Strike-out — claim group description

Landers v South Australia [2003] FCA 264

Mansfield J, 31 March 2003

Issues
This decision deals with whether or not a native title claim group is properly constituted if certain people are excluded from the claim group description merely to meet the requirements of registration test, in particular s. 190C(3) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
A motion was brought to either strike out a claimant application made by six people (referred to as the Edward Landers group) on behalf of The Edward Landers Dieri People under s. 84C(1) of the NTA or to summarily dismiss it under O20 r 2(1) of the Federal Court Rules on the basis that:

- the application did not comply with s. 61 of the NTA; and
- the applicant had not been authorised in accordance with s. 251B of the NTA to bring the application on behalf of the Dieri Mitha People.

The motion was brought by a group (referred to as the Dieri Mitha group) that:

- had brought a claimant application that encompassed the area covered by the Edward Landers application; and
- were parties to the Edward Landers application.

Both groups acknowledged that their respective claimant applications were 'authorised by and made on behalf of' the same native title claim group, namely the Dieri People. The evidence suggested that the same apical ancestors are ' the foundation for identifying the Dieri People'—at [11].

The question was, therefore, who was authorised as required under s. 251B by the Dieri People to bring an application on their behalf—at [12].

Principles for summary dismissal applied
Regardless of the source of the court's powers in the proceedings, his Honour was of the view that the principles for summary dismissal applications applied. Therefore, the court should only dismiss the application if:

- the case for doing so was very clear; and
- the claim as expressed was untenable even upon the version of the evidence most favourable to the applicant. However, this should not generally involve undertaking any weighing of conflicting evidence or of the inferences that might be drawn from the evidence—at [7].

Old or new Act?

Section 84C, which came into effect when the majority of the amendments to the NTA commenced late in 1998, provides (among other things) that:

- an claimant application that does not comply with ss. 61, 61A or 62 of the amended NTA may be struck out by the court on application of any party to the proceedings; and
- the court must consider any application for strike-out brought under s. 84C(1) before proceeding further with the claimant application.

The Edward Landers application was originally made under the old Act (i.e. the NTA as it stood prior to the 1998 amendments: see the transitional provisions, NTA Sch 5, Pt 9, cl 31) on behalf of both the Dieri and the Yandruwandha Peoples over a much larger area. However, it was amended after the new Act commenced to both reduce the area and remove the Yandruwandha Peoples from the application. In these circumstances, Justice Mansfield found that the claimant application must comply with s. 61 as amended, referring to *Quall v Risk* [2001] FCA 378 at [65] and the support provided to that decision in several other authorities.

A process aimed at addressing authorisation under s. 251B was undertaken and the application was certified by the Aboriginal Legal Rights Movement (the ALRM), which is the representative body for the area concerned. It was accepted for registration by the Native Title Registrar in 1999—at [5] and [13] to [14].

Authorisation

Subsection 61(1) 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. In this case, the 'particular native title claimed' was that of the Dieri People. Section 251B sets out the manner in which the applicant must be authorised.

The Edward Landers group relied on a meeting held over two days in March 1999 (the authorisation meeting). This was the same meeting at which it was decided to reduce the area covered by the application substantially and to remove the Yandruwandha People from the application so that they could bring a claimant application in their own right. The minutes of that meeting record that the six people in the Edward Landers group were 'authorised to make the application and deal with matters arising in relation to it' on behalf of all the other Dieri People. ALRM certified the application, being of the opinion that, as a result of the meeting, the six people to be named as the applicant were authorised under s. 251B(a), i.e. a traditional decision-making process that must be followed under traditional law and custom for authorising things like the making of a claimant application—at [20] to [21].

Those seeking dismissal submitted that many of the persons who attended the authorisation meeting were not entitled to have participated in the traditional decision making process. Conversely, some of the people who, under traditional law and custom, should have been involved in the decision did not participate either

because they were not given the opportunity to do so or chose not to attend. Further, it was said that the Edward Landers group:

- had not followed the traditional decision-making process of the Dieri People at the authorisation meeting;
- included people who did not have the native title rights and interests they claimed;
- had not consulted with important Dieri persons and the claim did not include sites significant to the Dieri People; and
- had lost their connection with the area covered by the application, their knowledge of traditional Dieri law, custom and sites and no person in that group was born within the area covered by the application—at [22] to [25].

Mansfield J refused to dismiss the application on the grounds of lack of authorisation, noting that:

- the authorisation meeting had been advertised extensively;
- significant numbers of people attended each day;
- this was not a case where it was clear that those attending were not Dieri People;
- the question of whether or not the process used reflected traditional laws and customs was not a question to be decided in these proceedings—at [27].

Description of claim group

The Edward Landers group relied on s. 61(4)(b) of the NTA, which requires that the native title claim group be described sufficiently clearly so that it can be ascertained whether any particular person is one of the persons in that group. In this case, the native title claim group was described 'by means of the principle of descent' from named apical ancestors. However, it was expressly stated that 'all of the people listed as the applicant group' in the Dieri Mitha group's particulars of claim were excluded from the native title claim group 'whilst those people's names appear as members of that applicant group'. The main reason given for excluding them related to the requirements of s. 190C(3)(a), pursuant to which a claimant application (the current claim) cannot be accepted for registration if any person in the native title claim group is also a member of a native title claim group for another claimant application that had been accepted for registration and was on the register when the current claim was made.

