Strike out applications —Perth metro area

Bodney v Western Australia [2003] FCA 890

Wilcox J, 25 August 2003

Issue

The Federal Court was asked to strike out five claimant applications (the Bodney applications) on the basis that those applications did not comply with the requirements of s. 61 of the *Native Title Act 1993* (Cwlth) (NTA).

Background

Three of the Bodney applications were made under the old Act (i.e. the NTA as it stood prior to the commencement of the *Native Title Amendment Act 1998*) and were unamended (the old Act applications). The remaining two Bodney applications, although filed under the old Act, were amended under the new Act (the new Act applications). Justice Wilcox applied the rule stated in *Quall v Risk* [2001] FCA 378 at [65], which requires that the question of compliance with s. 61 is to be determined by reference to the terms of the new Act (if an application was amended after the new Act commenced).

The strike-out applications were brought by the applicants in what are commonly called the Combined Metro applications. These claimant applications are located within or near the Perth metropolitan area and overlap the Bodney applications. At the time of the hearing of the strike-out applications, considerable evidence concerning both the Bodney and Combined Metro applications had been heard.

The old Act applications

Subsection 61(3) of the old Act required that an application made by a person or persons claiming to hold native title with others 'must describe or otherwise identify those others'. The old Act Bodney applications variously identified the native title group as 'Ballaruk People-Bodney Family Group' or 'Ballaruk Family Group'.

The new Act applications

It was clear from the evidence that a larger group, namely the Ballarruk and Didjarruk people, held the relevant native title rights and interests at sovereignty. The new Act Bodney applications were made on behalf of the biological descendants of Mr Bodney's parents, a sub-group of the larger group. His Honour likened the situation in this case to that considered by His Honour Justice O'Loughlin in *Risk v National Native Title Tribunal* [2000] FCA 1589—at [36] to [38].

Wilcox J decided the matter on the lack of requisite authorisation by that subgroup as provided for in the two limbs of s. 251B. Mr Bodney relied on both limbs. His Honour found on the evidence that there was no assertion of the existence of any traditional process of decision-making among the descendants of Mr Bodney's

parents and so s. 251B(a) was not applicable. Nor was there satisfactory evidence as to the representative nature of a meeting Mr Bodney asserted was held to confirm his authority so as to meet the requirements of s. 251B(b)—at [41] and [42].

Decision

In relation to the old Act applications, his Honour found that the descriptions of the claim group, absent further explanation, did not meaningfully describe or identify the people who fell within that group. They were 'uninformative'. Therefore, it was held that they did not comply with s. 61(3) of the old Act.

In relation to the new Act applications, his Honour concluded that they did not comply with the relevant requirements of s. 61 of the new Act and that the situation could not be cured by further evidence because 'the deficiencies are contained in the applications themselves'—at [19] to [21]and [46]. As a result, all five Bodney applications were dismissed.

The sub-group issue

Wilcox J did not think it necessary to express a concluded view on whether it is possible for a person to make a claimant application on behalf of himself or herself alone, or a small group, in respect of rights and interests that are held by a wider group—at [41].

However, his Honour made some observations on the implications arising from the view taken by O'Loughlin J in *Tilmouth v Northern Territory* [2001] FCA 820; 109 FCR 240 and Mansfield J in *Landers v South Australia* [2003] FCA 264 (summarised in *Native Title Hot Spots* Issue 5) to the effect that s. 61(1) does not permit the making of a claim by a subgroup of the 'real' native title claim group. In his Honour's opinion, if such a view is correct:

- it would be extremely difficult for a claimant application to succeed where the native title claim group is limited to descendants of a couple who are removed only a generation or two from the present;
- it effectively gives a veto right to any significant body of members of a group that allegedly holds native title rights and interests that and does not wish to support the claim of a particular putative applicant;
- it is difficult to reconcile these outcomes with the reference in s. 223(1) of the Act to 'individual' native title rights and interests—at [39] to [40]. (The reference in s. 223(1) appears to a reference to *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 63, where Brennan J referred to 'the native titles [*sic*] claimed by the Meriam people—communally, by group or individually'. If so, then s. 223(1) is a reference to the rights that an individual may have by virtue of being a member of a wider group.)