Claimant application required for recognition of native title

Commonwealth v Clifton (2007) 164 FCR 355; [2007] FCAFC 190 (Full Court)

Branson, Sundberg and Dowsett JJ, 6 December 2007

Issue

The issue in these appeal proceedings was whether the Federal Court could make a determination of native title in favour of a person:

- who did not have a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA) on foot in relation to the area in question; and
- who was a respondent to a claimant application brought on behalf of another group over that area.

The Full Court dismissed the appeal, finding that those who want a determination of native title to be made in their favour must have a claimant application on foot.

Background

Mark McKenzie sought a determination of native title on his and the Kuyani People's behalf, notwithstanding that they had no claimant application on foot. For further background to this matter, see *Kokatha People v South Australia* [2007] FCA 1057, summarised in *Native Title Hot Spots* Issue 25. At first instance, his Honour Justice Finn held that a determination of native title could not be made in these circumstances. The Commonwealth obtained leave to appeal against that judgment.

Commonwealth's submissions

The Commonwealth submitted (among other things) that:

- the content of a 'determination of native title' is controlled by s. 225, which directs the court to consider the content of all native title and non-native title rights and interests in the area in question and the relationship between them;
- the basic rule against reading the court's jurisdiction as limited, combined with the objects, text and structure of the NTA, did not favour the fettering of the court's jurisdiction in the manner found at first instance;
- the possibility that the court might be able to make a determination of native title that did not conform with a group identified in an application should not be excluded peremptorily or on procedural grounds;
- if, on the evidence, the court was satisfied that native title rights and interests were held by a person who, or group that, was not an applicant, a determination to that effect was not proscribed by the NTA;
- the extrinsic aids to the interpretation of Native Title Amendment Bill 1997 (No 2) (Cwlth), which (when enacted) became the *Native Title Amendment Act 1998* (Cwlth), demonstrated that the rationale for the 1998 amendments was not to limit the people in favour of whom a native title determination could be made but, rather, to limit the number of people and

groups with whom non-indigenous parties were required to negotiate under the future act regime found in the NTA.

Key provisions are ss. 13 and 213

Their Honours Justices Branson, Sundberg and Dowsett, in a joint judgment, stated that:

> [Subsection]…13(1), rather than s. 61(1), is the primary source of the right to make an application for a determination of native title with s. 61(1), as s. 60A recognises, being one of a number of provisions containing rules that govern such an application—at [19].

The court was also of the view that s. 213 was of 'central importance to this appeal'. It provides that any determination of native title must be made in accordance with the procedures of the NTA and, subject to the NTA, the court has jurisdiction in relation to matters arising under the NTA—at [30].

Their Honours:

- acknowledged the potential tension between the restrictions inherent in s. 61(1), concerning the person or persons who may make an application under s. 13(1), and the requirements of s. 94A that any order making a determination of native title set out details of the matters mentioned in s. 225;
- noted this was most apparent where, as in this case, a person who had (or a group that had) no s. 13(1) application on foot asserted native title rights in relation to an area the subject of a s. 13(1) application made on behalf of others—at [35].

Limits on jurisdiction under the NTA

The Commonwealth and Mr McKenzie contended that, provided a valid s. 13(1) application was on foot, the court could make a determination that another group of persons, that had not authorised the making of a claimant application, held native title in relation to the area covered by the application. It was noted this contention was 'quite different' to where the court was required to determine disputes which are 'an inherent aspect of the determination of an application' under s. 13(1) e.g. the 'true' membership of a native title claim group, the boundaries of the claim area or the nature and extent of the native title rights and interests—at [37].

Their Honours accepted (as had been contended) that s. 225(a) did not limit the range of persons or groups who were eligible to be identified as the native title claim group that had authorised a s. 13(1) application. However, this was said to be of 'limited significance for present purposes' because:

> Section 225 is concerned with the content of a determination of native title; it is not directly concerned with the jurisdiction or power of the Court to make an order in favour of a group which has not authorised the making of a claim on its behalf for a determination of native title. Nor is it concerned with who has standing to make an application for a determination of native title—at [38].

In the court's view (among other things):

- section 213, which is 'critical' to a determination of the extent of the court's jurisdiction under the NTA, demonstrates an intention to limit both the general jurisdiction conferred by the *Judiciary Act 1903* (Cwlth) and the jurisdiction conferred by s. 81 of the NTA;

- subsection 213(2) provides that the court's jurisdiction in relation to matters arising under the NTA is subject to the NTA and s. 213(1) provides that any determination of native title must be made in accordance with the procedures in the NTA;
- subsection 61(1) of the NTA was not concerned to vest, or limit, jurisdiction but to firstly identify the applications that may be made under Division 1, Part 3 and to secondly identify who has standing to make those applications;
- the requirement in s. 213(1) that a native title determination must be made in accordance with the procedures in the NTA made it necessary to identify the procedures that govern the making of such a determination;
- it may also make it necessary to determine which of those procedures the legislature intended to be critical to a valid exercise of the jurisdiction of the court—at [40] to [43], referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

Procedures for obtaining a determination of native title

The court noted that:

- Division 1, Part 3 of the NTA contains the rules governing the making of a native title determination, including who may make the application, the form of the application, the information it must include and how (and to whom) notice of the application must be given;
- Part 4 governs the way the court is to exercise its jurisdiction to hear and determine applications and, 'importantly', provides that every application under s. 61(1) must be referred to the National Native Title Tribunal for mediation unless orders are made to the contrary;
- section 67 provides a procedure for dealing with a situation where two or more native title determination applications are made over the same area i.e. the applications must be dealt with in the one proceeding (at least to the extent of any overlap)—at [44] to [46].

