FQM Australia Nickel Pty Ltd v Bullen [2011] FCAFC 30

North, McKerracher and Jagot JJ, 9 March 2011

Issue

The Full Court of the Federal Court agreed with the primary judge that, while the names of two deceased people appeared in an entry on the Register of Native Title Claims as 'the applicant', they continued to be the 'registered native title claimant' (RNTC) as defined in s. 253 of the *Native Title Act 1993* (Cwlth) (NTA).

Background

On September 2003, when one of the two persons named on the Register as comprising the applicant was still alive, the State of Western Australia gave notice under s. 29 of its intention to grant two mining leases the subject of these proceedings. Negotiations pursuant to s. 31(1) commenced in October 2003. However, in June 2007 (after the death of the remaining person whose name appeared in the Register), the state granted the leases to FQM Australia Nickel Pty Ltd under the *Mining Act 1978* (WA) without either an agreement under s. 31(1)(b) or a future act determination under s. 38. The leases were granted on the basis that s. 28(1)(b) was satisfied, i.e. because, 'immediately before the act was done [i.e. the grant of each lease] there is no native title party in relation to any of the land or waters that will be affected by the act'. However, in *Bullen v Western Australia* [2010] FCA 900 (summarised in *Native Title Hot Spots* Issue 33), Siopis J declared that 'immediately before the grant' of the mining leases, there was a RNTC 'as defined by section 253'. This case deals with an appeal from that decision.

Deceased persons are still the 'registered native title claimant'

The court noted there was a conflict, or at least a tension, between the provisions of the NTA that assume a RNTC will be a living person (or persons) capable of negotiating in good faith on behalf of the claim group and other provisions that enable members of the claim group to seek orders under s. 66B(2) to replace the RNTC (actually, to replace the 'current applicant')—at [11] and [26].

Justices North, McKerracher and Jagot held that s. 66B:

- assumes a claimant application continues to exist after the death of the applicant making it and, where the application is registered, also assumes it continues to be registered;
- 'expressly provides' that 'the person who was a living applicant in relation to a claimant application continues to be the applicant on ... death', which was 'given emphasis' by the expression 'current applicant' in s 66B(1), which on its terms embraced a deceased applicant;
- was designed to enable an application for replacement of the 'current applicant' (and, if the claim is registered, the RNTC) to be made and given effect 'notwithstanding the death of the applicant'—at [31].

It was found that s. 66B assumes 'an applicant who has died after registration of their claimant application is still' a RNTC as defined in s. 253. This was said to be 'consistent' with s. 30(2), which provides that 'a person ceases to be a native title party [in right to negotiate proceedings] if the person ceases to be a registered native title claimant' but not that 'a person ceases to be a native title party on ... death'. Given this statutory context, their Honours found that:

> By the inclusion of their name on the Register the deceased person remains, for the purpose of the Native Title Act at least, a person whose name appears in an entry on the Register as the applicant in relation to a claim to hold native title in relation to the land or waters. Because the person continues to have that status despite their death, s 66B can operate to enable the replacement of that person as the current applicant and, equally importantly, the amendment of the Register to that effect—at [32].

It was also noted (among other things) that:

- it may be an 'imperfect' scheme, in that (for example) no 'maximum period ... within which an application for replacement' under s. 66B(1) is prescribed;
- this can cause 'inconvenience' but 'is not a reason to avoid giving effect to the statutory scheme which the legislature has prescribed';
- the legislature intends s. 66B to provide a mechanism for replacing the applicant – and the RNTC if the claim is registered – 'without affecting the validity of the application or of the claim as registered'—at [33] to [34].

No step in the claimant application until deceased applicant replaced?

The court was satisfied that construing the definition of RNTC as 'continuing to apply to an applicant who has died until removal of that person's name from the Register' was 'consistent with the representative character' of a claimant application under the NTA. It was noted the appellants accepted s. 66B assumed the application continued 'to exist after the death of the applicant' but with the qualification that 'no step could be taken in respect of a claimant application unless and until a deceased applicant is replaced by a living person'. It is not clear whether or not the court accepted this qualification—at [31].

