National Native Title Tribunal

NATIVE TITLE Hot Spots

No. 23, February 2007

Contents

Recent cases

Mediation under the NTA – role of Tribunal and powers of Federal Court

***Franks v Western Australia* [2006] FCA 1811**

French J, 21 December 2006

Issue

The main issues raised in this case are:

- the role of the National Native Title Tribunal (the Tribunal) in the mediation of applications referred to it by the Federal Court under s. 86B of the *Native Title Act* 1993 (Cwlth) (NTA); and
- the court's power to make orders in relation to the conduct of that mediation.

Background

At directions hearings held for a number of claimant applications in the Geraldton and Pilbara regions of Western Australia which had been referred to the Tribunal for mediation, the court considered the Tribunal proposals (including the making of court orders) on how to expedite the mediation of those claims.

His Honour Justice French noted that:

- a 'chronic problem of delay' had arisen in the mediation of claimant in the various regions of Western Australia, caused largely by limitations on both human and financial resources;
- these limitations affected the both relevant representative Aboriginal/Torres Strait Islander body, Yamatji Land and Sea Council (YLSC), and the applicants they represented, along with the unrepresented applicants and the State of Western Australia and other respondents;
- the greatest difficulties arose in relation to the resolution of overlaps between claimant applications and the preparation, by or on behalf of applicants, of materials sufficient to satisfy the state that the claim group had the requisite relationship with the area subject to claim (i.e. preparation of 'connection' materials)—at [2].

The Tribunal's role in mediation

The court noted that:

- mediation of native title determination applications is primarily a matter for the Tribunal, a 'priority' reflected in ss. 86A and 86B of the NTA;
- subsections 86B(1) and (2) require that every native title determination application must be referred to the Tribunal for mediation unless the court orders otherwise;
- the role of the Tribunal in mediation was 'heightened' by the amendments made to the NTA in 1998 and 'covers' the process of exchange information during mediation, an important element of which is the provision of 'connection' material to the state;
- the fact that, under s. 86E, the court can request a report on the progress of mediation from the Tribunal reinforces its role;
- the provision of connection evidence between applicants and the state is neither outside of, nor antecedent to, the connection process—at [3] to [4], referring to *Frazer v Western Australia* (2003) 128 FCR 458; [2003] FCA 351 at [27] (*Frazer*), summarised in *Native Title Hot Spots* Issue 5.

Tribunal's proposed orders

Early in 2003, French J made orders that mediation protocols and timetables for the Geraldton and Pilbara regions be developed along similar lines to those the orders made in *Frazer*—at [33]. While those mediation protocols and timetables were developed, at the time of the directions hearing in late 2006, most had not been adhered to—at [5].

In regional reports submitted to the court prior to the directions hearing, the presiding member of the Tribunal:

- informed the court of significant non-compliance with the mediation protocols;
- submitted that, if parties were unable to comply with the timeframes agreed in the mediation protocols by the time of the next directions

hearing, the court should consider replacing those protocols with programming orders;
- proposed draft orders for applications, grouped according to sub-regions aimed at expediting the mediation of the applications with a particular focus on resolving overlaps.

The draft orders were intended to achieve:
- greater utilisation of the Tribunal in the resolution of overlaps;
- more intensive mediation of key strategic applications;
- increased commitment to adherence to mediation protocols—at [8].

The Tribunal suggested that greater utilisation of its 'significant research assistance capabilities' could be beneficial to progressing matters in the Geraldton region. Those 'capabilities' include:
- providing reports as to background collections of public domain anthropological and historical materials relating to claim areas and claim groups;
- based on that background material, providing further reports about European contact history and/or customary Indigenous cultural and ceremonial practices in the claim area;
- preparing an 'area identity report' describing the naming of groups within the area and language/tribal boundaries;
- creating comprehensive geospatially-enhanced databases that electronically link historical facts to maps;
- undertaking specific research projects related to claim or claims; and
- independently assessing connection materials—at [8] and see ss. 108(2) and (3).

The proposed orders in relation to Tribunal research included that, by a specified date:
- the applicants and/or their representatives attend meetings convened by the Tribunal to discuss the content and status of existing research materials covering their respective claim areas;
- the Tribunal (in consultation with the relevant parties and/or the YLSC) develop a program for the conduct of further necessary research in each matter and submit a copy of the program to the court;
- the Tribunal provide the court with progress reports on its research projects examining particular overlap areas.

