Barunga v Western Australia [2011] FCA 518

Gilmour J, 26 May 2011

Issue

The main issues before the Federal Court were whether to make a determination recognising native title exists under the *Native Title Act 1993* (Cwlth) (NTA) in a case where there may be a defect in the authorisation and whether it was appropriate to make an order that the State of Western Australia and the determined registered native title body corporate (RNTBC) 'negotiate in good faith to reach agreement' about a number of matters, including the negotiation of various indigenous land use agreements (ILUAs). It was decided that it was appropriate for the court to do so.

This is the third of determination recognising the Wanjina-Wunggurr Community of the West Kimberley as native title holders. The combined area covered by those determinations is around 121,000 square kilometres, an area almost twice the size of Tasmania. A map of the area is included in the summary of *Goonack v Western Australia* [2011] FCA 516 in *Native Title Hot Spots* Issue 34. The determination itself is not summarised here.

Background

The Wanjina-Wunggurr Dambimangari (WWD) claimant application was a combination of two applications (originally known as 'Worrora and others') made in 1996. There were combined in April 1999 and the combined application amended to state that the claim group was comprised of those people 'who hold in common the body of traditional laws and customs concerning land and waters known as Wanjina-Wunggurr'. The application covered about 28,000 square kilometres in the west Kimberley region in Western Australia. It was one of four claims known as the Wanjina-Wunggurr applications. The first of two of these (the Wanjina-Wunggurr Willinggin applications) were dealt with in *Neowarra v Western Australia* [2003] FCA 1402 (summarised in *Native Title Hot Spots* Issue 8 and Issue 9), where Sundberg J recognised that the Wanjina-Wunggurr Community (WWC):

> [C]onstituted a society and were bound together by a normative system of laws and customs which had continued to be acknowledged and observed by its members in a substantially uninterrupted manner since prior to the declaration of sovereignty over Western Australia—at [4].

In *Neowarra v Western Australia* [2004] FCA 1092 (*Neowarra*), Sundberg J determined that the WWC hold native title to most of the area covered by the Wanjina-Wunggurr Willinggin applications. In *Goonack v Western Australia* [2011] FCA 516 (summarised in *Native Title Hot Spots* Issue 34), Justice Gilmour determined determined that the WWC hold native title existed in relation to most of the area covered by the Wanjina-Wunggurr Uunguu application.

Through mediation with the National Native Title Tribunal, the parties to the WWD application reached an agreement that, among other things, provided for the recognition of the members of the WWC as the native title holders in relation to almost all of the WWD application area. The parties subsequently sought a determination by consent pursuant to s. 87A recognising native title is held by the members of the WWC 'for their respective communal, group and individual rights and interests' in relation to a large part of the proposed determination area. It was agreed

that, apart from the land and waters of one island, the area covered by the WWD is the traditional country of the members of the WWC. The traditional system of law of the WWC comes from 'spirit beings known as Wanjina'—at [8] to [9].

John Catlin, on behalf of the State of Western Australia, provided affidavit evidence that:

- the state advised the applicant that, subject to establishing the members of the WWC had maintained the requisite connection to the claim area, Sundberg J's findings as to the WWC applied and could be adopted in the WWU application;
- the state assessed the relevant materials in accordance with its guidelines;
- that material and Sundberg J's findings satisfied the state that a body of traditional laws and customs existed under which the members of the WWC hold rights and interests within the proposed determination area.

Defect in authorisation – s. 84D applied

Subsection 84D(4) provides that if there is a defect in authorisation:

> The Federal Court may, after balancing the need for due prosecution of the application and the interests of justice ... hear and determine the application, despite the defect in authorisation ... or ... make such other orders as the court considers appropriate.

As two of the seven persons named as the applicant had died since the application was amended in 1999, a question arose as to whether the surviving five people were authorised as required. Evidence as to the terms of the authorisation given in 1999 could not be found and so it was not possible to determine whether terms of the authorisation accommodated the death of one or more of seven authorised persons.

Justice Gilmour exercised the discretion available under s. 84D(4) to make the determination 'despite any perceived defect in authorisation' on the basis that:

- the purpose of authorising the original seven people was to prosecute the native title holders' claim to the area concerned and it was now all but finally prosecuted successfully;
- there would be a denial of justice if it did not proceed to determination;
- the delay, cost and confusion resulting from requiring strict compliance at such a late stage would 'bring no credit upon the legal system'—at [16] to [17], applying the same rational as Justice Finn employed in *Akiba v Queensland (No 2)* [2010] FCA 643 at [930] to [931].

Native title claim group description v native title holders – s. 84D applied

The description of the native title claimant group in the WWU application was close, but not identical, to the description of the native title holders in the determination made by Sundberg J in *Neowarra* (the WWW determination). The order sought in this case was in the same terms of the WWW determination. If it was made, it would effectively mean the determination was 'referable to an expanded native title claimant group'. However, there had been no amendment to the WWD application to reflect this expanded group. Gilmour J noted the court was 'not limited to making a determination in the form sought in the application and may ... make a determination in such form as it sees fit based on the evidence, provided the application is valid'—at [21], referring to *Patch v Western Australia* [2008] FCA 944 at [18].

