Defect in authorisation — applying s. 84D

Ashwin on behalf of the Wutha People v Western Australia [2010] FCA 206

Bennett J, 21 May 2010

Issue
In earlier proceedings, the Wutha People's claimant application was dismissed in part because it was found the applicant was not authorised to make it. The applicant for an overlapping application later sought orders requiring the Wutha applicant to produce evidence of authorisation in respect of the remainder of the application. In response, the Wutha applicant asked the Federal Court to allow its application to proceed notwithstanding the defect in the authorisation. The court refused to exercise its discretion to do so and instead ordered the Wutha applicant to file evidence to demonstrate that those who constitute the applicant are 'lawfully authorised' to make the Wutha application—at [48].

This case highlights the fact that, for the purposes of the *Native Title Act 1993* (Cwlth) (NTA), a native title claim group must be 'a group recognised under traditional laws and customs', not a 'construct for NTA purposes' such as passing the registration test—at [49].

Background
The Wutha application, made pursuant to s. 13 under s. 61(1) of the NTA, covers an area in the Goldfields in Western Australia. It overlaps the geographical area covered by a claimant application made on behalf of the Yugunga-Nya People (the Yugunga-Nya application).

In *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1; [2007] FCA 31 (*Wongatha*), Justice Lindgren considered the claim made in the Wutha application to the extent that it overlapped the area covered by the Wongatha People's claimant application. It was found (among other things) that the Wutha applicant was not authorised and so Lindgren J dismissed the Wutha application to the extent that it overlapped the Wongatha claim area. Subsequently, the other parties to the remainder of the Wutha application refused to participate in mediation before the National Native Title Tribunal (the Tribunal). In December 2008, the Tribunal recommended that the court order that mediation cease. It also drew attention to the issue of authorisation and to the court's powers pursuant to s. 84D.

Application under s. 84D(1)
The applicant for the Yugunga-Nya application applied for orders under s. 84D(1), which provides that the court may make an order requiring the applicant making an application under s. 61 to produce evidence as to authorisation. It was contended the Yugunga-Nya had an interest in having authorisation dealt with at a preliminary

stage because (among other things) they may be put to the expense and inconvenience of a trial if the Wutha application was set down for hearing in circumstances where the *Wongatha* decision apparently indicated the Wutha claim had no reasonable prospects of success. The State of Western Australia supported the Yugunga-Nya People's application.

History of the Wutha application

Justice Siopis set out the history of the Wutha application in some detail. In brief, two applications were made on behalf of Wutha People in 1996. In January 1999, following the 1998 amendments to the NTA, orders were made to combine those applications and to amend the description of the native title claim group in the combined application so that it read as follows:

> The name of the claim group is Wutha and the Wutha people are those persons who identify themselves as Wutha, and are the biological descendants of: ... Wunal (also known as Tommy) Ashwin (m) and Telpha Ashwin (f); and ... those persons adopted by the biological descendants or with marital relations to those persons.

There were other irrelevant amendments made in March 1999.

What was significant in this case (and in *Wongatha*) was a further amendment made in April 1999 which resulted in a 'reduction' of the claim group because it came to be described as:

> [T]he biological descendants of Wunal aka Tommy (m) and Telpha Ashwin (f) ***excluding the following*** individuals and descendants: [a list of 20 people and their offspring] ... [and] those persons adopted by those biological descendants in accordance with Wutha tradition and custom ... [with a description of adoption under Wutha tradition and custom following] (emphasis added).

The notice of motion for the amendment was supported by the affidavit of legal advisor Michael Rynne, who deposed that the Wutha applicant wished to amend the application to ensure that it did not 'offend the [Native Title] Registrar's interpretation of' a 'particular aspect' of the registration test.

Findings in *Wongatha*

In *Wongatha* at [2732], Lindgren J held that:

> For the purpose of the challenge to authorisation, the Wutha "native title claim group", that is to say [as s. 61(1) does], "all the persons ... who ... hold ... the particular native title claim[ed]", must be assumed to be either one of the earlier larger groups or the now reduced group [i.e. as reduced by the April 1999 amendment]. If the former, the only application they authorised was a pre-reduction application. If the latter, neither the original group nor the reduced group authorised that application. Accordingly, the present reduced group application before the Court was not authorised.