In relation to overlapping applicants, the various orders proposed included that, before a specified date:
- the applicants and/or their representatives attend meetings called by the Tribunal for the purpose of resolving overlaps;
- the Tribunal, in consultation with the parties, prepare and submit to the court a plan for resolution of overlaps prior to the next directions hearing.

In relation to 'connection', the various orders proposed included that, before a specified date, the state and YLSC to attend meetings convened by the Tribunal to develop a plan for the resolution of connection issues, with the Tribunal to give the court a copy of the plan before the next directions hearing.

YLSC's response

YLSC responded to the proposed orders by (among other things) informing the court that:
- a number of significant matters had progressed during the reporting period despite staff shortages and other constraints;
- the submission of connection materials on priority claims was progressing 'largely according to plan';
- in the Pilbara, its limited staff had to deal with extensive and urgent future act work;
- the orders the Tribunal proposed were unlikely to assist in 'overlap strategies' as most of the difficulties involved in complying with mediation protocols had arisen from not being able to get claimants to reach agreement in relation to overlaps;
- it was not appropriate for the court to make orders requiring claimants to settle overlaps—at [14] to [25] and [31] to [34].

It was noted that, while the other parties supported the position taken by the Tribunal, YLSC:
- 'expressed scepticism' about the utility of the Tribunal proposals on the basis that in some claims connection reports were under

preparation or research was pending, but not yet carried out and so the convening of further meetings at this time would not necessarily be 'a panacea';
- submitted that the parties were not in a position properly to negotiate until requisite research had been done—at [39].

However, his Honour was of the view that:

> [T]he Tribunal's approach offers a more structured basis upon which to move the mediations forward in the Pilbara region. The difficulties currently experienced by Yamatji [YLSC] underline the utility of closer support for the process generally from the Tribunal. That is necessarily subject to the proper maintenance of its role as a helpful neutral which is essential for the discharge of its mediation function. A closer involvement by the Tribunal in processes between overlapping applications, between applicants and the State and between represented and unrepresented applicants, will also enable a better information flow to other respondents who tend to be left on the sidelines wondering what is going on between the principal actors—at [40].

Powers of the court in relation to Tribunal mediation

French J noted that:

- the court had previously made orders requiring parties to prepare mediation protocols and programs and requiring that they adhere to the timetables in those programs;
- while the NTA mandates referral of native title determination applications to the Tribunal for mediation, this is subject to the discretion available to the court under ss. 86B(2) to 86B(4) and, further, pursuant to s. 86C, the court may order that mediation cease;
- while mediation of native title matters by the Tribunal is a central part of the legislative scheme of the NTA, proceedings subject to Tribunal mediation are nevertheless proceedings in the court and the court ultimately controls the duration of the mediation;
- mediation is consensual but, pursuant to a power derived from s. 23 of the *Federal Court of Australia Act 1976* (Cwlth) (FCA), the court can take appropriate steps to ensure its timely progress;
- the generality of s. 23 of the FCA enables the court to make such orders as are properly incidental to, or supportive of, the timely progress of mediations because, although the mediation of native title matters is a specific statutory process, it is established for the purpose of resolving proceedings in the court;
- the link between the purposes of mediation and the resolution of issues in the proceedings in the court is clear from the terms of s. 86A of the NTA;
- therefore, the court has the power to make orders of reasonable specificity calculated to assist Tribunal mediation to proceed expeditiously—at [35] to [38].

Decision

French J made orders in the terms proposed by the Tribunal, subject to the extension of the dates proposed, 'on the basis that closer support and engagement by the Tribunal with the parties offers more promise for progress than reliance on the existing mediation protocol' but noted that the protocols were not to be regarded as displaced by those orders—at [7] and [41].

The Tribunal was requested, in consultation with the parties, to file a minute of proposed orders to give effect to these reasons to the extent that they are applicable to a particular application and the directions hearing was adjourned to 27 June 2007.

Injunction sought to restrain representative body

***Charlie v Cape York Land Council (No.2)* [2006] FCA 1683**

Greenwood J, 5 December 2006.

Issue

The main issue in this case was whether to grant an interim order restraining a representative Aboriginal/Torres Strait Islander body (representative body) from holding a meeting to authorise amendments to a claimant application.

Background

This case deals with the second application by Gordon Charlie for an interim order restraining a representative body, the Cape York Land Council (CYLC), from holding an authorisation meeting

in relation to a claimant application brought on behalf of the Dingaal People. Mr Charlie's first such application, which alleged CYLC had failed to discharge its duty under s. 203BB(1) of the *Native Title Act* 1993 (Cwlth)(NTA) by not accepting a particular family (the Brims) as part of the native title claim group, was dismissed: see *Charlie v Cape York Land Council* [2006] FCA 1418, summarised *Native Title Hot Spots* Issue 22.

