

Overlapping claims – splitting proceedings under s. 67

Kokatha Native Title Claim v South Australia [2006] FCA 838

Finn J, 30 June 2006

Issue

The applicant in a claimant application made on behalf of the Arabunna People sought orders in the Federal Court to ensure that the portion of their application that overlapped the Kokatha Native Title Claim would be heard in the proceedings to deal with the rest of their application. Only the State of South Australia opposed the motion.

Background

The motion arose from an ‘overlap proceeding’ created by an order under s. 67(1) of the *Native Title Act 1993* (Cwlth), which required the court to make orders to ensure that overlapping applications are ‘dealt with in the same proceedings’, at least to the extent of the overlap. In this case, the orders made resulted in the whole of the Kokatha claim and parts of the Barngarla and the Arabunna Peoples’ claim (to the extent that they overlap both the Kokatha claim and each other’s claim) being set down to be heard in the same proceedings. A third overlapping claim, the Kuyani-Wilyaru claim had been discontinued but a new application was foreshadowed. If made, it would overlap the other three claims. The common area of overlap was a relatively small (but not insignificant) area called Overlap Area 20. This was the only part of the Arabunna claim that overlapped the Kokatha claim.

On 8 September 2005, Justice Mansfield made orders under s. 67(1) to bring part of the Barngarla and Arabunna proceedings into the overlap proceeding. At that time, the Arabunna indicated that they might later seek to have that part of their claim that overlapped the Kokatha claim excised from the overlap proceedings. If the Arabunna motion was successful, all of the claims to Overlap Area 20 would have to be determined in the Arabunna proceedings.

Justice Finn was of the view that both the orders of Mansfield J and the present motion invoked the jurisdiction of the court under s. 67, noting that:

The policy informing s 67(1) is plain enough. Fully informed decision-making and finality in respect of determinations relating to the same area are central to it ... [I]ts purpose seems clearly to be tied to facilitating the orderly and efficient administration of justice where claims overlap—at [5].

Decision

His Honour dismissed the motion for (among others) the following reasons:

- Mansfield J’s orders were made to effectuate the ‘imperative’ of s. 67(1) in the context of dealing with the Kokatha claim;

- the issue of a lack of funding raised by Arabunna was common to all the claimant groups and a lack of funding could not be relied upon to ‘freeze’ or ‘paralyse’ the proceedings;
- while the Arabunna asserted Overlap Area 20 was of special significance to them, it was also part of the other claim areas and it was inappropriate at this stage to venture any view on the relative significance of the area to the rival claim groups;
- the retention of the Arabunna claim in the Kokatha overlap proceedings was both ‘desirable and necessary’ because the evidence given by all of the various claim groups in relation to Overlap Area 20 could well inform or assist in casting light on issues that might arise in relation to lands contiguous to the area where other claimant groups had overlapping claims;
- consistent with one of the policy imperatives informing s. 67(1) (i.e. informed decision-making), it did not seem to be appropriate or desirable to foreclose the opportunity of deriving possible assistance from material relevant to the Overlap Area 20 claim in making determinations in the remainder of the Kokatha overlap proceedings— at [9] to [12].