Strike out under s. 84C—claim group and authorisation

Brown v South Australia [2009] FCA 206

Besanko J, 12 March 2009

Issue
The main issue before the Federal Court was whether a claimant application should be struck out under s. 84C(1) of the *Native Title Act 1993* (Cwlth) (NTA) on the grounds that:

- the native title claim group was not properly constituted;
- the applicant was not authorised to make the application.

The application was struck out because the State of South Australia succeeded on both grounds.

Background
On 27 March 2008, a claimant application was filed by Dawn Brown (the applicant) in which she claimed she was a member of the Brown Family Group and was authorised to speak for it. The claim group was made up of 22 named individuals. On 30 June 2008, the applicant filed an amended application in which the claim group was also said to be made up of 22 named individuals and their descendants. However, four of the 22 named in the original application had been removed and replaced with four others.

Native title claim group
The state contended that the Brown Family Group, as defined in the amended application, was not a 'native title claim group' under the NTA but a sub-group. The second respondent, the applicant for the Antakirinja Matu-Yankunytjatjara claimant application (AM-Y claim), an earlier overlapping claim, supported this contention. Among other things, the state relied upon s. 84C(1), which provides that the court may strike out an application that does not comply with ss. 61, 61A or 62 of the NTA.

The court noted that applications under s 84C(1) are approached 'in the same cautious way' as applications for summary dismissal under O 20 r 2 and so:

- the power should be exercised only where 'the claim as expressed is untenable and upon the version of the evidence favourable to the respondents to the strike out' and a 'clear case has to be made out';
- extensive argument may be required and it may be necessary to adduce evidence to establish the futility of a case—at [11], referring (among others) to *McKenzie v South Australia* [2005] FCA 22 at [26] (summarised in *Native Title Hot Spots* Issue 14), *Landers v South Australia* (2003) 128 FCR 495 at [7] (summarised in *Native Title Hot Spots* Issue 5), *Williams v Grant* [2004] FCAFC 178 at [48] and [49] and *Bodney*

v Bropho (2004) 140 FCR 77 at [51] to [52] (both summarised in *Native Title Hot Spots* Issue 11).

Justice Besanko held that a claimant application does not comply with s. 61(1) if it is clearly established that it is not made by a 'native title claim group', i.e. all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed—at [19], referring both to ss. 61(1), 61(4), 251B and 253 and to the numerous authorities on point.

His Honour found that the evidence as a whole established that the Brown Family Group was a sub-group of the AM-Y claim group or, at least, of a larger group of the Brown Family Group. That finding was supported by the following:

- thirteen of the 22 members of the Brown Family Group, as defined in the amended application, were members of the AM-Y claim group;
- two of the people who were in the claim group in the original application, but removed in the amended application, were members of the AM-Y group;
- the evidence from the applicant suggested that she considered membership of the Brown Family Group was dependent upon whether or not the relevant person agreed to be a member;
- the applicant was dissatisfied with the way in which the AM-Y claim was proceeding and asked that the Brown Family Group be withdrawn from the AM-Y claim; and
- the applicant stated that the Brown Family Group knew that there were other families with native title interests in the claim area—at [36].

The court found that the amended application did not comply with s. 61 of the NTA—at [37].

Authorisation

The state also contended that not all the persons in the Brown Family Group had authorised the applicant to make the application and to deal with matters arising in relation to it. The court noted that: 'The importance of proper authorisation to the native title determination claim process has been emphasised many times', going on to cite the relevant case law—at [22] to [24].

In this case, Besanko J held that the applicant had not established that she was authorised by all the persons in the Brown Family Group even assuming (for the purposes of the argument) that it was a native title claim group as defined in the NTA, holding that:

- claims by the applicant that she was authorised by the elder men and women of the Anangu Pitjantjatjara-Yankunytjatjara Lands, and that they had stated that the applicant was responsible for the women's dreaming in the claim area and had to speak for her grandfathers country, were not enough to establish valid authorisation;

- this was not sufficient as it was far from clear that the statement by the elder men and women constituted an authorisation to make the claimant application and deal with matters arising in relation to it;
- further, it did not establish that the elder men and women had the power to grant the relevant authorisation and there was no evidence of a traditional decision-making process conferring power on elder men and women to confer the relevant authority—at [39] and [44].

It was also found that a meeting held on 30 May 2008, after the original application was made and before the amended application was filed, did not give rise to a valid and effective authorisation because:

- there was a failure to give notice of the meeting to a number of people who appeared to be part of the Brown Family Group, which was fatal to the applicant's claim to be authorised as required by s. 251B;
- there was no evidence that any advertisement or notice was given in respect of the meeting;
- the connection between those who attended the meeting and the native title claim group was not established in respect of attendance—at [40].

Finally, the advertisement giving notice of a subsequent meeting (held on 8 November 2008) was found to be deficient because it did not sufficiently identify the alleged native title claim group, such that a person reading the advertisement could determine if he or she was, or may be, a member of the Brown Family Group. Therefore, it was found that this meeting did not result in a valid authorisation for the same reasons as given in relation to the meeting of 30 May 2008—at [42] to [43].

Decision

The claimant application was struck out pursuant s. 84C of the NTA because:

- the applicant did not establish she was authorised by all the persons in the Brown Family Group (even if it was assumed for the purposes of argument that it was a 'native title claim group'); and
- the Brown Family Group was sub-group of a larger group and so did not comply with s. 61—at [36] to [37] and [44] to [45].