

Representation by an unqualified person – s. 85

Adnyamathanha People No 1 v South Australia [2004] FCA 950

Mansfield J, 22 July 2004

Issue

Under what circumstances should leave be given under s. 85 of the *Native Title Act* 1993 (Cwlth) to allow representation by an unqualified person in a proceeding for a determination of native title?

Background

At the commencement of the hearing of an application to be joined as a party (the joinder application) to a claimant application, Brenton Richards (the person seeking to be joined) applied under s. 85 for leave to be represented by Iain Greenwood, who was not a legal practitioner. Justice Mansfield granted leave on limited terms. Subsequently, it became apparent that the joinder application was not necessary. This case sets out the reasons for the limited leave granted.

Principles governing s. 85

Mansfield J noted that:

- the exercise of the discretion available under s. 85 depends upon whether it is in the interests of the administration of justice, in all the circumstances, that a party be represented by a person who is not legally qualified;
- the interests of the administration of justice involve consideration of both that person's capacity to represent the party seeking leave and the interests of the other parties, as well as the efficient conduct of the proceedings. Therefore, the unqualified person must have the capacity to understand the nature of the court's processes and to serve the interests of the party they represent;
- representation by the unqualified person must not unduly or unfairly disadvantage the interests of other parties and 'the proposed representation must be useful, in a real sense, in the conduct of the proceedings' – at [10], citing *Rubibi v Western Australia* [2003] FCA 62 at [11], Merkel J (summarised in *Native Title Hot Spots Issue 4*) and *Harrington-Smith v Western Australia* [2002] FCA 871 at [20], Lindgren J.

Mr Greenwood's capacity

Mansfield J commented that:

- the material before the court did not demonstrate that Mr Greenwood was capable of assisting Mr Richards in any meaningful way at either a procedural or substantive level and, were it not for the timing of the application under s. 85, leave would not have been granted;
- the application was procedurally and substantially incompetent;

- similar deficiencies existed in a previous joinder application Mr Greenwood had assisted with; and
- there was nothing to indicate that Mr Greenwood had learnt from that experience or that he otherwise had the necessary skills to meaningfully assist Mr Richards—at [17] to [26].

Section 66B may be the appropriate route

His Honour also noted that, if Mr Richards was a member of the native title claim group asserting rights different from, and inconsistent with, what was being presented by those authorised to make the application, the appropriate procedure was to review the authorisation and then, depending upon the outcome of that review, seek replacement of the applicant under s. 66B—at [25]. On this point, see *Combined Dulabed and Malanbarra/Yidinji Peoples v Queensland* [2004] FCA 1097, summarised in *Native Title Hot Spots Issue 11*.

Decision

Mansfield J would not have granted leave but for the particular exigencies of the present matter and, therefore, gave leave only in the limited terms noted above. Had limited leave not been given, Mr Richards 'would simply not have had the opportunity to present his case to the Court at all', in which case 'it would have been necessary to adjourn the proceedings to give him the opportunity to seek other assistance The adjournment would have incurred extra expense and inconvenience to the other parties'. In future, however, Mansfield J would resolve any s. 85 application at a directions hearing—at [13] to [15].