Determination of native title - no right to sustainable benefit clause

Brown v South Australia [2010] FCA 875

Mansfield J, 13 August 2010

Issue

In this case, the Federal Court decided that respondents with mining interests could not insist, as a matter of law, on the inclusion in a native title determination of a term as to how any compensation they were required to pay be applied. His Honour also expressed the view that it may be a breach of an obligation to negotiate in good faith to use 'the carrot of consent' to a determination recognising native title as 'leverage to secure agreement on other matters', although that was not the case here—at [38] and [42].

Background

This question arose in relation to a claimant application made under ss. 13 and 61 of the *Native Title Act 1993* (Cwlth) (NTA) on behalf of the Antakirinja Matu-Yankunytjatjara native title claim group (AMY application). An application for a consent determination in accordance with s. 86G of the NTA was likely to be made relatively soon. Coombedown Resources Pty Ltd (Coombedown) and Scorpion Exploration Pty Ltd (Scorpion) (the mining respondents) hold mining interests granted under the *Mining Act 1971* (SA) (Mining Act). Pursuant to Part 9B of that Act, they must not carry out mining operations that will affect the continued existence, enjoyment or exercise of native title rights and interests unless there is either:

- a registered indigenous land use agreement (ILUA) that provides that the right to negotiate is not intended to apply to those mining operations; or
- an agreement or determination authorising them to carry out those mining operations under Part 9B of the Mining Act.

In this case, there was neither a registered ILUA between the applicant and the mining respondents nor any agreement or determination under Pt 9B of the Mining Act in evidence—at [5].

Question

The mining respondents sought an order made in the following terms:

> Any compensation subsequently payable in respect of the extinguished native title rights and interests shall be held and applied by the prescribed body corporate for the purposes of benefiting the existing members of the native title holders and their descendants.

The question was reframed in two parts. Question 1 was whether 'a term requiring the sustainable or equitable application of compensation payments by a prescribed body corporate' (a sustainable benefits term) was 'capable of inclusion' in a consent

determination. Among other things, the mining respondents argued that s. 94A required that a determination of native title set out the details of the matters mentioned in s. 225 and that a sustainable benefits term fells within s. 225(d) because it encompassed the relationship between the mining respondents and the native title holders, including those 'whose interests are to receive some benefit from compensation monies paid to existing holders through their prescribed body corporate'. It was also argued that the amendments to s. 87 made by the *Native Title Amendment Act 2009* (Cwlth) (the 2009 Amending Act) allowed for the making of such an order because the court now had power 'to make orders beyond, or instead of, a determination of native title'—at [10] to [12].

Question 2 was whether the mining respondents were entitled 'as a matter of law to require a sustainable benefits term [be included] in a consent determination directing the use of compensation payments payable to the claim group'. Among other things, they argued that:

> [B]ecause a prescribed body corporate may be required to hold such monies on trust, it is implicit that the prescribed body corporate should have a responsibility to future generations of the native title holders ... . If [this is so] ... they may insist upon a sustainable benefits term as a condition of consenting to the proposed consent determination, because the Court has power to make such an order (the answer to question (1) for which they contend) and should do so as that is simply the enunciation of the obligation of the prescribed body corporate—at [13].

The applicant, the State of South Australia and the Commonwealth opposed the making of the order.

Four steps to answering the question

Mansfield J identified 'four steps to be considered in addressing the particular question':

- whether the court had power when making a determination of native title (whether by consent or otherwise) to include a sustainable benefits term if this was not agreed by the parties;
- where the parties were agreed, whether the court had power under ss. 86G or 87 to include a sustainable benefits term as one of the agreed terms ;
- even if the parties agreed upon a sustainable benefits term, whether it was appropriate to do so 'having regard to' other provisions of the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cwlth) (the Regulations) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cwlth) (CATSI Act); and
- whether a respondent 'may require agreement on a sustainable benefits clause as a condition of it otherwise agreeing to the terms of a proposed consent determination', i.e. whether respondents may 'withhold ... consent in circumstances where there is no genuine or bona fide dispute about the terms of the proposed consent determination'—at [16].

