Ashwin v Western Australia (No 2) [2010] FCA 1472

Siopis J, 23 December 2010

Issue

The State of Western Australia sought dismissal of a claimant application made pursuant to s. 61 of the *Native Title Act 1993* (Cwlth) (NTA) on behalf of the Wutha People for lack of authorisation. Part of the application had been partially dismissed for want of authorisation 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). However, Justice Siopis declined to dismiss the remainder of the Wutha application, relying on the discretion available under s. 84D(4), which was inserted into the NTA after *Wongatha*. It allows the court to decide whether a defect in authorisation determines 'the fate of that application'—at [12].

Background

The state sought to have the remainder of the Wutha application struck out pursuant to s. 84C of the NTA or dismissed pursuant to O 20 r 2(1) of the *Federal Court Rules*. According to his Honour, the state contended (among other things) that the Wutha claim was bound to fail because the findings on the lack of authorisation and the order to partially dismiss the claim made in *Wongatha* gave rise to an issue estoppel—at [2].

Section 84D introduced 'a new statutory regime'

Siopis J noted that, if a claimant application is not authorised in accordance with the NTA, s. 84D(4) provides that the court may, 'after balancing the need for due prosecution of the application and the interests of justice' either 'hear and determine the application, despite the defect in authorisation' or 'make such other orders as the court considers appropriate'—at [11].

Therefore:

> [I]t does not axiomatically follow from a determination that a native title claim has not been lawfully authorised, that the claim must ... be dismissed. Rather, such a finding gives rise to the further question of whether it is in the interests of justice to proceed to hear the native title determination application, notwithstanding the defect in authorisation—at [12].

Effect on *stare decisis*

The court rejected the state's argument that interpreting s. 84D to allow the court to come to a different conclusion on authorisation would undermine 'the final decision of Lindgren J and, thereby, undermine the doctrine of *stare decisis*'. According to Siopis J:

- the finality of Lindgren J's decision was not undermined because (subject to any appeal) it remained 'binding in respect of what it decided';
- in any event, it is 'the prerogative of Parliament to make or change the law' and the court then giving effect to the new statutory regime does not undermine the doctrine of *stare decisis*—at [16] to [17].

Section 84D available

Among other things, the state contended that s. 84D only operated where the court that was to make the final determination also made the finding there was a defect in authorisation. Since the

finding as to authorisation had been made by Lindgren J, the state argued s. 84D was not available. Siopis J rejected this contention, finding that:

> [T]he determination in respect of any defect in authorisation ... in this proceeding will be made ... under a different statutory regime to that which prevailed when Lindgren J made his decision. The consequence is that this Court is not, and will not be, bound to reach the same result—at [22].

Issue estoppel

The state relied on *Quall v Northern Territory* (2009) 180 FCR 528; [2009] FCAFC 157 (summarised in *Native Title Hot Spots* Issue 31), where the Full Court upheld a decision to summarily dismiss a claim on the grounds of issue estoppel. Siopis J distinguished *Quall* because it was not defective authorisation that gave rise to an issue estoppel and, in any case, the 'new statutory regime' introduced by s. 84D 'changed the law in respect of authorisation', which was not the case in *Quall*—at [24] to [25]. Note that subsequently, a differently constituted Full Court expressed doubts about whether issue estoppel had 'any field of operation' in relation to an application for a determination of native title: see *Dale v Western Australia* [2011] FCAFC 46 at [88], summarised in *Native Title Hot Spots* Issue 34.

Decision

The state's application was dismissed. The parties will be heard on the directions for trial on whether the Wutha claim was duly authorised and, if not, whether it should be dismissed on that account—at [27] to [28].