Mediation under the NTA – role of Tribunal, 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. 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*. While those mediation protocols and timetables were developed, at the time of the directions hearing in late 2006, most had not been adhered to. 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 and 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.