Case management of claims - South West WA

Bennell v Western Australia [2004] FCAFC 338

Wilcox, French and Finn JJ, 23 December 2004

Issue

This case deals with a special regional case management conference held for 13 native title determination applications in the South West of Western Australia. One part of one of the areas subject to claim was part heard. Of particular interest are the court's comments about funding issues.

Background

His Honour Justice French had noted in an earlier case that:

> [T]he South West region of Western Australia has been bedevilled for many years with intra-indigenous conflict which has effectively prevented meaningful progress in the mediation of native title determination applications in that area. It is too early to venture any opinion on whether the first Noongar claim, which has now been filed, represents a breakthrough in this regard.... It... presents an opportunity to give new impetus to the development of a comprehensive resolution of native title issues in the *South West: Anderson v Western Australia* [2003] FCA 1058 at [24], summarised in *Native Title Hot Spots* Issue 7.

Submissions

The South West Aboriginal Land and Sea Council (SWALSC), which represented many of the relevant claimant groups, submitted (among other things) that:

- it was unable to agree to the fixing of any hearing dates, or to prepare and present a case for hearing in relation to any area under claim in the South West;
- if the matters were to proceed to hearing, the applicants would be unrepresented by SWALSC as it did not have funding or permission from its funding body to represent the applicants in litigated matters;
- progress on matters listed for trial should continue in accordance with the broadly accepted standard litigation timetable i.e. the respondents should file expert reports and a response to the applicants' outline of case, after which the Federal Court Registrar should convene a conference of experts to limit issues in dispute;
- remaining matters should continue in mediation subject to any renewed applications to remove individuals no longer authorised and to combine the claims—at [23] to [25].

SWALSC was unable to provide a priority list for hearing but indicated a preference for prioritising areas where it had the best chance of proving native title.

The state submitted (among other things) that:

- SWALSC's Strategic Plan and Funding Operation, lodged in May 2004, sought no funding for litigation;

- the history of native title claims in the South West was characterised by a lack of substantive progress brought about by numerous applications for adjournments and amendments and non-compliance with programming orders;
- the focus of the regional case management conference should be on how to progress these claims to trial via a series of separate hearings and determinations, rather than a single trial over the whole of the South West, which would be unmanageable;
- the issue of the existence and content of a single system of Noongar law and custom covering the South West should be addressed at the first trial and any findings in that matter then relied upon in subsequent cases;
- the hearings should be conducted on the basis of a preliminary question as to 'connection' under O 29 r. 2 of the Federal Court Rules—at [29] to [33].

The court was of the view that there was 'much force' in the submission by the state that there has been 'undue delay in progressing any part of the South West claims to trial' and that it should not contemplate any further delay in the trial (part heard) of the Perth Metropolitan part of the area covered by what is referred to as the Single Noongar claim—at [34].

Funding issues

The court noted that the difficulties in providing funding asserted by SWALSC seemed, at least to some extent, to be of its own making. Its application for funding in 2004 related to the funding of mediation. Although the trial of the Perth Metropolitan area claim was the subject of directions made in July 2004, no application for funding was initiated with the Commonwealth until 30 September 2004. Even then, it elicited a response which required it to address specific conditions for the grant of funds for litigation.

The court noted that:

> It is important to make the general point that the programming of native title matters...cannot be determined by the decisions of funding agencies or the views of representative bodies, the State or any other parties about appropriate priorities...[I]f it should happen that want of funding means that some applicants will be unrepresented at trial that is not a bar to proceeding with a trial although it will raise obvious difficulties in the management of the trial process—at [37].

Decision

Overall, the court formed the view that:

> [I]t is in the interests of justice that the hearing of the Perth Metropolitan area claim should proceed early in the second half 2005 at a date to be fixed. The SWALSC should, if it has not already done so, apply for litigation funding as soon as practicable.

The applications jointly referred to in South West Area 1 should continue in mediation for the time being albeit South West Area 1 will, in all probability, be a priority for hearing after the completion of the Perth Metropolitan area hearing.

The balance of the claims in the South West region which are still in the provisional docket are to continue in mediation. In the meantime, SWALSC should provide a proposed priority list of claims in the South West region which are to be progressed to trial in the event that mediation is unsuccessful—at [38] to [40].