His Honour found that the approach taken in this matter did not comply with s. 61(4)(b) because the application did not describe the native title claim group (i.e. the Dieri People). Rather, it described a smaller group of people (i.e. the Dieri People minus those excluded from it, namely the Dieri Mitha group). Mansfield J was of the view that s. 61(4)(b):

> [R]equires the application to be on behalf of the people who have authorised it. It does not permit the making of a claim by a native title determination application by a subgroup of the native title claim group, or the grant of native title to a subgroup of the real native title claim group: see *Ward v State of Western Australia* (1998) 159 ALR 483 at [541], *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60], *Tilmouth v Northern Territory of Australia* (2001) 109 FCR 240. By excluding from the authorising group, namely the Dieri People, the 87 persons named as the applicant group (or even merely

> the Dieri Mitha group) in the Dieri Mitha application, that is what the Edward Landers' group has done. The smaller group, as expressed, is not the group of people who should exclusively enjoy the communal native title—at [33].

The submission that ss. 61(1) and 61(4) should be read down to require only that the claim group should be capable of registration was rejected:

> The significance of the requirement introduced by s. 251B is clear ... . The proper identification of the native title claim group is the central or focal issue of a native title determination application. It is the native title claim group which provides the authorisation under s. 251B, and it is the group on whose behalf the claim is then pursued and, if successful, in whose favour a determination of native title is then made. I do not consider the registration procedures ... were intended to detract from that focus. Nor do I consider there is any tension between those procedures and s. 61 of the NT Act.
>
> The term "native title claim group" in s. 253 is...the group mentioned in ... s 61(1). It refers to "all the persons" who authorised the particular applicants to make the claim. In this instance, it is the claim of the Edward Landers' group that they were authorised by the Dieri People. But the application does not then identify the Dieri People as the persons on whose behalf the claim is made, but 'some only' of the Dieri People. I think the requirements of s 61(1) and (4) are clear—at [35] to [36].

It was also argued that the application only provisionally excluded some of the Dieri People and did so only in order to pass the registration test. His Honour was of the view that s. 61(1) and s. 61(4) 'do not permit such an exclusion whether for that reason or otherwise'—at [40].

Purpose of the registration test

Mansfield J went on to note the importance of registration. Registration gives the applicant status as a native title party, attached to which are significant rights. In response to a submission that the requirements of the registration test were so onerous as to deny registration to all but unassailable claims, the court referred to the second reading speech of the Attorney-General, which indicated that the introduction of the registration procedures was to ensure only those with a 'credible claim' should become a 'native title party' in future act matters. It also sought to avoid giving that status to those who make 'ambit and unprepared' claimant applications—at [37] to [38].

Subsection 190C(3)

Counsel for the ALRM contended that the description of the 'native title claim group' for the purposes of s. 61(1) is the group of people that satisfied the requirements of s. 190C(3). Any other reading would raise the bar to registration 'so high as to deny registration of all but unassailable claims'—at [35].

His Honour noted that s. 190C(3) does not prevent the registration of competing claimant applications brought by different claimant groups over the same area of land and waters. Rather:

> It seeks to ensure that an application for native title by a particular native title applicant is authorised by the native title claim group. If there are different persons making a claim

> over the same or partly the same area on behalf of the one native title claim group, it is consistent with giving s. 61(1) and (4) their full operation and with s. 251B that the legislation intended ... registration to be refused. The circumstances of different applicants on behalf of the same native title claim group separately seeking determination of native title over the same, or partly the same, claim area would tend to indicate some flaw in the authorisation process. The proper course ... may be for the native title claim group under its proper processes to substitute new applicants in one or other of the claims under s. 66B ... or to have one or other of the authorised claims amended to avoid any overlap. Hence ... the procedural requirement of s. 190C(3) does not impose any 'unassailable bar' upon registration but is consistent with the proper operation of ss 61(1), 61 (4) and 251B of the NT Act—at [38].

Decision

His Honour was of the view that, because of the failure to comply with the requirements of s. 61(1) and s. 61(4), the application should be dismissed. In this case, it was not appropriate to adjourn the proceedings to enable amendment to be made because:

- the Edward Landers group did not seek an adjournment;
- there was a real possibility that considerable dissension would arise between significant sections of the Dieri People as to who is authorised to make and maintain a claimant application on their behalf.

According to the court, such issues are better addressed in a fresh authorisation process under s. 251B which should enable a fresh native title determination application to be made on behalf of all the Dieri People—at [41].

Appeal

Representatives of the Dieri People filed a notice of appeal in the Federal Court on 22 April 2003 in relation to the decision to dismiss the application. The grounds for appeal relate to compliance with s. 61 and the requirements of s. 251(b) of the NTA.