Party status

Murray on behalf of the Yilka Native Title Claimants v Western Australia [2010] FCA 595

McKerracher J, 11 June 2010

Issue
The main issues in this case were whether notices filed by Indigenous people pursuant to s. 84(3) of the *Native Title Act 1993* (Cwlth) within time that indicated they wished to be joined as a party to a claimant application complied with requirements as to form and whether the information provided in those notices could be supplemented. The court found that relevant regulations for giving notice pursuant to s. 84(3) were not prescriptive and that supplementary material could be considered.

Background
The claimant application relevant to these proceedings, brought on behalf of the Yilka native title claimants (the Yilka claim) in December 2008, covers the same area as was covered by a previous application (known as the Cosmo Newberry claim) that was dismissed by Lindgren J in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (*Wongatha*, summarised in *Native Title Hot Spots* Issue 24). Notice was given of the Yilka claim pursuant to s. 66(8) in September 2009.

Regulation 6 of the *Native Title (Federal Court) Regulations 1998* (Cwlth) provides that notice of intention to become a party for the purpose of s. 84(3)(b) 'may be' in accordance with Form 5, which in turn requires the person giving notice to state the basis on which that person wants to become a party.Within the period prescribed by s. 66(10), Form 5 notices were filed by (among others): Alison, Kathy, Daniel, Quinton, Michael and Fabian Tucker; Corina, Matthew and Lisa Bennell; Bessie, Jarred, Brett, Hilda, Shaun and Aaron Dimer; Shondelle Dimer/Garlett; Pearlie Wells; Lynnette Graham; Daisy Doolkie Rundle; Ron Harrington-Smith; Laurel Cooper; Lorraine Griffiths (the Form 5 applicants). The applicant for the Yilka claim (the Yilka applicant) objected to the Form 5 applicants having party status.

NTA framework
Subsection 84(3) relevantly provides that, in addition to the applicant, another person is a party to a claimant application if:

- the person is covered by any of ss. 66(3)(a)(i) to (vi); or
- the person claims to hold native title in relation to land or waters in the area covered by the application; or
- the person's interest, in relation to land or waters, may be affected by a determination in the proceedings; *and*
- the person notifies the Federal Court, in writing, that the person wants to be a party to the proceeding within the period specified in the notice under section 66.

As Justice McKerracher noted:

> The provisions of the NTA make it clear that a person is a party to a proceeding by operation of s 84(3) if the person notifies the Federal Court in the manner prescribed by s 84(3)(b) and also the notice itself identifies the person as someone to whom any of the paragraphs of s 84(3)(a) apply—at [12].

In addition, s. 84(5) provides that the court may join any person as a party to the proceedings at any time if it is satisfied that 'the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so'.

Pursuant to s. 84(8), the court may at any time order that a person (other than the applicant) cease to be a party to the proceedings. Under s. 84(9), the court is to consider doing so if it is satisfied that (among other things) the person never had, or no longer has, interests that may be affected by a determination in the proceedings.

The issues

The 'crux of the matter' was that (with three exceptions) none of the Form 5 applicants included the term 'native title' or any equivalent in their Form 5. The Yilka applicant argued that such a claim was 'essential to trigger the operation of s. 84(3)(a)(ii)'. Nor was any other kind of interest 'in relation to land or waters' for the purpose of s. 84(3)(a)(iii) or s. 84(5) identified in the notices. In two cases, the person was said to have given evidence in *Wongatha* that contradicted or was inconsistent with what was stated in the relevant Form 5.

In the three exceptional cases, it was asserted in the Form 5 that 'I have registered native title right and interest in the land'. The Yilka applicant argued (among other things) that this could not mean pursuant to an entry on either the National Native Title Register or the Register of Native Title Claims. Therefore, it was submitted the reference to 'registered' rights and interests did not satisfy s. 84(3)(a)(ii) and, even if did, the lack of any substantiation as to what was meant provided grounds for dismissal as a party under s. 84(8). It was also argued that these three Form 5 applicants had 'dissociated' themselves from the Cosmo Newberry claim in *Wongatha* and so, even if there were parties by operation of s. 84(3), they should be dismissed under s. 84(8) on the basis that that they never had a relevant interest.