Step 1 - no power where no agreement

His Honour thought it was 'clear' that s. 94A of the NTA did not 'provide a foundation' for the court 'having power to include a sustainable benefits term in the determination' because, among other things:

- section 94A requires a determination of native title to set out details of the matters mentioned in s. 225;
- the wording of s. 225(d) does not 'encompass ... a sustainable benefits term' because such a term 'would not address the relationship between the interests' of the mining respondents and the native title holders as required by s. 225(d);
- whether or not compensation is payable as a result of any extinguishment of native title and, if so, the quantification of that compensation are 'further and separate' steps;
- still more remote is the step that a party is 'entitled to insist upon orders as to how the native title holders whose rights have been extinguished should apply any compensation, once there is an entitlement to it and it is quantified'—at [17] to [21].

Step 2 - court has power under ss. 86G or 87 if there is agreement

Again, Mansfield J thought the answer to this question was 'clear'. The court's powers under ss. 86G and 87 are 'extensive'. For example, s. 87 gives the court power to make 'orders which do not relate directly to the determination of native title rights and interests'. In this case:

> No party argued that, if the parties are agreed, they could not include a sustainable benefits term in the terms of the consent determination of native title rights and interests as a supplementary term pursuant to s 87 of the Act—at [24], referring to s. 87(1A).

However, as there was no agreement in this case, there was 'no basis upon which' the mining respondents were 'entitled as a matter of law to have such a term included in the proposed consent determination' under either ss. 86G or 87. 'In other words', the mining respondents 'may not insist upon such a term being included in the proposed determination where the applicant does not agree to it'—at [26].

Comment – use of s. 86G

It appears s. 86G has not been used previously in the manner contemplated by his Honour in this case. Subsection 86G(1) provides (among other things) that if a claimant application is 'unopposed', the court may make an order in or consistent with the terms of any order sought by the applicant without a hearing or without completing any hearing that has started. Subsection 86G(2) provides relevantly that an application is 'unopposed' if all of the respondent parties give the court written notice that they do not oppose the making of the order. The footnote to s. 86G(1) states that the order 'would need to comply with s. 94A' if the 'application involves making a determination of native title'. Under both ss. 86G and 87, the orders must be within power and appropriate.

The main differences between these provisions seem to be that s. 87 involves making orders which reflect an agreement struck between the parties that has been filed in

the court and (expressly) may include orders about 'matters other than native title'. On the other hand, s. 86G deals with circumstances where the applicant seeks the orders and the respondents do not oppose them being made. Therefore, s. 86G implies a more passive role for the respondents than that contemplated by s. 87. Further, there is no express reference to dealing with non-native title matters in s. 86G.

Step 3 – would it have been appropriate if agreed?
While it was not necessary to do so, Mansfield J considered the third step, noting that:

- when the court makes a native title determination recognising native title exists, it must also 'satisfy the requirements' of Pt 2 Div 6, which deal with the determination of a prescribed body corporate (PBC);
- section 55 (sic, actually s. 56) requires a determination as to 'whether the native title is to be held on trust, and if so by whom', with s. 56(2) setting out the process for nomination of the PBC by the common law holders;
- the determination 'will declare that the prescribed body corporate holds the rights and interests from time to time comprising the native title in trust for the holders of the native title rights and interests';
- a trustee PBC 'then holds the native title rights and interests in trust for those persons in accordance with the Regulations', which also 'enliven certain financial accountability obligations imposed' by the CATSI Act;
- otherwise, the powers and functions of a PBC are set out in ss. 56, 57 and 58 of the NTA—at [29] to [30].

Therefore, the NTA: '[E]stablishes a detailed regime under which the native title holders through their prescribed body corporate should hold the benefit of the native title rights and interests'. The mining respondents 'may wish to better secure for future generations of the native title holders the benefits of compensation' paid under the NTA or otherwise. However, importantly, a PBC 'is constrained by the provisions' of the NTA and the Regulations 'as to the application of any compensation entitlements'. Further:

> The future act regime itself under Div 3 of Pt 2 of the NT Act also does not expressly contemplate that those who may, by reason of a future act, be obliged to negotiate with the holders of native title rights and interests through the applicant authorised to bring the native title determination application, should apply those funds in a particular way—at [31].

