Indigenous Parties to Native Title Claims

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July 2012

Introduction

During the public notification period of a new native title claim lodged under the *Native Title Act 1993* (Cth) (the NTA), persons who claim to hold native title in relation to land or waters in a claim area, or any person whose interest in the claim area may be affected by a determination of native title, can notify the Federal Court that they want to be a party to the proceeding.

Many indigenous parties join native title claims to protect a non-native title interest – indigenous owners of pastoral land, Aboriginal or Torres Strait Islander local government authorities to name a couple. Here we examine parties who, in competition with native title claimants, assert native title rights and interests in a claimed area. What can indigenous respondents to a native title claim hope to achieve? Can their interest be recognised in a determination of native title?

This paper examines the way in which indigenous people asserting native title can become respondent parties to native title claims and some of the recent decisions of the Federal Court.

Indigenous People Applying to Join a Native Title Claim

Where an application for a determination of native title is made to the Federal Court under section 61(1) of the NTA, section 84(3) of the NTA provides that a person becomes a party to the proceeding if they claim to hold native title in relation to land or waters in the area claimed and they notify the Federal Court that they want to be a party to the proceeding.

After the initial public notification of a native claim by the Native Title Registrar, the Federal Court may at any time join any person as a party to the claim if the Court is satisfied that the person's interests may be affected by a determination of native title and it is in the interests of justice to do so (s 84(5) NTA).

Recent decisions of the Federal and High Courts, changes to the NTA and to government funding programs have assisted to limit the issues required to be determined between the parties in native title claims. Anyone involved in native litigation knows that the behaviour of respondent parties will be critical to the efficient disposal of the proceedings. Parties to litigation have the power to influence the direction of the proceedings. In *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1 at 7-8, Black CJ said:

> "The nature and content of the right to become a party to proceedings for the determination of native title, with the power as a party in effect to veto the process of mediation and conciliation which the Act favours, suggests that the interests with which s 68(2)(a) and the related sections dealing with parties are concerned are interests that are not indirect, remote or lacking

> substance. The nature and content of the right also suggests that the interests must be capable of clear definition and, equally importantly, that they are of such a character that they may be affected in a demonstrable way by a determination in relation to the application.
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> There is, however, no reason to conclude from the subject matter, scope and purpose of the Act that the interests need be proprietary or even legal or equitable in nature. Whilst the interests must be genuine and not indirect, remote or lacking substance, there is no indication that, for example, a person who has a special, well-established non-proprietary connection with land or waters which is of significance to that person is not to be regarded as having interests that may be affected by a determination."

In *Murray v Western Australia & Ors* [2010] FCA 595, an applicant to a native title claim contended that notices by Aboriginal people indicating they wished to be joined as parties to the claim were deficient. One of the issues raised by the applicant was that those seeking to be joined failed to assert or substantiate a claim to "native title" in the claim area when completing the relevant notice as required by s 84(3)(a)(ii). McKerracher J held that nothing in the terms of s 84(3) of the NTA bound the Court to limit itself to the form or content of the notification under s 84(3)(b). He then considered additional "clarifactory" evidence from the joinder applicants.

The Court need only consider whether an applicant for joinder has a prima facie case in relation to an "interest"[1] and need not determine, as a matter of fact, whether an applicant for joinder holds native title in the claim area.[2]

Applications by indigenous respondents to become a party to proceedings outside of a claim's initial public notification period are by no means guaranteed to succeed. Following amendment to the NTA in 2007, the Federal Court became empowered to join any person as a party to a proceeding if the Court is satisfied that person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so (s 84(5)). In a recent decision, His Honour Justice Reeves in *Isaacs on behalf of the Turrbal People v State of Queensland (No. 2)* [2011] FCA 942, exercised the Court's discretion under section 84(5) of the NTA to refuse to join as respondents people asserting native title rights and interests in a native title claim area. His Honour cited the joinder applicants':

- late application,
- the absence of any explanation for their delay and
- the likelihood that their presence as respondents would jeopardise the imminent trial of the proceedings,

in dismissing their applications.

In the matter of *Kokatha Native Title Claim v South Australia* [2005] 143 FCR 544, Justice Mansfield decided that where a significant number of people who claimed to have native title rights and

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[1] See, for example, *Wakka Wakka People #2 v State of Queensland* [2005] FCA 1578 per Kiefel J at [6].

[2] "If I were to entertain these factual disputes, I would be placed in the paradoxical position of having to determine one of the factual issues in dispute in the substantive proceedings for the purposes of determining whether or not the applicants should be joined as respondents to contest that very factual issue", Per Reeves J, *Isaacs on behalf of the Turrbal People v State of Queensland (No 2)* [2011] FCA 942 at [10].

interests over all or part of a claim area apply to join proceedings as parties, it would not be necessary to join every individual. In that matter, the Court determined that the members of the competing claim group's interests would be adequately protected by the joinder of just one of them.

Defensively Asserting Native Title

Section 225 of the NTA states:

> "225 Determination of native title
> A *determination of native title* is a determination whether or not native title exists in relation to a particular area (the *determination area*) of land or waters and, if it does exist, a determination of:
> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
> (c) the nature and extent of any other interests in relation to the determination area; and
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
> ...
> Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests."

