Replacing the applicant, claim group amendment

Martin (dec'd) v Western Australia (No 2) [2009] FCA 635

Barker J, 12 June 2009

Issue

The issues before the Federal Court in this case were whether to make an order to replace the current applicant (who had died) and, if so, whether the new applicant should be allowed to amend the relevant claimant application. The court made the orders sought. The amendment allowed to the claim group description, which was made for the purposes of meeting one of the conditions of the registration test, is of particular note.

Background

The application in question was made in 1998 and subsequently amended. In October 2008, the sole applicant passed away. Seven members of the claim group subsequently sought an order under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) that they, jointly, replace the current (deceased) applicant.

In Schedule A of the application, it was said that: 'The claim is brought on behalf of [certain named individuals] ... and their biological descendants'. If the s. 66B application was successful, then those who replaced the current applicant proposed that the application be further amended, including by the addition of the following proviso to the claim group description in Schedule A:

> [T]hat any person who is within the description contained in Section 190C(3) [one of the conditions of the registration test] of the ... [NTA] ... whether specifically named in this Schedule or a descendant of a person named in this Schedule is excluded from those persons on whose behalf the claim is brought.

Schedule O, relevant to s. 190C(3), requires the applicant to provide:

> Details of the membership of the applicant or any member of the native title claim group in a native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application.

It was proposed to amend Schedule O so that it read:

> The amended ... description of the claim group (Schedule A) by which any person caught by Section 190C(3) is excluded from the claim group means that by definition of the claim group there can be no person within the group that falls within those to be described under this Schedule.

Yamatji Marlpa Aboriginal Corporation (YMAC, the fourth respondents) opposed the making of the orders.

As the court noted, there was 'little doubt' that the proposed amendments were 'designed to facilitate the registration of the claimant application'—at [84].

Were those proposed as the new applicant duly authorised?
In this case, s. 66B(1)(a)(ii) was satisfied, i.e. the current applicant had died and seven members of the native title claim group had made application to the court that they jointly replace the current applicant. The questions considered by the court were:

- whether s. 66B(1)(b) was met, i.e. were those claim group members authorised by the claim group to make the application and to deal with matters arising in relation to it; and
- whether it should exercise its discretion to make the order sought.

Section 251B relevantly provides that all the persons in a native title claim group authorise a person or persons to make a native title determination application and to deal with matters arising in relation to it if:

- where there is a process of decision-making that must be complied with under the traditional laws and customs of the persons in the native title claim group in relation to authorising 'things of that kind'—the persons in that group authorise the person or persons to do so in accordance with that process; or
- where there is no such process—the persons in the native title claim group authorise the other person or persons to do so in accordance with a process of decision-making agreed to and adopted by the persons in that group 'in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind'.

The second limb was relied upon in this case. YMAC (supported by the State of Western Australia) submitted (among other things) that the evidence showed that a 'smaller claim group than that described in the ... application has authorised the application to replace the current applicant and that an informed authorisation has not been conveyed'—at [73] and [75].

According to the court, the principles underlying this submission were 'clear enough' and could be exemplified as follows:

> [I]f the original claim group in the claimant application were described as groups "A plus B" and the evidence discloses that only the "A" group has authorised an application to replace the current applicant, then the requirements of s 66B(1)(b) are not met. Similarly, if group A makes a claim to vindicate the native title rights and interests held by groups A and B, without having the authority of both groups, then the requirements of s 66B(1)(b) are not met. This simply involves an application of the principles to which the above authorities relate—at [76].

Justice Barker rejected the submission that s. 66B(1)(b) was not met, finding that:

> On the proper construction of the authorisation process undertaken, the claim group as originally described in the claimant application, in its unamended form ... were identified with reasonable precision, reasonably notified and had the proper opportunity to meaningfully participate in the meeting to consider the motion to replace the current applicant. The manner in which the meeting was conducted ... shows that it was an orderly meeting and that the persons properly entitled to participate as members of the claim group did participate and that persons not entitled to participate did not participate. ... Those in attendance at the meeting had explained to them the importance and significance of the authorisation they were being asked to consider. Moreover the members of the claim group that participated in that meeting were properly advised concerning the requirements of s 251B and then determined that there was no traditional decision-making process that applied in a case such as that before them. Accordingly, they reasonably resolved to adopt a majority voting position. In the event there was no dissent from any of the propositions put—at [78].

His Honour was 'quite satisfied' that 'on a plain reading and proper understanding of the evidence' this was a case where:

> [T]he claim group as described in the claimant application, focussed on the relevant issues, provided the relevant authorisation to the proposed applicants to pursue the native title rights and interests that they, and they alone claim—at [80].

Should the proposed amendments be allowed?

The court decided to exercise its discretion under s. 66B(2) and make the order to replace the current applicant. Therefore, those who now constituted the applicant 'were entitled to proceed with their application to amend the claimant application'. The question was whether the amendments should be allowed—at [83].