Two of the Form 5 applicants (Bessie Dimer and Daisy Doolkie Rundle) were members of the Yilka claim group because they were the daughters of a listed apical ancestor. The Yilka applicant argued the discretion under s. 84(5) should not be exercised because there was nothing to indicate a need for them to be joined as respondents, e.g. that they were not adequately represented by the Yilka applicant. In relation to s. 84(3), as with the other Form 5 applicants, the complaint was that since mere assertions of 'connection' were not sufficient, neither ss. 84(3)(a)(ii) nor (iii) applied and so they were not made claimants by operation of s. 84(3).

Consideration

His Honour found that:

- Reg 6 is permissive (rather than prescriptive) as to the form of notice required;
- while only a person who satisfies the requirements of s. 84(3) becomes a party by operation of that provision, 'the precise content of the notice is of less significance';
- there was no reason why a challenge to the notice should not be brought but, equally, no reason that evidence and submissions should not be provided to expand upon or clarify the content of the notice;
- nothing in s. 84(3) binds the court to limit itself to the form or content of the notice to be given under s. 84(3)(b) in order to determine whether the person giving the notification has 'the necessary qualifications to do so as required' by s. 84(3)(a);
- whether or not the interests alluded to in the Form 5 notices in this case fell within the category of 'persons claiming to hold native title' in s. 84(3)(a)(ii), they comprised 'an interest which may be affected by a determination in the proceeding' for the purposes of s. 84(3)(a)(iii)—at [92] to [93].

Further:

> The omission of the expression 'native title interests' in the descriptive words used in the Form 5 documents does not necessarily mean that what is claimed is not native title. Where there is doubt as to compliance with s 84(3)(a)(ii) NTA by what is contained in the Form 5 notifications, then it is appropriate to consider such further evidence as may be provided to it on a challenge—at [93].

In this case, the court was satisfied that there was 'some force to the applicant's complaints as to the content of the Form 5 applications'. However:

- there was no 'statutory imperative' precluding the court from taking into account further evidence that clarified the nature of the claim described in a Form 5 if it is challenged;
- this did not render the time limits imposed under s. 84(3) 'inutile' because, unless a challenge was 'very much delayed, the position should be clarified reasonably promptly'—at [95] to [96].

Decision

The Form 5 applicants who filed submissions and provided a basis on which they are entitled to be recognised as parties to the application (even where the Form 5 was arguably inadequate or defective) were joined. However, as was noted:

> [T]hat is purely a prima facie basis as the justification for it will need to be tested as events unfold. ... . At this early stage, ... consistent with conventional strike out principles, it would be too severe a sanction when there is at least some basis in each instance for the inclusion of the remaining Form 5 applicants in the proceeding to, in effect, shut them out—at [97].

McKerracher J saw no reason why those who did not file additional material and did not respond should be parties to the proceedings 'if they ever were' but they were given leave to apply to be joined pursuant to s. 84(5) within 21 days 'should they be

so advised'. Given 'so many different entities [are] purporting to stake a claim in the application', specific directions will be made that 'one person only represent each of the respective groups who have responded to this motion'. Further, given the 'valid criticisms of the illusory descriptions of the claims as presently articulated', the Form 5 applicants who are parties are to amend their Form 5 to articulate the interest claimed 'with greater precision'—at [98] to [100].

His Honour asked the relevant parties to try to agree on orders reflecting the court's findings and, if that was not possible, to file short submissions to allow orders to be made on the papers. Orders were also sought as to costs: see *Murray on behalf of the Yilka Native Title Claimants v Western Australia (No 2)* [2010] FCA 926, summarised in *Native Title Hot Spots* Issue 33.