His Honour found that, pursuant to s. 84D(4), it was 'in the interests of justice to make the determination sought' despite any 'defect in authorisation'. Reliance was placed on s. 84D(3),

which covers circumstances where those who are (or were) the applicant have dealt (or do deal) with a matter arising in relation to the application in circumstances where they were (or are) not authorised to do so—at [22].

Comment on ss. 47A(3) & 47B(3) and the group recognised

There is one issue that may arise if the claim group described in application is not the same as the group recognised as holding native title. Subsections 47A(3) or 47B(3) both state that if 'the determination on the application is that the *native title claim group* hold the native title rights and interests claimed' (emphasis added), then the effect of determination recognising native title is as prescribed in ss. 47A(3) and 47B(3) e.g. the non-extinguishment principle applies to the creation of certain prior interests. 'Native title claim group' is defined in s. 253 as 'the group mentioned in relation to the application in the table' in s. 61(1). In turn, s. 61(1) describes that group as '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*' (emphasis added). Therefore, in this case, if it can be said that the 'particular native title claimed' is that of the WCC, it seems the conditions of ss. 47A(3) and 47B(3) are satisfied.

Applying s. 87A

His Honour set out s. 87A which (in paraphrase) provides that the court may make a determination of native title by consent over part of an application area without holding a hearing provided certain pre-conditions are met, the court is satisfied the orders sought is within power and it appears appropriate to the court to make those. The pre-conditions were either met or not relevant in this case. It was accepted there was no reason not to be satisfied that an order in, or consistent with, the terms of the agreement was within power and complied with ss. 13(1)(a), 67(1), 68, 94A and 225 of the NTA—at [22] to [23].

In considering whether it would be appropriate to make the orders sought, it was noted (among other things) that:

- the discretion under to s. 87(1A) 'must... be exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose' of the NTA;
- it is appropriate to make orders under s. 87 'where no evidence of the primary facts ... has been received' if the court is satisfied 'that the parties have freely and on an informed basis come to an agreement';
- orders under 87 may be made if the court 'is satisfied that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicant relies';
- the court might consider 'the findings on the evidence on which the State relies ... for the limited purpose of being satisfied that the State is acting in good faith and rationally'—at [24] to [26], citing various authorities.

In this case:

> The State ... played an active role in the negotiation of the proposed consent determination ... . [I]n so doing, the State, acting on behalf of the community generally, having regard to the requirements of the Native Title Act and through a rigorous and detailed assessment process has satisfied itself that the determination as sought is justified in all the circumstances—at [27].

Orders giving effect matters other than native title – s. 87(5)

The parties asked the court to make orders pursuant to s. 87(5) that Wanjina-Wunggurr (Native Title) Aboriginal Corporation (the RNTBC) and the state 'will negotiate in good faith to reach agreement on the matters in Attachment A to these orders, as provided for in Attachment A'. This would give effect to an agreement that those parties 'enter into negotiations in good faith to reach agreement on the relationship between the native title rights and interests ... and the non-native title rights and interests which exist' within the determination area. It includes an agreement to negotiate ILUAs dealing with:

- the relationship between the native title rights and interests and the rights and interests of the Department of Environment and Conservation with respect to certain conservation reserves;
- the validation, joint management and protection of native title rights and interests with respect to those reserves;
- alternative processes for the grant of future exploration and prospecting tenements and standard heritage agreement provisions for the determination area.

At [32], Gilmour J noted what was said of s. 87 by Justice Mansfield in *Brown v South Australia* [2010] FCA 875 at [24], namely that it:

> [C]ontemplates that ... the Court may make such orders as it considers appropriate even if it does not proceed to make a determination of native title. ... [I]t is difficult to see that the parties ... 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 ... orders under s 87 is confined to those matters ... . 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.

Therefore, his Honour was satisfied that 'it would be appropriate and within power' to make the orders sought by the parties.

Comment on scope of s. 87A powers

As noted, his Honour agreed with Mansfield J's comment 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'. However, with respect, 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. 87 or 87A. For example:

- One of the conditions in s. 28 must be met to ensure that a future act that attracts the right to negotiate is valid and an order under s. 87 or 87A is not one of those conditions. The only alternative means of ensuring validity is where the future act is covered by registered ILUA in which parties consent to it being done and it includes a statement that Subdiv P is not intended to apply—see s. 26(2).
- Section 24OA provides that a future act is invalid to the extent that it affects native title unless a provision of the NTA' otherwise provides'.
- Section 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*)' (emphasis added). Sections 87 and 87A refer to orders being made in terms of agreements reached. If the relevant government is to be a party, it seems the agreement cannot involve the native title parties 'consenting to the doing of future acts';
- Section 11 provides that native title cannot be extinguished contrary to the NTA. Where the parties agree to a surrender of native title, an area agreement ILUA, a body corporate ILUA or

a s. 24MD(2A) agreement would seem to be required because it is only under these agreements that provision is made in the NTA for extinguishment via surrender.

- An ILUA may also be required where the parties agree that the non-extinguishment principle should apply to a future act that would otherwise extinguish native title given that principle is a creature of the statute.

Decision

Orders were made as sought by the parties.