BULLEN V WESTERN AUSTRALIA

Federal Court of Australia (Siopis J)
20 August 2010
[2010] FCA 900

Registered native title claimant – applicants to native title claim deceased – grant of mining lease to area of claim – whether immediately before the granting of the leases time there was registered native title claimant – s 28(1)(b) of the *Native Title Act 1993* (Cth) – whether issue dealt with constituted a matter

Facts:

In 1999 Malcolm Bullen and James Dimer were recorded as the applicant of the Esperance Nyungar native title claim group ('the claim group'). By September 2005 both applicants had passed away. In 2003 the state government gave notice to the applicant and to the Goldfields Lands and Sea Council Aboriginal Corporation ('GLSC') that they intended to grant two mining leases in the area covered by the claim group. Negotiations were held, but by August 2004, they had stalled. The National Native Title Tribunal was requested to assist in mediating between the stalled parties.

In December 2005 GLSC stood on behalf of the deceased applicants to make a future act determination application ('FADA') to the Tribunal regarding other exploration licences. The Tribunal rejected the FADA because both applicants had passed away prior to December 2005, so the application was a nullity.

In June 2007 the government granted the two mining leases, despite no agreement having been made as per s 31(1)(b) of the *Native Title Act 1993* (Cth) ('the Act') and no relevant FADA. The government claimed that the grant of these leases was valid because no native title party existed at the time in relation to any of the land in dispute. The GLSC, acting on behalf of the claim group, challenged this assertion.

In October 2008 the Court made orders under s 66B of the Act to replace the two deceased members of the application with new applicants for the claim group. The applicants then sought a declaration that immediately before the grant of the mining leases there was a registered native title claimant. The principal issues that the Federal Court of Australia had to determine were whether the declaration sought by the applicants related to a matter that was hypothetical, and whether there was a native title claimant immediately before the granting of the mining leases.

Held, finding that the relevant question is not hypothetical and constitutes a matter:

1. There was a real controversy regarding the existence of a registered native title claimant in respect of the land covered by the mining leases. A decision regarding this controversy would result in foreseeable consequences for the parties: [26]–[27].

2. The mining leases had been granted and thus the issue raised by the applicants was not a hypothetical one: [28]; *Edwards v Santos Ltd* (2009) 263 ALR 473, distinguished.

Held, declaring that immediately before the granting of the mining leases there was a registered native title claimant as per s 28(1)(b) of the Act:

3. The Act should be construed as establishing the right of applicants to negotiate and bring proceedings on behalf of native title claimant groups. This requires various processes to be met in order to achieve these ends. These requirements are not at odds with the public interest of deciding mining leases within a reasonable time: [44], [49], [50]–[52], [61].

4. Section 66B of the Act provides for the replacement of the current applicant, including upon the death of one or all members of the applicant group. The act uses 'current applicant' rather than 'former applicant', thus the deceased remain the registered applicant until the 'new applicant' replaces them. This is the only method contemplated for the replacement of the applicant: [53], [55], [60].

5. As the 'new applicant' had not replaced the 'current applicant' in June 2007, the deceased remained the registered native title claimant.