At various points in the proposed amended application, reference was made to the 'Widi Mob', e.g. in Schedule E, it was said that the 'Widi Mob' claimed the native title rights and interests set out in the application and there were references to 'Widi laws and customs' in Schedule M. YMAC submitted that:

- the terms of the application to amend were, effectively, that the applicant (on behalf of the claim group) was claiming as a subgroup in respect of, or on behalf of, a wider 'Widi Mob' than themselves;
- therefore, the proposed amended application was defective, relying on *Landers v South Australia* (2003) 128 FCR 495; [2003] FCA 264 (*Landers*) and *Dieri People v South Australia* (2003) 127 FCR 364; [2003] FCA 187 (*Dieri People*). (Each is summarised in *Native Title Hot Spots* Issue 5.)

This submission was rejected because YMAC had wrongly construed the proposed amendments and *Dieri People* could be distinguished. According to Barker J:

> [T]he reference to the "Widi Mob" [in the proposed amended application] is merely a reference to the claim group and not to any wider group. The expression "Widi Mob" is therefore simply a convenient way in which the claim group refers to itself and itself alone.

> The applicants do not purport to be a subgroup of some larger group, and the material currently before the Court does not suggest they are. In those circumstances there is no question, as was the case in *Dieri People* ... , that the proposed application is put forward on behalf of some other, larger group, who have not, as a larger group, authorised the making of the amended application—at [99] to [100].

The argument that there was a lack of certainty as to who fell within the claim group and who did not, given the way in which it was proposed to exclude those caught by s. 190C, was found to be 'without substance'. According to the court:

> What is of key importance in a case such as this, is that the claim group has been defined with sufficient particularity. This is not a case where the claim group is described by reference to the descendents of some long ago apical ancestor. ... [I]t is a case where named living (or recently deceased) persons and their biological descendants constitute the claim group. The exception is in respect of any persons who may fall within the description of persons to whom s 190C ... applies—at [110].

Decision

For the reasons given, the court made orders to replace the current applicant and to amend the application in the proposed manner— at [111] to [113].

Comment on the exclusion clause

In this case, it was apparent to the court that the proposed amendments were made in an attempt to facilitate registration of the application. At [108], Barker J expressed the view that the proviso in Schedule A was merely 'a clarifying and incidental provision'. However, according to *Landers* at [37], nothing can be discerned from the context of ss. 190A, 190B and 190C (aka the registration test) 'or from their words' to suggest that 'the clear words' of ss. 61(1) and 61(4) 'do not mean what they say'. Further, s. 84C provides that a failure to meet these conditions may be grounds for striking out a claimant application.

At [59], Barker J noted that authorisation 'must be by all the persons who constitute the native title claim group in respect of the common or group rights or interests comprising the particular native title **claim**'(emphasis added), referring to Justice Lindgren in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith*, summarised in *Native Title Hotspots* Issue 24) at [1172]. However, Lindgren J actually referred to 'the common or group rights and interests comprising the particular native title **claimed**' (emphasis added), a reference to the definition of the native title claim group in s. 61(1), 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'. In *Harrington-Smith* at [1216], it was found that:

> [T]here must be a coincidence between (a) the native title claim group as defined in ss 61(1) and 253 ... (the actual holders of the particular native title claimed); (b) the claim group as defined in the Form 1; and (c) all of the persons who authorised the making of the application, and who must be named or otherwise defined in the Form 1 as required by s 61(4).

At [280] to [281] in *Harrington-Smith*, Lindgren J appears to be critical of applicants who 'redefined' the native title claim group by amending the relevant application to 'exclude problematical ... members', including people who were otherwise members of the claim group but were excluded simply in order to pass the condition found in s. 190C. His Honour was apparently of the view that such exclusions are only permissible for the purposes of s. 61(1) if:

- there is evidence before the court that there were traditional laws and traditional customs providing for the exclusion of those people on that basis;
- the evidence supports an inference that 'by a process of variation or adaptation, rooted in pre-sovereignty laws and customs', the applicant had the right to exclude those people on that basis—see *Harrington-Smith* at [1305]. See also at [1222].

These findings in *Harrington-Smith* appear to accord with what was said in *Landers* at [39] to [40]. There, the application was amended to exclude certain people 'not because the excluded persons are not members of the Dieri People'. It was done 'to secure registration of the application'. Mansfield J found that ss. 61(1) and 61(4) 'do not permit such an exclusion whether for that reason or otherwise'. However, the reasons for judgment in this case do not indicate that the issue was put to the court on the basis of these findings in *Landers* and *Harrington-Smith*.

One further issue arises in relation to the findings at [109] that there was 'no uncertainty about the description of the claim group' in the amended application and that the applicant was not required to 'undertake a task' that the Native Title Registrar may be required to perform, i.e. the task under s. 190C(3), in order to 'definitively identify every person who is not included within the claim group'. Paragraph s. 61(4)(b), which was relied upon in this case, states that:

> A native title determination application ... that **persons in a native title claim group** ... authorised the applicant to make **must** ... describe the persons **sufficiently clearly** so that it **can be ascertained** whether **any particular person is one of those persons** (emphasis added).

There is no doubt that his Honour was right to find that this condition was met in relation to the application as it stood prior to amendment. It is, with respect, less clear that the application **as amended** meets this requirement. It should also be noted that, pursuant to s. 190B(3)(b), the Registrar must be satisfied that the persons in the native title claim group are 'described sufficiently clearly so that it can be ascertained whether any particular person is in that group'.