

Strike out under s. 84C – Town of Batchelor No

Hazelbane v Northern Territory [2008] FCA 291

Mansfield J, 7 March 2008

Issue

This case concerns an application to strike out a claimant application under s. 84C of the *Native Title Act 1993* (Cwlth) (NTA) on grounds that it did not comply with ss. 61 or 62 of the NTA. It is related to the judgment in *Hazelbane v Doepel* [2008] FCA 290 (summarised in *Native Title Hot Spots Issue 27*).

Background

There are two claimant applications over the town of Batchelor, referred to here as Town of Batchelor No 1 and Town of Batchelor No 2. In September 2002, a group that identified itself as the Finniss River Brinkin Group (FRBG) was joined as a respondent to Town of Batchelor No 1. FRBG was said to be comprised of the patrilineal members of eight clans, three of which were the Emu Clan, the Blue Tongue Lizard Clan and the King Brown Snake Clan.

Town of Batchelor No 2 was made subsequently, initially on behalf of these three FRBG clans. It was then amended so that it was brought only on behalf of members of the Emu Clan and the Blue Tongue Lizard Clan. The three people named as ‘the applicant’ (see s. 61(2)(d) of the NTA), Thomas Petherick, May Stevens and Captain Wodidj, were said to have been authorised by the ‘Emu and Blue Tongue Lizard Kungarakany group’, with the native title claim group said to be members of the Emu and Blue Tongue Lizard Clan native title claim groups who ‘constitute local descent groups affiliated with the Kungarakany language area’.

Both the applicant and the native title claim group for each of the Town of Batchelor claims were comprised of different persons. In November 2005, the court ordered that the applications be heard together.

The applicant for the Town of Batchelor No 1 was joined as a respondent to Town of Batchelor No 2 and subsequently sought strike-out of Town of Batchelor No 2 pursuant to either s. 84C(1), on the basis that the application did not comply with ss. 61, 61A or 62 or O 2 r 2(1) of the Federal Court Rules.

Nature of s. 84C application

Justice Mansfield noted, among other things, that:

- an application under s. 84C should be allowed ‘only where a clear case for summary dismissal has been made out;
- those seeking strike-out under s 84C must make out ‘a very clear case of want of authorisation’ or ‘a clear failure to comply with one or other of the requirements’ of ss. 61, 61A or 62—at [11].

After noting that ‘proper authorisation is fundamental to the legitimacy’ of a claimant application, Mansfield J went on to observe that:

It is, therefore, hard to resist the temptation of determining such a fundamental issue ... before a full trial To do so has the attraction of expedition and economy. Certain recent decisions of the Court have illustrated that proper authorisation is a matter which should not be overlooked, and the possibility of a challenge, at an early point in the proceeding The mere complexity of an issue, or the fact that extensive argument may be necessary to demonstrate that the claim is untenable, is not a reason not to dispose of an application summarily—at [14].

However, his Honour went on to say that, despite this fact and ‘the obvious advantages’ to the Town of Batchelor No 1 applicant of having the authorisation issue heard and determined on its strike out motion:

[I]t can only succeed if upon the whole of the evidence on the motion it satisfies the Court that there is no real prospect of the ... applicants in the Town of Batchelor No 2 application establishing that they are authorised in terms of s 61(1) ... and ... s 251B ... and that they have complied with s 62—at [16].

Contentions

The applicant for Town of Batchelor No 1 contended that:

- the persons who constituted the applicant on the Town of Batchelor No 2 application were not authorised by all the members of the native title claim group to bring that application;
- the members of the Emu and the Blue Tongue Lizard clans were only part of the native title claim group; and
- the Town of Batchelor No 2 applicant did not comply with the requirements to provide an affidavit and other information under ss. 61 and s. 62, in particular that, contrary to s. 62(1)(a), the application as amended was not accompanied by affidavits deposing to the matters referred to in ss. 62(1)(a)(i) to (v).

History to the proceedings

Mansfield J noted that:

- it was apparent that the FRBG was comprised of at least eight clan groups;
- for many years, FRBG had been seeking to have its interest in (among others) the area covered by the Town of Batchelor No 2 application recognised under the *Aboriginal Land Rights (Northern Territory) Act (1976)* (Cwlth) and the NTA but both the Aboriginal Land Rights Commissioner (see the Finnis River Land Claim 1980) and the Northern Land Council (NLC), the relevant representative body under the NTA, declined to recognise that interest;
- NLC also declined to provide financial or other support to the FRBG to pursue its claims;
- consequently and ‘unsurprisingly’ (given the process of making such a claimant application ‘is complex and the information required is detailed’), the Town of Batchelor No 2 application and other of the FRBG’s documents had ‘some unsatisfactory aspects’;
- that said, the court was required to determine the motion for strike-out ‘having regard to the principles applicable to’ s. 84C and on the material before it—at [24].

Failure to comply with s. 61(1)

The Town of Batchelor No 2 application named Captain Wodidj, Tjalma Tiger Jongman, Madntingi, Thullumbun and Chugulla (with all but Captain Wodidj being deceased) as the apical ancestors for the Emu Clan, with George Birid Stevens and Jimmy Jeribid (both deceased) named as the apical ancestors for the Blue Tongue Lizard Clan.

Mansfield J found that:

- there was clear evidence that four of the five persons named as apical ancestors for the Emu Clan did not possess native title rights and interests in respect of the Batchelor claim area and, in particular, there was strong evidence that Captain Wodidj did not claim to be a member of any native title claim group with rights and interests in the Town of Batchelor area;
- this was sufficient to determine the application adversely to the Town of Batchelor No 2 applicant for failure to comply with s. 61(1)—at [26] to [27] and [29] to [30].

His Honour also held that:

- Captain Wodidj was not, as required by s. 61(1), a member of the native title claim group as that group was described in the amended application;
- there was no evidence that Thomas Petherick was authorised by all the members of the native title claim group to bring the application on their behalf;
- at best, the relevant attachments to the application described Mr Petherick as a ‘spokesperson interpreter in the courts representing the FRBG itself, and not the two particular clans’ and he was not named in either of those attachments as an ‘Authorised Person’ or a ‘Clan Group Representative Spokesperson’;
- the native title claim group as described in the amended application was confined to members of the Emu Clan and the Blue Tongue Lizard Clan but the material presented by Mr Petherick indicated that his inquiries had been on behalf of the FRBG generally;
- on Mr Petherick’s own material, those two clans are a mere subset of the FRBG and, therefore (in accordance with the authorities cited in the reasons for judgment), it was ‘inappropriate that they should constitute the native title claim group’ —at [34] to [35].

Decision

His Honour decided that:

[T]here are clear reasons why the Town of Batchelor No 2 application, as presently expressed is not capable of being maintained in its present form. I propose to strike it out. I will give the second applicants 14 days within which to apply by motion for orders which may save the application...The strike out order is therefore not to be sealed for that time. I do not suggest that the second applicant should make any such application, but I think it appropriate to give them the opportunity to do so—at [38].