Corunna v Western Australia [2010] FCA 1113

Siopis J, 14 October 2010

Issue

The Federal Court was asked to make an order under s. 84D(1) of the *Native Title Act 1993* (Cwlth) (NTA) requiring those who made a claimant application to produce evidence that they were duly authorised to do so. The court made orders accordingly.

Background

The relevant application was filed on behalf of the Swan River People over part of the Perth metropolitan area and its adjacent waters (SRP application). Trevor Walley asserted he was a member of the claim group described in the application and subsequently sought:

- an order under s. 84D(1) that those making the application produce evidence of their authorisation; and
- an order that the application be dismissed pursuant to s. 84C because it did not comply with s. 61 of the NTA, i.e. the persons who made the application were not authorised to do so.

Standing

An application for an order under s. 84D(1) may be brought by a member of the claim group. Here, the order was sought as a preliminary to seeking summary dismissal pursuant to s. 84C for want of authorisation.

Justice Siopis thought seeking evidence as to authorisation 'in the context of an existing application for summary dismissal ... is obviously an important consideration in relation to the utility of the making of an order' under s. 84D(1). However, an application for strike-out under s. 84C can only be made by a party to the proceeding and Mr Walley was not a party. Therefore, his notice of motion seemed incompetent 'insofar as it seeks ... summary dismissal' pursuant to s. 84C. The same difficulty arose in relation to s. 31A of the *Federal Court of Australia Act* 1976 (Cwlth) and O 21 r 5 of the Federal Court Rules. The position was less clear in relation to the court's powers under s. 84D(4)(b) of the NTA. However, in 'the interests of case management', the merits of the argument were considered because:

- the court was empowered by s. 84D(2)(a) to make the order on its own motion;
- the court's jurisdiction was properly invoked by Mr Walley which allowed the court 'to act on its own motion';
- it could not be said that Mr Walley's claim 'is colourable';
- in any case, the State of Western Australia was likely to seek an order under s. 84D(1)—at [24].

Orders under s. 84D(1)

Mr Walley said (among other things) the SRP application was brought on behalf of a subgroup of those who hold native title to the claim area. In the absence of rebutting evidence from the applicant, Siopis J held that:

- there was a real issue as to whether there were other persons who claim native title over the SRP application area who were excluded from the claim group as defined in the SRP application;

- the evidence on authorisation demonstrated individual persons had been authorised by family groups within the nominated claim group and then each of the persons comprising the applicant authorised in this way then authorised each other to bring the SRP application;
- the method of authorisation described gave rise to an issue as to whether there was authorisation within the meaning of s. 251B;
- the SRP application did not appear to disclose that there had ever been authorisation of the persons jointly comprising the applicant by all the members of the native title claim group;
- section 251B contemplates authorisation of the persons jointly comprising the applicant by all the persons in the native title claim group—at [33] and [37] to [39].

Decision

The persons comprising the applicant were ordered to provide all the evidence on which they relied to establish that they were authorised to make the SRP application within the meaning of s. 251B of the NTA.