Consistent with the objects of the NTA

That primary judge's construction (with which their Honour's agreed) 'gives effect to the statutory provisions and so it could not be said to 'undermine any of the purposes of the statute' outlined in s. 3 (the object's clause): 'To the contrary, it promotes those purposes where the construction of the appellants would undermine them'—at [37].

Section 66B is the 'leading provision'

It was acknowledged that the future act provisions in Div 3 of Pt 2 created 'tension or potential inconsistency with the scheme for replacement' of the applicant under s. 66B. However, the court resolved this by:

- giving effect to s. 66B 'on its own terms';
- finding that, 'when it comes to the effect of the death of an applicant', s. 66B is 'the leading provision which takes precedence'—at [38].

The fact that other definitions in the NTA, such as 'native title holder' in s. 224 and 'native title claim group' in s. 61(1) could have been used to define a 'native title party' under ss. 29 and 30 was 'a neutral consideration' because:

> The statute defines a native title party in a way which includes a registered native title claimant. It defines a registered native title claimant in a way which requires entry on the Register. It contains provisions dealing with the Register and its amendment. Those provisions include the replacement of an applicant who is a registered native title claimant where that applicant has died. Effect must be given to the scheme for which the statute provides—at [38].

Options where 'unreasonable delay' in replacing the applicant

The court noted 'other options' that would 'facilitate the operation' of the NTA if there is 'unreasonable delay' by members of a native title claim group in making an application under s. 66B(1) to replace the applicant (and, therefore, the RNTC), including:

- the grantee or government party may make a future act determination application (FADA) pursuant to ss. 35(1) and 75, albeit that 'without a living' RNTC, 'there would be no contradictor' for the purpose of that application;
- any respondent to the associated claimant application 'could have recourse to' the court, including by seeking summary dismissal for want of prosecution or abuse of process—at [36].

Declaratory relief available – question not hypothetical

The appellants argued the primary judge should have refused to make a declaration as to the status of the RNTC because the question was hypothetical. The court was satisfied that the status of persons as RNTC 'immediately before' the grant of the mining leases 'involves a real not hypothetical question'. *Lardil Peoples v Queensland* (2001) 108 FCR 453; [2001] FCA 4 was distinguished because in that case the 'validity [of an authority to install a mooring buoy] ... depended on its grant being ... an act which affects native title'. In this case, the declaration sought did not 'depend on the assumed existence of native title'. The declaration 'would be relevant to the validity of the mining leases if native title is found to exist' but this was 'simply an aspect of its utility'. Further, there were 'other aspects of utility', for example:

- the mining leases had been granted;
- subsequently, the applicant had been replaced and the new applicant was now the RNTC;
- there was 'a real dispute' between the current RNTC and the appellants 'as to whether there was' a RNTC 'immediately before the grant of the mining leases';
- the declaration sought, if made, would quell that controversy—at [42].

It was also argued the declaration was a 'staging-post' for other litigation. When analysed properly, this was found to be 'an impermissible complaint about a discretionary exercise' of power and did not support a submission that the declaration involved 'a hypothetical and not a real dispute'—at [44].

Similarly, a submission that the primary judge failed to have regard to a relevant consideration (i.e. the fragmentation of proceedings in circumstances where the related clamant application, when resolved, could determine the issues in relation to the leases) was rejected because:

> The nature and the breadth of the discretion [relating to the making of declarations] do not permit any one consideration to be elevated to the status of a matter that the primary judge was bound to consider—at [45].

Arguments based on *Edwards v Santos Ltd* [2009] FCA 1532 and *Edwards v Santos* (2010) 185 FCR 280; [2010] FCAFC 64 are not noted because, subsequent to this decision, the High Court quashed the orders made in those cases—see *Edwards v Santos* [2011] HCA 8 (summarised in *Native Title Hot Spots* Issue 34).

Distinguishing *Chapman*, *Lennon* and *Sambo*

Chapman v Queensland (2007) 159 FCR 507; [2007] FCA 597 (summarised in *Native Title Hot Spots* Issue 24) was distinguished on the basis that:

- the issue in that case was not whether a deceased person continued to be a RNTC;
- section 66B was subsequently amended by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth) and, accordingly, 'the present statutory context ... is different'—at [29].

