Amendment of a claimant application

Harrington-Smith v Western Australia (No 5) [2003] FCA 218

Lindgren J, 14 February 2003 and 19 March 2003

Issue
This decision concerns an application by the Wongatha people seeking leave to amend their claimant application and to submit amended points of claim. It provides useful guidance for applicants in relation to drafting claimant applications. This summary sets out the main points only.

Background
This matter is part heard, with all of the applicant's witnesses (other than the experts) having given evidence in chief. The Commonwealth and the State of Western Australia objected to some of the proposed amendments.

General comment on drafting
Justice Lindgren noted that a claimant application should 'clearly and unambiguously [convey] the nature of the claim to native title that is made' and should not 'include matters which it can be said ... will definitely not be supported on a final hearing'. However, his Honour commented that the unlikelihood of success on the final hearing is not a proper ground for refusing leave to amend—at [4].

Description of boundaries and map
Paragraph 62(1)(b) and s. 62(2) of the *Native Title Act 1993* (Cwlth) (NTA) require that a claimant application must contain information enabling the identification of the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application. In this case, the identification of the areas excluded from the application was in issue, as was the question of whether or not the proposed amended application included areas of land and waters that were not included in the original application, in contravention of the prohibition found in s. 64(1). His Honour was of the view that:

> Properly drawn, an application will identify the **area** of land and waters within the outer boundaries and the internal excluded **areas** of land and waters—at [8], emphasis in original.

However, the map that must be provided need only identify the outer or perimeter boundaries of the area covered by the application. It does not have to depict the areas within the boundaries that are not covered by the application—at [7].

Description of the area covered by the application
His Honour was of the view that:

- the phrase 'external boundaries of the claim' did not conform with the NTA, noting that a claim is 'different in kind from the geographical area with which the

[NTA] is concerned'. In order to better conform with the requirements of s. 62(2)(a)(i), the terminology used should be: 'The boundaries of the area of land and waters covered by the application';
- the heading 'Internal boundaries' is not 'entirely appropriate', as what was required was the identification of areas of land and waters not covered by the application in order to conform with the language of s. 62(2)(a)(i). The use of a heading in these terms was, therefore, to be preferred. Further, areas should be excluded from the 'area covered by the application', not the 'claim'—at [12] to [15]

Exclusion of 'valid' past and intermediate period acts

The applicants sought to exclude from the area covered by the application any area in relation to which a 'valid' category A past or intermediate period act had been done. His Honour agreed with the Commonwealth's submission that the use of the word 'valid' in this context was superfluous and confusing and, therefore, should be omitted. (This is because, by definition, both past and intermediate period acts are valid: see ss. 14 and 22A of the NTA in relation to past and intermediate period acts attributable to the Commonwealth, as defined in ss. 239, 5 and 12A of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) in relation to past and intermediate period acts attributable to the State—see s. 239.) The use of 'valid' in the proposed amended application suggested that there could be both valid and invalid acts of the various kinds, which is not the case—at [16].

Although not mentioned in the judgment, the same can be said for 'previous exclusive possession acts' or 'relevant' acts, as some are called under the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA).

Exclusion of particular 'tenures'

The proposed amended application stated that, 'to avoid uncertainty', certain 'tenures' were expressly excluded from the claim area. Again, Lindgren J criticised the use of 'claim' rather than 'area covered by the application'. Further, saying that, 'to avoid uncertainty', these 'tenures' were excluded was 'unsatisfactory' and confused the issue because it was not clear whether these 'tenures' were within the class of excluded acts (e.g. category A past acts) or in addition to them. This required clarification. Finally, the point of time at which the exclusions occurred was not identified, e.g. at the point of filing the application—see [17] to [20].

Clarification of areas included

It was proposed to include in the amended application statements that:
- 'the applicants exclude from the claim any areas not covered by any of the original applications'; and
- the paragraphs expressly excluding specified 'tenures' were 'subject to such provisions of the non-extinguishment principle [as defined in s. 238 of the NTA] and such of the provisions of sections 47, 47A and 47B as apply to any part of the area contained within this application'.

The state was critical of these amendments, submitting that they were either unnecessary or, if necessary, they contravened s. 61(4), which prohibits the inclusion

of any area not covered by the original application. His Honour was not aware of the terms of the original application but tentatively concluded (without deciding the matter) that the amendments were merely intended to make clear something that was previously implied in the application i.e. that the exclusion of specified 'tenures' and defined acts was not to be taken as omitting an area to the extent that ss. 47, 47A and 47B or the non-extinguishment principle otherwise applied—at [30] to [32].

