reid can self-authorise' which, at best, betrayed 'considerable uncertainty on Mr Reid's part as to his right to self-authorise'—at [37].

In the light of these, and other matters, the court was satisfied that 'it cannot arguably be said to satisfy the requirements of s 61(1) of the Act as it relates to the amended application of present concern'—at [42].

As to the second pathway to authorisation, his Honour found that:
- the evidence put on by elders of the Western Desert region could not, of itself, constitute authorisation of Mr Reid for the purposes of s. 61 of the NTA, which required authorisation by 'all the persons ... who ... hold the common or group rights';
- while that elders' evidence may provide some support for Mr Reid's assertion that he possessed the authority he claimed, it did not assist in determining this case because it was not addressed to 'the deficiencies and contradictions in the application itself, in the affidavit evidence and in the supporting submissions' and, importantly but 'understandably', did not address the requirements of ss. 61(1) and 251B(a)—at [43].

In relation to the third 'pathway' to authorisation, Finn J reviewed the KPC and its objects of association, which included the bringing of claims and as a forum for decision- making for the benefit of the members of the KPC. Membership was open to Kokatha people and others who (among other things) were 'recognised and accepted by the Traditional Cultural Leader' and Mr Reid was, among other things, the cultural leader—at [16].

Finn J found (among other things) that:

- the newspaper advertisement for the meeting held in March 2007 upon which Mr Reid relied simply stated that there was to be an annual general meeting of the KPC;
- the minutes of that meeting indicated fewer than 20 people attended, albeit that those present voted unanimously to give Mr Reid authority to make the KNC application;
- there was no evidence that all 103 people named in the application authorised the making of the application—at [17] .

It was noted that:

- Attachment A to the application indicated that the 103 listed members of the claim group were KPC members and the KPC constitution tied membership to acceptance by Mr Reid;
- the KPC was not a holder of native title rights and interests and could not authorise a native title claim;
- pursuant to s. 251B(b), a native title claim group whose members are the members of an incorporated association may, where there is no relevant and mandatory traditional decision making process applicable to authorisation, agree to and adopt a process for authorisation of the claim;
- however, that process 'must be able to be traced to a decision of the native title group who adopt that process'—at [46].

It was at the point of 'tracing back' that the ineffectiveness of the third pathway to authorisation's became 'apparent':

> While there is evidence that the less than 20 of the 103 members of the claim group who were present at the meeting voted unanimously for the application to be made, there is no evidence at all that such notice of the meeting as was given, advertised other than that an AGM was to be held. There is nothing to suggest that the group members were being asked to agree to and adopt a non-traditional process for authorising a claimant application. This would, of itself, be enough to reject the legitimacy of the claimed authorisation process. Further ... there is no reasonably arguable basis on which one could infer that the meeting was fairly representative of the claim group ... . There is not ... any arguable basis for contending that the meeting was in the circumstances adequate to satisfy the requirements of s 251B(b)—at [47].

For the reasons noted above, Finn J found that none of the three means of authorisation described in the KNC application (i.e. self-authorisation, authorisation

by the elders of surrounding Western Desert tribes and authorisation by KPC members) satisfied the requirements of s. 61(1).

Costs

The state and the representative body sought orders that Mr Reid pay their costs of the proceeding or else of the strike-out motion. His Honour referred to the applicable principles to the awarding of costs under s. 85A NTA set out in his earlier decision in *McKenzie* at [8], observing that it is not appropriate to award costs to either punish a party or to act as a deterrent to other would be applicants—at [51] to [54] and [63].

Finn J was satisfied that there should be no order as to costs for (among others) the following reasons:

- Mr Reid brought the application in good faith and acted reasonably despite his application being misconceived in relation to the requirements of the NTA;
- the timing of the application was not informed by any improper motive including disrupting other proceedings relating to overlapping claims;
- Mr Reid, an unrepresented person with only spasmodic legal and other assistance, erred by not capitulating in the face of the flaws in the application pointed out to him by the state but did not do so unreasonably in all the circumstances—at [56] to [61].

Decision

Finn J held that:

- there were fundamental deficiencies in the KNC and it should be struck out pursuant to s. 84C of the NTA;
- the order of 17 August 2007 suspending the above order be vacated;
- there should be no order as to costs—at [62].