It was found that:

- the NTA provides no other procedures other than those noted above whereby a person or group could obtain a determination of native title;
- the definition of 'approved determination of native title' in s. 13(3) is limited to those made on an application under s. 13(1) or, in accordance with s. 13(2), in relation to a compensation application under Division 5—at [47].

Mr McKenzie's submission that Order 5 rule 1 of the Federal Court Rules (FCR), which deals with cross-claims, provided a procedure that a 'non-applicant' party to a claimant application use to obtain a determination of native title was rejected:

> Order 5 rule 1 only authorises a respondent to cross-claim against an applicant for relief to which the respondent would be entitled against the applicant if the applicant were a respondent in a separate proceeding commenced in the Court by the respondent for that purpose. It does not authorise a respondent to cross-claim for relief which he or she could not claim as an applicant in a separate proceeding. S[ubs]ection 61(1) requires a native title determination application to be authorised by the relevant native title claim group. Order 5 rule 1 therefore requires a cross-claimant to be similarly authorised—at [48].

Legislative intent of 1998 amendments not limited to right to negotiate

The court accepted that the second reading speech and Explanatory Memorandum for the *Native Title Amendment Bill 1997 (No 2)* (Cwlth) (which became the *Native Title Amendment Act 1998*),

demonstrated that one rational behind the amendments was to limit the number of people and groups non-indigenous parties were required to negotiate with. However, the court did not accept that this was the only rationale:

> [N]othing in the second reading speech or the Explanatory Memorandum suggested that the proposed amendments to Division 1 of Part 3 of the Act were only intended to provide a foundation for the new registration test and were not intended to place any real restraint on the ability of individuals and groups of individuals to claim determinations of native title—at [50].

In the court's view:

> [I]t is unlikely almost to the point of being fanciful that the legislature intended that standing to institute a proceeding claiming a determination of native title should be strictly limited to persons authorised by the relevant native title claim group but that standing effectively to counter-claim for identical relief should be unlimited by any requirement for authorisation. This unlikelihood is the more apparent when one considers the numerous obligations placed on the Native Title Registrar to give notice of a native title determination application. Assuming the submissions of the Commonwealth and Mr McKenzie to be correct, other parties to the proceeding could advance comparable claims without any requirement arising for these statutory requirements and obligations to be met—at [52].

Therefore, their Honours rejected the submission that s. 61 was merely intended to 'discipline applicants as to the content and form of primary applications' and that the incentive to comply with s. 61 was the right to negotiate—at [54].

Individual native title rights and interests

Mr McKenzie made a submission that the NTA may provide for an individual to be recognised as holding native title. After noting that this was not 'an appropriate occasion for consideration of the nature of an individual native title right', the court went on to observe that:

> [T]he sole survivor of a class or group of persons who once held the common or group rights comprising the native title in an area would need no additional authority to make a claim under s 13(1). By contrast, an individual who claimed that according to the traditional laws and customs of his or her society, he or she alone had the right to enjoy some element of the common or group rights comprising the native title would need to be authorised as required by s 61 to make a claim under s 13(1)—at [56].

Conclusions

It was found that:

- subsection 213(1) disclosed a legislative intent that a determination of native title should only be made in accordance with the procedures set out in the NTA;
- since the 1998 amendments, those procedures required, at a minimum, that a s. 13(1) application must be made under Part 3 of the NTA by a person or persons authorised by a native title claim group in the manner required by s. 61(1);
- where more than one native title claim group sought a determination of native title, each group must authorise a person or persons to make an application as mentioned in s. 13(1) under Part 3;
- where more than one native title determination application is made over an area, s. 67 requires that they be dealt with in the one proceeding (at least to the extent of any overlap);
- consequently, a determination of native title in respect of any one or more of the claim groups would be able to be made in accordance with the procedures of the NTA;

- alternatively, if after the Native Title Registrar has given notice under s. 66, only one application is filed in respect of the area, the court would be entitled to be satisfied that no other group or groups asserted a claim to hold native title to the area—at [57] to [59].

Note that the court indicated that these were not necessarily exhaustive findings as to the 'critical' requirements of Division 1 of Part 3—at [58].

Ward distinguished

While these views might not accord with what was said by their Honours Justices Beaumont and von Doussa in *Western Australia v Ward* (2000) 99 FCR 316 at [191] to [194], the court noted (among other things) that:

- that case was decided on the basis of the 'old Act' (i.e. the NTA as it stood before the 1998 amendments) which contained no provisions requiring an applicant to be authorised by the relevant native title claim group;
- a view consistent with that preferred in this case had more recently by been expressed by other judges—at [60] to [61], referring to *Moses v Western Australia* (2007) 160 FCR 148, summarised in *Native Title Hot Spots* Issue 25.

Decision

The appeal was dismissed—at [62].