Strike out application under s. 84C — Kooma People

Wharton v Queensland [2003] FCA 790

Emmett J, 18 June 2003

Issues
This decision deals with an application under s. 84C of the *Native Title Act* 1993 (Cwlth) (NTA) to strike out a claimant application on the ground that the applicant was not authorised by the native title claim group to bring the proceeding.

Background
The claimant application in question was lodged in under the old Act by Wayne Wharton 'on behalf of all Kooma People' (i.e. the NTA as it stood before the commencement of the *Native Title Amendment Act 1998*). Consequent to the 1998 amendments, a claimant application may be made only by a person who is authorised by all persons who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed: s. 61(1) of the new Act (i.e. the NTA as amended). If there is a failure to comply with this requirement, then a party may apply under s. 84C to strike out the proceeding—at [11].

In May 1999, the application (referred to here as the Wharton claim) was amended. In March 2002, a second claimant application was filed that completely overlapped the area covered by the Wharton claim (referred to here as the Branfield claim). The Branfield claim was also said to be made on behalf of the Kooma People. It was common ground that the Branfield claimants are descendants of persons named as apical ancestors in the Wharton claim.

In August 2002, the applicant in the Branfield claim was joined as a party to the Wharton claim proceedings. Subsequently, and with leave of the court, the Branfield applicant applied to strike out the Wharton claim on the ground that Mr Wharton was not authorised by the native title claim group.

Authorisation
Section 251B of the NTA deals with the question of authorisation. An applicant is authorised if:

- the person has been authorised by the group in a mandatory process for making decisions of that kind under traditional law and custom; or
- there is no such decision-making process, then the person has been authorised by the claim group in accordance with a decision-making process agreed to and adopted by that group.

In this case, neither party suggested there was such a decision making process under traditional law and custom. Mr Wharton relied on the second limb of s. 251B. Justice Emmett noted that s. 251B(b) does not require that all members of a relevant claim group must be involved in the decision:

> Still less does it require that the vote be a unanimous vote of every member. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process—at [34], referring to *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (summarised in *Native Title Hot Spots* Issue 3) at [25].

The original application was made as a result of resolutions passed by the Kooma Corporation, which was set up after a meeting of 34 people in 1994. One of its objects was to obtain secure tenure to the Kooma Tribes traditional land. At the same meeting, a resolution to make the original application was passed. There was evidence of a further meeting of the Kooma Corporation in 1999, attended by 40 people, where a resolution was passed that Mr Wharton was 'authorised by all people in attendance at the Kooma Native Title Meeting to deal with the Native Title Claim of Kooma and matters arising in relation to it'. There was also a resolution passed at that meeting stating that 'all Kooma people' agreed to use a consensus decision-making process. Notice of the meeting was sent to 180 members of the Kooma Corporation and the meeting was advertised on both local and national indigenous radio stations—see at [19] to [29].

The question was whether authorisation had been given in accordance with a process of decision-making agreed to and adopted by the persons in the native title claim group described in the Wharton claim as required under s. 251B(a)—at [18] to [30] and [33].

Decision

It was held that the evidence of authorisation was inconclusive and, as a result, the court was not persuaded that Mr Wharton was authorised by the native title claim group. The following matters were noted:

- there was no evidence concerning the circumstances surrounding the convening of the initial meeting in 1994. While an inference that those present were members of the native title claim group described in the Wharton application could be drawn:
    - the court had no way of knowing who was informed of the proposal to convene the meeting; and
    - there was nothing in the minutes of that meeting to suggest that those present were agreeing to, and adopting, the procedures of the proposed Kooma Corporation as a means of decision-making on behalf of the native title claim group
- Mr Wharton needed to establish that all the members of the native title claim group were given the opportunity of attending the initial meeting in 1994 that resulted in the creation of the Kooma Corporation and the lodging of the original application. Evidence that all those people had also been given the opportunity to become members of the Kooma Corporation was also required;

- it was common ground that at least 40 members of the claim group were not members of the Kooma Corporation—at [38].

His Honour was not satisfied that the authorisation process relied upon by Mr Wharton satisfied s. 251B(b). This was because the evidence did not enable the court to conclude that a process consisting of a resolution of the members of the Kooma Corporation was a process of decision-making agreed to and adopted by the current descendants of the apical ancestors named in the application who made up the native title claim group. Therefore, the application did not comply with s. 61 and should be struck out pursuant to s. 84C of the NTA.

However, before making any order, his Honour thought it appropriate to allow the parties an opportunity to consider his conclusions and the reasons for them. His Honour was persuaded to take that course of action because it had been suggested in the course of argument that similar difficulties may arise in the Branfield claim—at [44].

Subsequent developments—the transitional provisions

On 5 August 2003, the matter came before his Honour again. Counsel for Mr Wharton, who was unable to appear at the time, had filed submissions in court apparently seeking to argue that item 21 of Application, Saving or Transitional Provisions of the *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions) applied to the Wharton application. Item 21 provides that:

> Section 84C of the new Act applies where the main application mentioned in that section was made either before or after the commencement of that section. If the main application was made before the commencement, the reference in that section to section 61 or section 62 is a reference to section 61 or section 62 of the old Act.

If item 21 applies, then the strike out application must be decided on the basis of s. 61 of the old Act. In those circumstances, it may be that Mr Wharton does not need to show that he was authorised pursuant to the new Act. The issue before the court now is whether amendments to the application made after the commencement of the new Act mean that item 21 no longer applies. His Honour made directions in relation to the filing of written submissions on this point and indicated that he would publish the reasons for his conclusions on the application of item 21 as soon as practicable after any submissions are filed.