Identification of s. 47 to s. 47B areas required

The commonwealth argued that it was for the applicants to specify the areas where they claim s. 47, s. 47A or s. 47B applied. The proposed amended application did list specific pastoral leases (see s. 47) and Aboriginal reserves (see s. 47A). However, it referred 'in an unhelpful way' to 'vacant Crown land within the external boundaries of the claim' for the purposes of s. 47B. His Honour agreed with the Commonwealth submission, noting that at this late stage in proceedings, when much of the applicant's evidence had been heard, the applicant should be able to identify with particularity the areas to which the applicant says ss. 47, 47A or 47B apply—at [35].

Details and results of searches

Paragraph s. 62(2)(c) requires that an application must contain 'details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to land or waters in the area covered by the application'. The state had conducted extensive searches, filed the results in the court and served a copy on the applicants. Schedule D of the proposed amended application stated that:

> Searches ... have been carried out by the State...and served on the Applicants in the form of 31 CD-ROMs ... . They are available for inspection at the offices of the Applicant's representative.

His Honour was of the view that Schedule D did *not* contain the 'details and results' required by the NTA. However, despite the contravention of s. 62, the respondents did not object, provided it was made clear that the applicants relied on the state's CD-ROMs. Lindgren J was prepared to accept Schedule D as drafted provided it included statements to the effect that:

- the applicant had not carried out the searches described in par 62(2)(c) of the Act; and
- details of results of all searches carried out to determine the existence of any non-native title rights and interests in relation to land or waters in the area covered by the application are those found in the CD-ROMs produced by the state for the purpose of the proceeding.

Presumably, this was acceptable in this because the hearing of the matter is well advanced, with most of the applicant's evidence having been given, and the fact that this material had been filed in the court and is, therefore, available to the parties.

Description of native title rights and interests

The state and the commonwealth submitted that certain rights claimed in relation to cultural knowledge 'pertaining to the area, and ... of places in the area' were not native title rights and interests as defined in s. 223 of the NTA, relying on *Western*

Australia v Ward (2002) 191 ALR 1 at [17], [58] and [60] and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at [33]. While his Honour saw force in the submission, it could be dealt with in the final reasons for judgment—at [39].

The native title rights and interests claimed in the proposed amended application were subject to, among other things:

- making no claim to native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in respect of any areas in relation to which a previous non-exclusive possession act (as defined in s. 23F of the NTA) had been done;
- being limited to those rights and interests that are consistent with any act, grant, title or interest that partially extinguished native title;
- making no claim to a right of possession or rights to either control access or to make decisions about the use and enjoyment of any area where the native title rights to exclusive possession has been extinguished.

The commonwealth submitted that:

- the qualifications were vague and not properly referenced to the list of itemised rights and interests claimed; and
- a claim for non-exclusive rights and interests cannot be sustained.

Lindgren J did not see any reason to determine that question. The applicant's evidence relating to the matter is closed and the issue could be determined in the final judgement—at [42].

Shared rights

The state objected to a proposed amendment which would state that the rights and interests over a particular area are shared with other members of the Western Desert cultural bloc. The basis for the objection was that this suggested that the native title rights and interests are held by a group that is wider than the claimant group, in contravention of the requirement in s. 61(1), which requires that the applicant must be authorised by all the persons who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed.

His Honour disagreed:

> It is conceivable that the traditional laws and customs under which the rights and interests claimed are held might ... be also traditional laws and customs of a wider population, without that wider population being a part of the claim group. I have rights and interests in land under the laws of New South Wales and those laws are "shared" with other persons, but it is not true that, as a result, my rights and interests in land are shared with them. The same laws apply so as to generate proprietorial rights in a person because of factual circumstances peculiar to that individual. Similarly, it is conceivable that traditional laws and customs shared by members of the Western Desert cultural bloc may apply so as to confer rights and interests on the Wongatha people in relation to the land and waters covered by the application which they do not confer on other members of the Western Desert cultural bloc—at [53].

Authorisation
The commonwealth objected to the description of the native title claim group on the basis that certain identified descendants had been excluded. This meant that the potential native title holding group was wider than the claimant group. Therefore, it was questionable whether there had been the authorisation required under the NTA. If this was the case, then the application was fatally flawed. The applicant submitted that the fact that certain named lineages or persons are excluded says nothing on the face of it as to whether or not authorisation occurred. Whilst the court agreed with this submission, Lindgren J did warn the applicants that the objection effectively puts the applicants on notice of a potential difficulty that may arise at trial—at [64].

Decision
The application to amend was refused, with the judge noting that the applicants would, no doubt, want to submit a further draft application and draft points of claim. If so, it should be prepared as a matter of urgency and distributed to all parties with a view to agreeing that the draft conforms to the reasons summarised here.