In addition, the sustainable benefits term as drafted for the purposes of this case was not able 'to be readily understood of enforced'. Therefore, whether a PBC was complying with its terms would involve 'a matter of judgment', which was contrary to the notion that a court order:

- 'should convey clearly what it is that the entity subject to the order is required to do';
- 'be capable of being understood by those to whom it applies, and others who might be affected by their compliance', which in this case would include current and future native title holders—at [32], referring to the relevant authorities.

That said, his Honour repeated that 'the parties may agree upon a term of a determination such as the sustainable benefits term and the Court may include it in its orders'—at [34].

Step 4 – withholding consent where no dispute about consent determination
This question did not arise directly in this case because the mining respondents did not suggest that they could insist on such a term 'in the absence of genuine agreement'. However, his Honour indicated it would not be right for a respondent:

> [T]o endeavour to impede the proper recognition of native title rights and interests by seeking to secure agreement on an unrelated matter, such as a sustainable benefits term, when there was no bona fide dispute about the existence of the native title rights and interests asserted—at [36].

Mansfield J thought that a court 'might readily infer' a duty to negotiate in good faith the context of 'negotiations to reach agreement in relation to a matter concerning' recognition of native title under the NTA because (among other things):

> In mediation under the NT Act ... the parties are expected to mediate in good faith: s 94P(1) and 94Q. If there is no bona fide dispute about issues concerning a proposed consent determination, it would be a breach of any obligation to negotiate in good faith to use the carrot of consent to the determination as leverage to secure agreement on other matters such as a sustainable benefits term—at [38].

However, his Honour went on to point out that it may be 'entirely appropriate [for the parties to] negotiate for a mix of accepted native title rights and interests and other orders, or indeed for other non-native title outcomes'. According to the court:

> They will be doing so in good faith, having regard to their respective and real perceptions and undertakings about their strengths and weaknesses on the various matters under consideration—at [40].

Decision
For the reasons summarised about, it was found that the mining respondents could not, at law, insist on the inclusion of a sustainable benefits term and so the answer to the question posed was 'no'—at [41].

Comment on scope of s. 87 powers
In considering the question posed, his Honour commented that:

> [I]t is difficult to see that the parties to an application under s 61 *could not agree upon any of the matters encompassed within the coverage of an ILUA* ... Nor is there any apparent reason why the range of matters which may be the subject of an agreement incorporated into Court orders under s 87 is confined to those matters, although they are widely expressed. The only step the Court must take to include the terms of an agreement is to be satisfied that it is appropriate to do so—at [24] (emphasis added).

With respect, it should be noted that there may be occasions when the NTA will require either an ILUA or that the matter be otherwise be dealt with in accordance with Pt 2, Div 3 (the future act regime), rather than ss. 86G, 87 or 87A.

For example, if the parties want to ensure that a future act to which Subdiv P applies and that attracts the right to negotiate is valid, then one of the conditions in s. 28 must be met before that act is done. An order under s. 87 or 87A is not one of the s. 28 conditions. The only alternative means of ensuring validity is where the future act is covered by registered ILUA in which parties have given consent to it being done and which includes a statement that Subdiv P is not intended to apply—see s. 26(2). It is also of note that s. 24OA provides that, unless a provision of the NTA provides otherwise, a future act is invalid to the extent that it affects native title. It may be that Mansfield J takes the view that an order under ss. 87 or 87A is a provision of the NTA that 'provides otherwise'. However, whether or not this is the case remains to be determined.

Further, s. 24EC provides (in paraphrase) that government parties can make 'other agreements' (i.e. other than an ILUA) with native title holders that 'relate to their native title rights ... (other than agreements consenting to the doing of future acts)'. Sections 87 and 87A refer to orders being made in terms of agreements reached which, it seems, government respondents cannot make if doing so involves an agreement 'consenting to the doing of future acts'. (As noted earlier, s. 86G does not deal with agreements but with orders sought by the applicant that are not opposed.)

Finally, given that s. 11 provides that native title is not able to be extinguished contrary to the NTA, it may be that an area agreement or body corporate ILUA or s. 24MD(2A) agreement is required since it is only under these agreements that provision is made in the NTA for extinguishment via surrender. It also seems an ILUA would be required where the parties agree that the non-extinguishment principle should apply to a future act that would otherwise extinguish native title, since that principle is a creature of the statute.