Evidence—preservation basis and gender restriction

Eringa No 1 Native Title Claim v South Australia [2007] FCA 182

Mansfield J, 22 February 2007

Issue
The issue in this case related to varying orders made by the Federal Court concerning the reception at trial of 'preservation evidence' which was gender restricted in relation to a claimant application made under s. 61(1) of the *Native Title Act 1993* (Cwlth) (NTA).

Background
Under s. 46 of the *Federal Court of Australia Act 1976* (Cwlth) (FCA) and O 24 r 1(1)(a) of the Federal Court Rules (FCR), Justice Mansfield heard 'preservation evidence' given on behalf of a native title claim group, including evidence relating to Aboriginal law which was, under that law, gender restricted. His Honour had previously ordered that, before 'preservation' evidence was given, each Aboriginal witness was to be informed by their solicitor of the possibility that:

- the court may set aside or vary those orders; and
- any appeal court may include female members of the judiciary.

This case deals with an application to vary those orders to stipulate that, if gender restricted 'preservation' evidence was given, and the judge then appointed to hear the proceeding was a woman, the applicant would be entitled not to adduce that evidence at trial.

Mansfield J observed (among other things) that:

- pursuant to s. 46(d) of the FCA, preservation evidence did not automatically become evidence in the hearing of the proceeding and it was not necessary or desirable for the court to make the order as proposed because it was merely declaratory of the 'uncontested operation' of s. 46(d);
- the exercise of the discretion available under s. 46(d) was guided by s. 82(2) of the NTA, which provides that the court may take account of the cultural and customary concerns of Indigenous Australians so long as to do so did not unduly prejudice any other party to the proceedings;
- the court had previously exercised its powers to ensure that such evidence was 'duly confined to those entitled to see it';
- the judge hearing a matter, whether male or female, had a role and presence which was an 'inevitable part of the exercise of judicial power' under Chapter III of the Constitution, a 'significant' point—at [7] to [9], [12] and [14] to [15].

In these circumstances, Mansfield J was of the view that declining to make the order sought would not operate as a disincentive to a person providing preservation

evidence that included gender restricted evidence, so long as the powers available to the court to ensure that evidence was properly restricted from publication were explained to the witness before they testified—at [17].

Decision

His Honour decided that simply amending the earlier orders to note that a female judge may be appointed to the hearing of the application would make any potential witness aware that the court may be constituted by a judge or judges who are female—at [17].