Evidence — can it be given jointly?

Nudding v Western Australia [2002] FCA 934

Lindgren J, 23 July 2002

Issue
The question in this case was whether evidence could be given by claimants either jointly or in consultation.

Background
The applicants in the Maduwongga People's claimant application are two sisters: Anne Joyce Nudding and Marjorie May Strickland. Their application overlapped a claim that was being heard by the court and evidence in support of the Maduwongga claim in the overlapping area was about to be heard. Ms Strickland and Mrs Nudding sought leave to testify in a special way: by giving evidence either jointly or in consultation with one another. They relied upon Order 78 subrule 34(1) of the Federal Court Rules, which provides that:

- the Federal Court may, if it considers that in all the circumstances it is *in the interests of justice* to do so, receive into evidence statements from a group of witnesses, or a statement from a witness after that witness has consulted with other persons — subrule 34(1), emphasis added;
- if a statement is made by a witness after consultation with other persons, the identity of the persons may, at the direction of the court, be recorded in the transcript — subrule 34(2).

Part of the evidence given in support of the motion was that Mrs Nudding expected to have difficulty and possibly would be 'unable to give the best oral testimony' unless she could sit with her sister and 'ask for her assistance and reassurance from time to time'—at [15].

Justice Lindgren observed that this circumstance may also arise where two or more witnesses, such as the occupants of a motor vehicle involved in a collision or co-workers who witness the same event. Like Ms Strickland and Mrs Nudding, they too would have knowledge 'touching the same subject matter'—at [16] to [17].

Lindgren J was of the view that the first order sought could not be made as witnesses cannot testify jointly; a witness can testify only as an individual. In any case, his Honour found that it was not in the interests of justice to make either order sought:

> I think it is in the interests of justice that the Court be able to understand the extent of each witness's own knowledge and recollection in the usual way, without the contamination of consultation. For this reason, the motion should be dismissed—at [23].

Observations on Order 78 subrule 34(1)
At [26] to [28], his Honour expressed the following views as to the proper application of this rule:

- in the case of the reception into evidence of statements from a group of witnesses, the statements will be identifiable as those of respective individual members of the group who testify on their oath or affirmation;
- where the court allows consultation, the person consulted is not, by reason of having been consulted, a witness and is therefore not required to be sworn;
- in an appropriate case, the court might permit:
    - witnesses to stand or sit as a group while testifying;
    - those members of a group who are to testify all to be sworn at the outset and counsel for the party who calls them to question them, switching from one to another, rather than questioning one witness to conclusion before questioning the next one;
- in these circumstances, the cross-examiner should then have the option of either questioning each witness in the usual way or to do as the examiner-in-chief has done.

Lindgren J considered that these comments were consistent with the observations of Chief Justice Black in relation to O 78 r 34 in his article 'Developments in Practice and Procedure in Native Title Cases' (2002) 13 *Public Law Review* 1 at 7.

Decision

The motion was dismissed. Ms Strickland and Mrs Nudding would be permitted to sit near each other when giving evidence for 'moral support'. If counsel for the one giving evidence sought leave to have her consult with her sister, then that application would be dealt with on its merits at that time.