ILUA registration — appeal to Full Court

Murray v Registrar of the National Native Title Tribunal [2003] FCAFC 220

Spender, Branson and North JJ, 24 September 2003

Issue
The issue before the court was whether an agreement was an Indigenous Land Use Agreement (ILUA), as defined by s. 24CA of the *Native Title Act 1993* (Cwlth) (NTA). An agreement must (among other things) satisfy s. 24CD to be an ILUA. Subsection 24CD(1) requires that all the persons in the 'native title group' must be parties to the ILUA.

In this case, the mandatory parties were 'any person claiming to hold native title' in relation to the area (s. 24CD(3)(a)). Therefore, the major issue before the court was whether the word 'any' in that paragraph required that all persons claiming to hold native in relation to the area must be a party to the ILUA or only that any one or more persons claiming to hold native title in relation to the area must be a party to the agreement.

Background
This is an appeal on a limited basis from the decision of Justice Marshall handed down on 20 December 2002 in *Murray v Registrar of the National Native Title Tribunal* [2002] FCA 1598, summarised in *Native Title Hot Spots* Issue 4.

The relevant provisions in defining the mandatory parties to the ILUA in this case were:

- *all* persons in the 'native title group' — as defined in subsection (2) or (3) — in relation to the area must be parties to the agreement — s. 24CD(1), emphasis added;
- as subsection (2) did not apply, the ***native title group*** was to consist of one or more of the following:
    - *any* person who claims to hold native title in relation to land or waters in the area;
    - *any* representative Aboriginal/Torres Strait Islander body for the area — s. 24CD(3)(a) and (b), emphasis added.

No representative body was a party to the ILUA.

The appellant, Sonia Murray, submitted that s. 24CD(3)(a), when read in conjunction with s. 24CD(1), required that all persons who claim to hold native title in relation to land or waters in the area must be parties to the agreement if they have not authorised a party to enter into the agreement pursuant to s. 24CG(3)(b). Therefore, it was argued that Ms Murray should have been a party to the ILUA because she was a

person claiming to hold native title in relation to the area and she had not authorised a party to enter into the agreement pursuant to s. 24CG(3)(b). Since she was not a party to the agreement, it was submitted that the agreement was not an ILUA and should not have been registered.

The second and third respondents (the developer and the native title party to the agreement respectively) contended that s. 24CD(1) did not require that all persons who claim to hold native title in relation to land or waters in the area be parties to the agreement. Rather, it was submitted that all 'persons in the native title group' within the meaning of s. 24CD(1) meant that all persons in that group may, in accordance with s. 24CD(3), be constituted of one or more of the persons or bodies identified in s. 24CD(3)(a) and (b). Further, since other persons claiming to hold native title were parties to the ILUA, then there was no requirement that the appellant also be a party.

The court thought it unlikely that s. 24CD(3) required that all persons claiming to hold native title in the agreement area must be parties to the ILUA:

> As Division 3 [of the NTA] implicitly recognises...it may be impossible in a practical sense to identify all persons who hold, or may hold, native title in relation to land or waters in an area. At least equivalent practical difficulties, and possibly greater practical difficulties, would attend any attempt to identify every person who claims to hold native title...in an area. It seems for this reason unlikely that s 24CD(3) was intended to require the identification of all such persons. Were s 24CD construed so as to require the identifying and naming of all such persons, the consequence would seem to be that a late discovery of a previously unidentified claimant could deprive even a registered agreement of its character as an indigenous land use agreement (see s 24CA). This inconvenient result should not lightly be found to have been intended by the legislature—at [18].

It was held that, when s. 24CD is read as a whole, it is clear that s. 24CD(3) does not require the identification of all persons who claim to hold native title in relation to land or waters in an area—at [19] and [20].

Decision

The court came to the conclusion that, on the proper construction of s. 24CD of the NTA, if subsection (2) does not apply, then the native title group consists of:

- any one or more person or persons who claim to hold native title in relation to land or waters in the area;
- any one or more representative Aboriginal/Torres Strait Islander body or bodies for the area; or
- any one or more person or persons who claims to hold native title in relation to land or waters in the area together with any one or more representative Aboriginal/Torres Strait Islander body or bodies for the area—at [29].

As a result, the appeal was dismissed with costs.