Mr Charlie's additional evidence

The additional evidence provided by Mr Charlie to support this application included:

- his letter to the CYLC dated 1 November 1994 describing his claims regarding the ancestry of the Brim family and a similar letter he sent to the National Native Title Tribunal;
- his letter to the CYLC dated 27 February 2003 in which he asserted that he is the traditional custodian for the Dingaalwarra People, purportedly to put the CYLC on notice that all Brim family members ought to be added to any claim of native title brought on behalf of the Dingaal claim group, and requested that the Brim family be invited to relevant meetings of the claim group;
- two 'mandate' documents in which a range of signatories assert that Brim family members are part of the Dingaal and Charlie family groups and are to be considered part of the Dingaal claim group;
- the purported minutes of the Dingaal Native Title Meeting of 3 July 2005.

CYLC's evidence

The CYLC filed extensive affidavit material in reply which addressed three issues, namely the extent to which:

- an examination of the anthropological evidence demonstrated any relationship between the Brim and Charlie families and any connection to the lands the subject of the Dingaal native title claim;
- doubts might be held about the accuracy of the minutes of the meeting said to have taken place on 3 July 2005; and
- the balance of convenience weighed in favour of the CYLC, having regard to the logistical steps associated with convening a two-day meeting of existing claim group members and the dislocation which would arise if the injunction was granted.

Interim injunctions – organising principles

His Honour set out the 'organising principles' governing this matter, including that:

- in all applications for an interlocutory injunction, a court will ask whether:
  - there is a serious question to be tried as to the applicant's (in this case, Mr Charlie's) entitlement to relief;
  - the applicant is likely to suffer injury for which damages will not be an adequate remedy; and
  - the applicant has shown that the balance of convenience favours the granting of an injunction;
- in assessing whether the applicant has made out a prima facie case, it is enough that the applicant show a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending trial;
- the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought;
- the reference to practical consequences is illustrated by the particular considerations which arise where the grant or refusal of an interlocutory injunction in effect would dispose of the action finally in favour of whichever party succeeded;
- these principles must be applied having regard to the nature and circumstances of the case—at [14] to [16], referring to the recent High Court decision in *Australian Broadcasting Corporation v O'Neil* (2006) 229 ALR 457; [2006] HCA 46 at [19] and [65] to [72].

Greenwood J went on to consider the evidence in the light of these principles.

Anthropological evidence

The evidence going to whether or not there was a serious question to be tried included an affidavit of Dr Fiona Powell, an anthropologist retained by the CYLC to prepare a connection report in relation

to the Dingaal application who had worked in the area since the early 1970s. Her evidence was that at no time had she obtained information of a connection between the Charlie family and the Brim family or a connection on the part of the Brim family to the area of the current Dingaal claim. The court noted that:

- it was 'clear' Dr Powell had a long-term deeply rooted knowledge of the ancestral and anthropological evidence in relation to the claimant groups who had a 'demonstrated connection' with the relevant area;
- Dr Powell had compiled genealogical information, including that relating to the Charlie family, from as early as the 1970s (including interviews with Gordon Charlie) and her evidence was that at no time did she obtain information of a connection between the Charlie family and the Brim family or a connection on the part of the Brim family to the area of the current Dingaal claim—at [18] to [19].

Greenwood J was satisfied that, 'plainly', Dr Powell's evidence was persuasive for the purposes of interlocutory proceedings—at [28].

Evidence as to the 'mandate'

The CYLC provided affidavits from people who denied that they signed the mandate documents provided by the applicant which purported to assert the inter-relationship of the Brim family. Greenwood J held that this raised serious doubts as to the accuracy of the 'mandate documents' – at [26].

Minutes of meeting 3 July 2005

The CYLC provided affidavits from a number of persons that raised doubts about the accuracy of the minutes of the meeting of 3 July 2005, including affidavits of people listed in the minutes as having attended who deposed that they did not.

Greenwood J considered that this raised 'more profoundly serious doubt about the accuracy and integrity of the document described as the minutes'. It was held that 'no weight at all' should be attributed to that document for 'interlocutory purposes' – at [26].

Balance of convenience—loss of Brim family claims

His Honour considered the steps taken to prepare for the two-day meeting against the proposition by Mr Charlie that the claims of the Brim family members would be 'irreparably' lost if the meeting went ahead.