The NTA provides for a person whose non-native title interest which may be affected by a determination of native title to be joined to a proceeding. The NTA then empowers the Court to determine the nature and extent of that non-native title interest and the relationship between the interest and any native title rights and interests determined to exist.

But what is the Court's role in reconciling the interests asserted by a native title claimant and an indigenous respondent asserting native title within the framework of the NTA? Some recent decisions of the Federal Court have clarified the role of indigenous respondents who defensively assert native title.

In *Kokatha People v State of South Australia* [2007] FCA 1057, the Court had to determine whether it could make a determination of native title in favour of a person that has not made a native title determination application under section 61 of the NTA but was a respondent to an application brought on behalf of another claimant group. Various parties including the Commonwealth submitted that having regard to the language of section 225, the Court is entitled to make a determination that recognises native title rights on the part of any person or group whom the evidence establishes holds native title irrespective of whether or not that person has made a claim for native title under section 61. Justice Finn determined that the language of section 225 does not detach the determination of native title from the application made for the determination under section 61.

Justice Finn's decision in *Kokatha* went under appeal to the Full Federal Court and in *Commonwealth v Clifton* [2007] FCAFC 190 Branson, Sundberg and Dowsett JJ dismissed the appeal. The Court emphasised the importance attributed by the legislature to the requirement than an applicant in a native title claim be authorised by all members of the native title claim group. It said:

> "In our view, it is unlikely almost to the point of being fanciful that the legislature intended that standing to institute a proceeding claiming a determination of native title should be strictly limited to persons authorised by the relevant native title claim group but that standing effectively to counter-claim for identical relief should be unlimited by any requirement for authorisation. This unlikelihood is the more apparent when one considers the numerous obligations placed on the Native Title Registrar to give notice of a native title determination application. Assuming the submissions of the Commonwealth and Mr McKenzie to be correct, other parties to the proceeding could advance comparable claims without any requirement arising for these statutory requirements and obligations to be met" [at 52].

The Court considered the situation would be quite different if the Court were required to determine a dispute as to the membership of a native title claim group or the boundaries of the area over which the claim group holds native title (at [37]).

The Court concluded that where competing groups claimed native title, each group must authorise a separate claim and to the extent the claims cover the same area, they will be dealt with in the one proceeding (s 67 NTA) (at [58]).

Interestingly, in an application brought under the *Administrative Decision (Judicial Review)* Act 1977 (Cth), the Federal Court partly relied upon the decision in *Commonwealth v Clifton* to determine that a competing native title group that had not filed its own native title claim was not entitled to be involved in the authorisation of an Indigenous Land Use Agreement (Area Agreement) under s251A of the NTA by a registered native title claim group.[3]

An indigenous respondent asserting native title rights and interests in another's claim area can seek to protect their rights from erosion, dilution or discount.[4] They can negotiate the membership of the native title claim group or the area of land and waters claimed. But they cannot achieve a determination of native title in their favour.

Dissentient Members of a Native Title Claim Group

In some circumstances members of a native title claim group seek separate party status. In *Combined Dulabed and Malanbarra/Yidinji Peoples v State of Queensland* [2004] FCA 1097 a member of the relevant claim group disputed the proposed evidence of the claim group (through an anthropological report) about membership of the claim group because, he claimed, certain identified persons should not in fact be accepted as members of it as they were not sufficiently connected to the claim area [at 48]. The Court considered there to be insufficient evidence to support assertions about the make up of the claim group and the joinder application was dismissed.

In *Starkey v South Australia* [2011] FCA 456 Mansfield J considered the authorities on the joinder of dissentient members of a native title claim group. He concluded that there is no necessary legal impediment to a member of a native title claim group being joined, or remaining, as a respondent

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[3] *QGC Pty Limited v Bygrave* [2011] FCA 1457, [104] to [115]

[4] See, for example, *Kokatha Native Title Claim v South Australia* [2005] FCA 836 per Mansfield J at [24]

party to a claim, but the circumstances in which a dissentient member of a native title claim group will be permitted to become a respondent party under s 84(5) or, having become a respondent party under s 84(3), will be permitted to remain a respondent party, will be rare [at 61]. Mansfield J said:

> "The role of such dissentient members, in that event, would either be to assert their own status or role intramurally, or within the claim group, when that issue is not one to be decided on the application, or would be to assert that the claim should be handled in some other way. From the point of view of the other respondent parties, they would be faced with the problem of dealing not only with the authorised applicant but with dissentient members of the claim group who had become respondent parties. That process would make negotiated resolution of claims less likely. It would add to cost and delay [at 55]."

Conclusion

The Federal Court has made it clear that the only way to obtain a positive determination of native title is to lodge a native title claim and that it is not possible to defensively assert native title to obtain formal recognition.

An indigenous person asserting native title rights and interests in another's claim area can apply to join proceedings to protect their rights from erosion, dilution or discount. Their rights cannot be recognised in a determination of native title under section 225 of the NTA. However, the assertion of those rights may lead to a more informed decision on the primary application as to how and where native title rights and interests might be determined to exist. It is of course possible to amend the description of a native title claim group to include people who were previously left out.

Finally, dissentient members of a native title claim group will be permitted to join proceedings only in rare circumstances.

For more information on this issue, please contact p&e Law, www.paelaw.com

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