Lindgren J was also concerned that the claim was now (impermissibly) being made on behalf of a subgroup of the proper native title claim group. At [2750] of *Wongatha*, his Honour asked how it was that 'the 20 individuals or families at one moment

satisfy the criteria' for Wutha claim group membership and 'the next moment', they do not? In the absence of any evidence on point, at [2751] the inference was drawn that:

> The 20 individuals or families were excluded, whether with their agreement or not, because they were in another claim group or other claim groups. This is an NTA consideration, and suggests that the present Wutha claim group is a construct for NTA purposes, rather than a group recognised under traditional laws and customs.

Lindgren J also referred to anthropological evidence indicating there may be other people who had been excluded from the claim group without any proper reason.

Wutha applicant's contentions

The Wutha applicant relied on s. 84D(4) which provides that, 'after balancing the need for due prosecution of the application and the interests of justice', the court may:

- hear and determine the application, despite the defect in authorisation; or
- make such other orders as the court considers appropriate.

As his Honour noted:

> The Wutha applicant contended that s 84D(4) was an ameliorative provision and the discretion thereby conferred was to be exercised with regard to the due prosecution of the litigation and the interests of justice. The applicant went on to contend that the particular circumstances constituted "a powerful case" for the Court to exercise its power under s 84D(4)(a) to allow the application to proceed to hearing and determination "despite the defect in authorisation" found by Lindgren J. Accordingly, the applicant said, the Court should allow the existing application (including the Yugunga-Nya overlap) to proceed to mediation or to determination, and not require the Wutha applicant to provide evidence of authorisation—at [34].

Findings

The Wutha applicant's submission that *Wongatha* only applied to the area of the overlap with the Wongatha claim was rejected. Siopis J held the findings in *Wongatha* were 'of general application and have the propensity to invalidate the Wutha claim as a whole'—at [36].

Among other things, his Honour acknowledged at [39] that s. 84D was introduced 'to mitigate any unfairness which may arise from an objection to authorisation being raised at a late stage of the proceeding', as was the case in *Wongatha*. However, while the Wutha claim had been on foot for a long time, it was not close to trial. According to Siopis J:

> [T]he respondent parties ... have considered the impact of the findings of Lindgren J on the continued viability of the proceeding and reacted thereto, timeously; and certainly well before this proceeding is ready to go to trial. ... Accordingly, ... , there has not been any material delay by the respondent parties in responding to the findings of Lindgren J—at [39] to [40].

The applicant attempted to 'downplay' Lindgren J's findings by characterising them as obiter dicta. In his Honour's opinion, whether or not this was so:

> [T]he fact remains that Lindgren J has identified an issue as to authorisation which is fundamental to the viability of the Wutha claim, namely, the precise identity and scope of the persons on whose behalf the claim is brought. The removal of the 20 families from the amended claim group is a serious issue which needs to be explained and justified—at [46].

Decision

His Honour rejected Wutha applicant's application to have the court exercise its discretion under s. 84D(4) because:

- the defect referred to by Lindgren J was 'founded in a matter of such fundamental importance to the Wutha claim' that it weighed 'strongly against' the exercise of the discretion;
- the proceeding was 'a long way from trial' and it was in the interests of justice 'that the question of authorisation be determined as a preliminary matter'—at [47] to [48].

In order to fairly determine the question, those who comprise the applicant were ordered to file any further evidence they wish to rely upon to demonstrate that the Wutha application 'is lawfully authorised' pursuant to ss. 61 and 251B of the NTA—at [48] at [51].

Comment – what will be required?

It appears that the additional evidence will need to address both 'the rationale for the definition of the Wutha claim group by reference to the reduced claim group' and 'the justification for the removal of the 20 families' via the 1999 amendment. Siopis J was inclined to the view that the evidence at present confirmed Lindgren J's observation that the reduced claim group appeared to be a 'construct for NTA purposes, rather than a group recognised under traditional laws and customs' as required by s. 61(1) of the NTA—at [49].