It was found that:

- these claims would not be lost if the meeting went ahead;
- any reliable information that demonstrated an interrelationship between the Brim and Charlie families, and a connection with the lands the subject of the Dingaal claim, could be put before the CYLC and the current Dingaal native title claim group – at [29].

Greenwood J held that:

- Mr Charlie had not demonstrated a serious question to be tried or a prima facie case in the sense that, if the evidence remains as it is, there was a probability that he would be found, at the trial of the action, to be held entitled to relief;
- the material relied upon by Mr Charlie in connection with the minutes of meeting of 3 July 2005 and subsequent decision was, at least for interlocutory purposes, 'entirely unreliable';
- no irreparable injury would arise if the meeting went ahead;
- having regard to the extensive steps taken to convene the meeting, and the dislocation caused by enjoining it, the balance of convenience weighed in favour of making no interlocutory order—at [30].

Decision

His Honour:

- dismissed Mr Charlie's application for an interlocutory injunction; and
- ordered him to pay CYLC's costs because the material he relied upon 'so fails to demonstrate any of the necessary elements in support of an interlocutory order of the kind sought' that he 'ought' to pay those costs—at [31] to [32].

Strike out

Worimi v Minister for Lands (NSW) [2006] FCA 1770

Bennett J, 19 December 2006

Issue

The issue in this case was whether the court should strike out a claimant application made pursuant to s. 61(1) of the *Native Title Act 1993* (Cwlth).

Background

This decision should be read in conjunction with the decision in *Hillig v Minister for Lands (NSW) (No. 3)* [2006] FCA 1776 (Hillig No. 3, summarised in this issue of *Native Title Hot Spots*) and the events described in *Hillig v Minister for Lands (NSW) (No. 2)* [2006] FCA 1115 (Hillig No. 2, summarised in *Native Title Hot Spots* Issue 21).

Mr Hillig is the administrator of Worimi Local Aboriginal Land Council in New South Wales, which owns the fee simple in land at Port Stephens (the relevant land), subject to any native title rights or interests, and wants to sell it.

However, the transfer of the relevant land to the council was subject to ss. 40 and 40AA of the *Aboriginal Land Rights Act 1983 (NSW)*, which provide that the council cannot deal with the land unless it was the subject of an 'approved determination' of native title, as defined by s. 13 and s. 253 of the NTA. In separate proceedings, Mr Hillig made a non-claimant application on the council's behalf seeking an approved determination that native title does not exist over the relevant land (see Hillig No. 3) to facilitate the sale.

In August 2006, her Honour Justice Bennett struck out a claimant application by Mr Dates, who prefers to be known as Worimi, for a determination that native title exists over the relevant land (see Hillig No. 2). Worimi then filed a further claimant application, which is the application dealt with in this case.

Her Honour observed that:

> This is not a case where Worimi claims that his immediate family hold native title rights by virtue of the membership of their family alone (cf *Colbung v Western Australia* [2003] FCA 774). He acknowledges that the Land is Worimi land. That is, according to traditional law and custom, the rights are held by Worimi people or the particular clan or group, such as the Garuahgal people. Whatever the precise identity of the people who possess such rights over the Land (see Hillig No. 2 at [20]-[22]), it is a group larger than Worimi and his family. If that is the case the family, by calling itself a native title claim group, does not establish that it is a 'native title claim group' for the purposes of Worimi's entitlement to make the second application pursuant to s 61(1) of the NTA—at [43], referring to *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60].

Bennett J noted that the native title claim group must establish rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by that group. Worimi's evidence was that his claim group, made up of himself, his wife and the daughters to whom he has passed the laws and custom, was not the totality of the group which possessed the native title rights and interests under traditional laws and customs—at [46], referring to *De Rose v South Australia (No. 2)* (2005) 145 FCR 290; [2005] FCFCA 110, summarised in *Native Title Hot Spots* Issue 15.

Woromi's counsel placed considerable reliance on *Bodney v Bropho* (2004) 140 FCR 77; [2004] FCAFC 226 (Bodney, summarised in *Native Title Hot Spots* Issue 11), where the Full Court of the Federal Court dealt with a claim group analogous to that of the present application and allowed an appeal against an order to strike out that application pursuant to s. 84C of the Act—at [48].

Her Honour distinguished Bodney, noting that, unlike Mr Bodney, Woromi had changed the composition of the claim group from the first to the second application:

> Worimi's evidence is that there are other persons outside his immediate family who, as part of the Garuahgal people or the Worimi nation, would have been entitled to assert native title over the Land. His qualification is that he now understands that they do not observe traditional laws and customs and that, accordingly, the persons specified in the claim

group are the whole of the group alleged by him to hold the claimed native title rights and interests—at [50].