Lennon v South Australia [2010] FCA 743 and *Sambo v Western Australia* (2008) 172 FCR 271; [2008] FCA 1575 (summarised respectively in *Native Title Hot Spots* Issue 33 and Issue 29) were distinguished on the basis that in neither case was the court 'confronted by the same issue as that which arises in the present case', i.e. whether a deceased person ceased to be an applicant (and thus a RNTC) 'immediately upon death'—at [30].

Decision
The court agreed with the primary's judge's finding that there was a RNTC 'immediately before the grant of the mining leases' for the reasons summarised above and 'on the facts of the present case'. Therefore, the court dismissed the appeal—at [40] and [46].

No costs order
Despite being unsuccessful, the points raised by the appellants 'were important to the construction' of the NTA and 'reasonably pursued'. Therefore, there would no order as to costs 'having regard to' s. 85A unless submissions to the contrary were filed within 10 days of the decision, which they were not—at [47].

Comment – possible implications for future act matters
Regardless of whether or not the court agreed with the appellants that no step could be taken in the proceedings before the court in relation to the claimant application until a deceased applicant was replaced under s. 66B(2), both the primary judge and the Full Court were of the view that steps could be taken before the National Native Title Tribunal in relation to right to negotiate proceedings.

At first instance, Siopis J acknowledged that deceased RNTC 'may be incapable of carrying out the statutory functions of the applicant', including 'negotiations called for' under s. 31(1), i.e. negotiation in good faith— at [56].

According to the Full Court, if there is 'unreasonable delay' on the claim group's behalf in making an application under s. 66B(1), then the government or grantee party may make application under s. 35 for a determination by the Tribunal. In such a case, 'without a living registered native title claimant, there would be no contradictor' in those proceedings—at [36].

At [28], the court refused to find that the 'express provisions' of s. 66B were subordinate to 'an implied obligation' on the claim group to 'ensure that, at all times', a RNTC 'was alive and thus capable of representing the group ... including by engaging in the right to negotiate procedures'. While not free from doubt, this seems to indicate that, without a living RNTC, there is no-one capable of taking steps on behalf of the claim group in the right to negotiate process. However, it was also found that there is a RNTC, even where all those comprising the RNTC are deceased. This means that there is a 'native title party' under ss. 29 and 30 and a native title party is a 'negotiation party' under s. 30A. This may give rise to some issues in right to negotiate proceedings, including the following.

Firstly, can government and grantee parties simply say that, since there is no competent 'native title party', they are not obliged to negotiate in good faith with anyone and so need only await the expiration of the mandatory six month period before making a FADA? In other words, are they relived of the obligation to negotiate in good faith, given it is the native title party with whom they are obliged to negotiate is not competent? Second, if the grantee or government party did make a FADA in these circumstances, must the Tribunal first find that there has been 'unreasonable delay' on the part of the claim group in making a s. 66B(1) application before it makes a determination in respect of it? Or can the Tribunal simply proceed to make a future act determination without further ado? If submissions and evidence are lodged with the Tribunal by a legal representative purporting to act on the instructions of the relevant claim group, must the Tribunal refuse to have regard to them? Is this implicit in the court's comment that there would be no contradictor? However, it seems the Tribunal could take these matters into account when making its determination under s. 38 if the Tribunal considered them relevant—see s. 39(1)(f).

There would also be a 'native title party' for the purposes of the expedited procedure objection application process pursuant to ss. 32(3) and 75. However, if an objection application was lodged by a legal representative purporting to act on the instructions of a claim group for a registered claim in circumstances where all those named in the Register are deceased, it seems the Tribunal be at liberty to dismiss the objection application under s. 148(a) because it was satisfied it was not entitled to deal with the application. In other words, it seems the Tribunal would be at liberty to find that there is no-one 'capable of representing the [claim group] in accordance with the requirements of the legislation', including the lodging of objections—at [28].