Party status – person claiming native title seeks respondent status

Worimi Local Aboriginal Land Council v Minister for Lands (NSW) [2007] FCA 1357

Bennett J, 11 September 2007

Issue
The issue in this case was whether the court should exercise its discretion to join a person claiming to hold native title as a respondent to a non-claimant application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
The Worimi Local Aboriginal Land Council (WLALC) made a non-claimant application under s. 61(1) seeking a declaration that no native title existed over certain land at Port Stephens in New South Wales. Gary Dates, also known as Worimi, had previously filed two claimant applications for a determination that native title existed over the same area. Each of those claimant applications was struck out pursuant to s. 84C for failure to comply with s. 61—see *Hillig v Minister for Lands (NSW) (No 2)* [2006] FCA 1115 (*Hillig*); *Worimi v Minister for Lands (NSW)* [2006] FCA 1770 (*Worimi*), summarised in *Native Title Hot Spots* Issue 21 and Issue 23 respectively.

WLALC's non-claimant application was filed in December 2004. Public notice, given pursuant to s. 66(3)(a) in March 2005, included a statement that persons wishing to be party to the proceedings should inform the Federal Court of their intention to do so by 8 June 2005. Mr Dates failed to do so.

By notice of motion filed in August 2005 (as amended in March 2007), Mr Dates sought to be joined as a respondent to WLALC's non-claimant application pursuant to s. 84(5). His application for joinder was opposed by WLALC. Pursuant to s. 66(10)(c), Mr Dates required leave of the court to be joined.

As a preliminary matter, Justice Bennett noted that the application for joinder was made before the commencement of the *Native Title Amendment Act 2007* (Cwlth), which amended s. 84(5) by inserting the words 'and it is in the interests of justice to do so' i.e. to give leave to join. As the amendment only applied to applications made after it commencement, it was not taken into consideration in this matter—at [3].

Bennett J identified the three matters for consideration:
- whether Mr Dates had an interest within the meaning of s. 84(5);
- whether that interest may be affected by a determination in the proceedings;
- in any event, whether the court should exercise its discretion to join Mr Dates as a respondent—at [4].

Did Mr Dates have the requisite interests?

Her Honour applied the 'Byron test' (found in *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1) to s. 84(5) i.e. the asserted interests must not be 'indirect, remote or lacking substance' and must be 'capable of clear definition'. It was noted that the nature and content of the right to become a party to proceedings for a determination of native title suggested the interests must be such that they may be affected in a 'demonstrable' way by a determination in the proceedings—at [10].

Bennett J found that Mr Dates satisfied the Byron test because his interest was that of a person who claimed that native title existed over the area in question:

> That interest is not indirect, remote or lacking in substance. It is not advanced as an interest of an emotional kind. It is clearly directly affected by a declaration that there is no native title. It is not remote or insubstantial. The ... [WLALC] submits that it can be no more than a belief. However ... [t]here was no evidence on this application for joinder to contradict Worimi's [Mr Dates'] evidence or to demonstrate that it fails to satisfy the Byron test... . It has not yet been determined whether ... [his] belief is or is not well-founded—at [16].

Was the striking-out of earlier claimant applications relevant?

WLALC submitted that:

- the scheme of the NTA was such any person or group wishing to assert native title must do so as a claimant and meet the tests imposed by the NTA;
- Mr Dates attempted to do so on two previous occasions but both applications were summarily dismissed;
- Mr Dates could not identify a claim group capable of meeting the requirements of s. 61.

While agreeing that a person seeking a determination of native title in their favour (i.e. a 'positive' determination) must make an application that complied with ss. 61, 61A, 62 and 251B, Bennett J noted:

> [T]hat does not mean that a person is unable to use claimed native title rights and interests defensively to combat a non-claimant application for a declaration that no native title exists. The assertion of such rights and interests may lead to a more informed decision in the non-claimant application— at [30], referring to *Kokatha People v South Australia* [2007] FCA 1057, summarised in *Native Title Hot Spots* Issue 25.

Discretion

Her Honour noted (among other things) that:

- although the court had discretion under s. 84(5) whether or not to join a person whose interests may be affected by a determination in the proceedings, that discretion was not 'at large';
- where the interest concerned was a 'positive' claim to native title, the fact that no such determination could be made absent a properly brought application under s. 61(1) was relevant;
- if WALAC's non-claimant application succeeded, a determination that native title did not exist, which would operate in rem, would be made;

- to prevent the making of the declaration sought by the WLALC, Mr Dates needed to advance a case that either established that native title did exist or cast doubt on WLALC's evidence— at [31], [32] and [35].

It was also noted that, during the course of the various proceedings:

- Mr Dates changed the description of the claim group and the basis of his own participation, from being the representative of the Worimi/Garuahgal women who claim the women's site on the land to claiming for himself and his immediate family and as guardian of the land;
- Mr Dates changed the description of the location of the women's site from being wholly on the Land to only partly on the Land;
- no Worimi woman had given evidence to support the existence of that site;
- there had been delay, adjournments and applications struck out in relation to Mr Dates during the course of the matter;
- the delay attributable to the various applications brought by Mr Dates, based on his assertion of native title, was in the order of 22 months— at [33], [34] and [39].

Her Honour observed:

> It is not suggested by Worimi [Mr Dates] that the community of Worimi people recognises the asserted native title. Worimi claims that the traditional laws and customs observed by him and, through him, his immediate family, are laws and customs that should be but are not observed by the Worimi people and, in particular, the Worimi/Garuahgal women. He may not be able to establish that native title does exist but his evidence if accepted, may cast doubt on the Land Council's case. Worimi has no present s 61 application and there is no reason to believe that he intends to file a further application or that, if he did, it would survive an application to strike it out for failure to establish authorisation under s 251B of the Act. The Land Council has not filed any evidence in this application—at [36].

Bennett J saw no evidence of prejudice to the Land Council if Mr Dates was joined, other than that occasioned by delay, which could be mitigated by an appropriate direction—at [37] to [38].

Decision

Bennett J was satisfied that the court should exercise its discretion to join Mr Dates to the non-claimant application, subject to a condition that he file and serve any further evidence within 14 weeks—at [39] to [40].