Worimi's reliance upon the 'theoretical possibility' that individuals who are Garuahgal or Worimi by descent do not share in all of the native title rights and interests because they have ceased to acknowledge the traditional laws and observe the traditional customs of the community was not a question that her Honour felt needed to be determined on this strike-out application. Bennett J was 'prepared to accept that possibility, for the purposes of this application'—at [50].

Her Honour said that the evidence as to the claim group was inconsistent with the claim group described in the second application because:

- the claim group is not restricted to Worimi's immediate family;
- the only evidence of traditional law and custom authorises Worimi to bring the application on behalf of his immediate family;
- the claim group is not comprised of all the persons who, according to traditional law and custom, hold the common or group rights and interests comprising the native title claimed; and
- Worimi's evidence establishes that he is not authorised to bring the second application for the purposes of NTA—at [55], referring to s. 61(1).

Decision

Her Honour concluded the application should be struck out under s.84C for failure to comply with s. 61, observing that '(t)o allow the application to proceed would involve useless expense'. The proceedings were also summarily dismissed pursuant to O20 r2 of the Federal Court Rules—at [56].

Party status in non-claimant application

Hillig v Minister for Lands (NSW) (No. 3) [2006] FCA 1776

Bennett J, 19 December 2006

Issue

The issue in this matter was whether a person should be joined as a respondent to a non-claimant application made pursuant to s. 61(1) of the *Native Title Act 1993* (Cwlth).

Background

This decision should be read in conjunction with the decision in *Worimi v Minister for Lands (NSW)* [2006] FCA 1770 (the Worimi case, summarised in this issue of *Native Title Hot Spots*). Mr Dates (Worimi) sought to be joined as a respondent the non-claimant application brought by Mr Hillig (as administrator of the Worimi Local Aboriginal Land Council).

Her Honour Justice Bennett noted that:

- issues different from those considered in the Worimi case may arise with respect to Worimi's application for joinder to the Hillig proceedings;
- evidence had been filed in the Hillig proceedings which was not taken into account in the Worimi case;
- the parties did not address the court separately on the application for joinder—at [2] to [4].

In the circumstances, her Honour proposed to give the parties opportunity to address the court on the joinder application—at [4].

Decision

The proceedings, including Mr Dates' (Worimi's) motion for joinder, were stood over to February 2007.

Turrbal People v Queensland [2006] FCA 1687

Spender J, 4 December 2006

Issue

The issue concerned the giving of notice of an amended claimant application under s. 66A of the *Native Title Act 1993* (Cwlth) (NTA)

Background

On 2 March 2006, his Honour Justice Spender granted leave to the Turrbal people to file and serve an amended claimant application. The directions included a direction that

The Native Title Registrar, in addition to the notice required under *Native Title Act 1993* (Cwlth) s. 66A(1)(d), give notice of the amended application to the persons or bodies referred to in s 66(3)(a). to the extent that such persons or bodies are not already parties to the application, and to notify the public in the determined way—at [2].

On 1 December 2006, Spender J made springing orders to the effect that the applicants file and serve an amended claimant application within 21 days and the Native Title Registrar (the Registrar), so far as he was reasonably capable of doing so, was directed to comply with the direction set out above concerning notice within 28 days of the applicant complying with the order to file and serve the amended application.

It came to his Honour's attention that, in relation to the proposed amended application, the provisions of s 66A(1)(e) (which govern the giving of notice of amended application by the Registrar) had no application because the period specified in the notice of the original application, in accordance with s. 66(10)(c), had ended. Paragraph 66A(1)(e) only requires the Registrar to give notice of the amended application to the people notified pursuant to s. 66(3)(a) if the period specified in s. 66(10)(c) has not ended.

His Honour felt it appropriate that proper notice be given to parties who are affected by the amended application and relied on the power given to the court under s. 66A(4) to direct the Registrar as to appropriate notice of an amended application—at [4].

Decision

His Honour made orders to ensure that parties who may be affected by the amended application be given notice by the Registrar—at [5] to [7].

Comment

His Honour's reasons for decision indicate he relied upon the power in s. 66A(4), which relates to the 'Native Title Registrar'. This means 'the Native Title Registrar appointed under Part 5' of the NTA (see s. 253) i.e. the Registrar of the National Native Title Tribunal. However, the orders as made were addressed to 'the Native Title Registrar of the Federal Court of Australia', a different entity.