Party status — commercial fishers in protected area

Birri Gubba v Queensland [2003] FCA 276

Drummond J, 28 March 2003

Issue

The issue before the Federal Court was whether two commercial fishermen, who sought to be joined as respondents and who may have been acting unlawfully by fishing in a national park, had an interest that may be affected by a determination in the proceedings as required under s. 84(5) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

Two commercial fishermen who sought party status argued that:

- a determination in the proceedings (which concerned a claimant application brought on behalf of the Birri Gubba people) may affect the rights they currently enjoyed under their commercial fishing and fishing boat licences issued under s. 30 of the Fisheries Regulation 1995 (Qld);
- their licences authorised fishing in tidal waters that are part of a national park.

The area concerned is both a 'protected area' and a 'prescribed place' under the *Nature Conservation Act 1992* (Qld) (the NCA). Under s. 62 of the NCA, it is an offence to (among other things) take fish from a protected area other than under (again, among other things):

- a licence or authority issued or given under an Act by the Governor in Council or someone else with the consent of the Minister for the Environment or the chief executive of the Environmental Protection Authority (s. 61(1)(c)(iii) of the NCA); or
- a licence or authority issued or given under a regulation made under the NCA (s. 61(1)(d) of the NCA)—see [17] to [22].

Those seeking to join the proceedings relied on these exceptions.

Test case

Justice Drummond noted that, 'in truth', the motion was brought to test a conflict that had arisen between the Queensland Seafood Industry Association (QSIA), a commercial fisher's association to which both of the people seeking to be joined belonged, and the Environmental Protection Authority (EPA):

> It is a striking feature of the case that though there has been in force since 1994 what counsel for the State of Queensland contends is a clear prohibition on commercial fishing in national parks, the Queensland Department of Primary Industries (DPI), which administers the fisheries licensing regime, has continued to issue annual licences which ... authorise commercial fishing in some national parks—at [8].

Evidence of fishing

There was undisputed evidence before the court that (among other things):

- the two fishermen had regularly fished in the tidal waters in question;
- commercial fishing in the tidal waters of national parks was a historic and well established practice;
- at least 79 of 2000 members of QSIA recently surveyed indicated that they fished in tidal waters within national parks;
- loss of access to these areas is an important issue for the commercial fishing industry and to individual commercial operators—at [5] to [8].

State's argument

The State of Queensland opposed the application for joinder, arguing that:

- while the DPI could lawfully issue licences to fish commercially in national parks, if the holders of such a licence exercised the right granted, they would commit an offence under s. 62 of the NCA;
- the term 'interests' in ss. 84(3) and 84(5) comprehends only lawful interests;
- any rights to fish in the tidal waters of a national park can only be unlawful and, therefore, could not be 'interests' for the purposes of ss. 84(3) and 84(5).

The native title claimants supported these contentions.

Affected interests within s. 84(5)

Drummond J noted that:

- the native title rights and interests claimed included the right to control access to the area covered by the application; and
- if the application succeeded on those terms, then the commercial fishing interest holders may be required to get permission from the native title holders before exercising their rights under the fishing licences;
- this was sufficient to show each applicant had interests within s. 84(5) that may be affected by the determination sought by the Birri Gubba claimants—at [10].

Annual licence is not too transitory

Fishing licences of the kind considered here are typically issued under s. 30 of the Fisheries Regulation for only 12 month periods but are renewable under ss. 56 and 58 of the *Fisheries Act 1994* (Qld) (Fisheries Act). His Honour found that, as the applicants held a lawful entitlement to fish and had at least an expectation of renewal, this was not (as the native title claimants had argued) too transitory an entitlement to constitute an interest within the meaning of ss. 84(3) and 84(5)—at [11].

Were there lawful rights to take fish?

The central question was the existence of a lawful right to take fish in the area concerned. Drummond J reviewed the legislative history of the NCA and held that the applicants would not infringe s. 62(1) of the NCA by engaging in commercial fishing in the tidal waters concerned. They were exempt from the prohibition in s. 62(1) provided that they complied with:

- subsection 27(2) of the *Nature Conservation Regulation 1994* (Qld) (NCR) made under s. 175 of the NCA, which allows a person to take fish from a national park provided conditions are met and, therefore, authorises 'that which would otherwise be prohibited by s. 62(1)'; and
- the conditions of their licences—at [22] to [43].

Therefore, s. 62(1)(d) applied to make the taking of fish in the tidal waters of a national park under the licences held by the applicants lawful—at [28].

His Honour rejected the state's argument that the application of s. 27 of the NCR is restricted to recreational fishing. That section:

> [C]onfers a general authority on all persons to take fish from national parks subject to compliance with the conditions contained in s. 27. None of those conditions limits the taking of fish ... for non-commercial purposes only—at [31].

Habitual unlawful activity may be a sufficient 'interest'

Drummond J surveyed the authorities on point, noting that the term 'interests' as used in ss. 84(3) and 84(5) is not confined to legal and equitable interests in land and waters. Whether or not a person's interests may be affected by a determination in the proceedings is a question of fact governed by the circumstances in the particular case—at [44] to [48].

Particular reference was made to:

- Justice Olney's comment in *Members of the Yorta Yorta Aboriginal Community v Victoria* [1996] FCA 453 that the habitual use of an area without any legal right to do so but with the 'acquiescence' of the title holder may be sufficient to give rise to an interest within s. 84(3) and s. 84(5), which Drummond J took to be a reference to acquiescence in a 'non-technical, practical sense'; and
- Justice Dowsett's acceptance in *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2002] FCA 730 that habitual use without any legal right in circumstances where the native title holder has tolerated that use may also be sufficient;
- the fact that the series of licences issued to the fishermen under the Fisheries Act purported on their face to authorise fishing in the tidal waters of a national park;
- the absence of any evidence of enforcement of s. 62 of the NCA against licence holders commercially fishing in national parks, which suggested that a deliberate policy of non-enforcement has been adopted to date—at [50] to [51].

His Honour concluded that, even if commercial fishing in tidal waters of a national park was a contravention of s. 62 of the NCA (and, therefore, unlawful), the licence holder would still be entitled to become a party to the claimant application—at [14] and [52].

Decision

Drummond J found the fishermen had an interest that was sufficient for the purposes of ss. 84(3) and 84(5) of the NTA and made orders joining them as parties to the Birri Gubba claimant application.