

Access to documents in native title proceedings

Allison v Western Australia [2007] FCA 1969

Sackville J, 12 December 2007

Issue

The issue before the court was whether to make an order allowing five members of a native title claim group access to certain documents relating to a claim brought on their behalf (along with others) under the *Native Title Act 1993* (Cwlth) (NTA). Access was sought to enable them to obtain independent legal advice as to how they should proceed. The access order was made, subject to undertakings by the relevant legal advisors.

Background

Five members of the claimant group (the movers) in the Wanmulla/Sir Samuel claim (Sir Samuel 2) sought orders from the Federal Court for access to certain documents. The area covered by the application is in the north-west Goldfields region of Western Australia. The movers sought orders requiring the applicants in the Sir Samuel 2 proceedings (other than the movers themselves) to provide for inspection and copying (among other things) all documents in their possession, custody or control relating to:

- Sir Samuel 2;
- any native title proceeding lodged after 1 September 1995 which had previously been consolidated into the Sir Samuel 2 claim; and
- any proposed new application which included or overlapped the boundaries of the Sir Samuel 2 claim.

The claimant group in Sir Samuel 2 originally consisted of the same 29 people who originally comprised the claimant group in the Tjupan Ngalia/Sir Samuel claim (Sir Samuel 1), although some members had died since the proceedings were instituted. Sir Samuel 1 related to a larger area adjacent to, and south of, the land subject to the Sir Samuel 2 claim. The Goldfields Land and Sea Council (GLSC) acted for the Sir Samuel 2 claim group and had previously refused to provide the movers with access to the documents they sought, 'at least on terms satisfactory to' the movers—at [4].

Mr Allison (one of the movers) deposed that he filed a claimant application in December 1995 on behalf of the Wanmulla people which covered the areas of the Sir Samuel 1 and Sir Samuel 2 claims. At some unidentified time, the GLSC was retained as the legal representative for the Wanmulla claim. As the result of mediation, proposals were made to consolidate various native title claims in the region and Sir Samuel 1 and Sir Samuel 2 were filed. While neither claim had progressed very far, His Honour Justice Sackville noted some relevant developments:

- in October 2005, an in principle agreement to reformulate the Sir Samuel claims was reached but (partly because of disagreements within the claimant group) it appeared that no progress had been made in implementing it;
- there was a decision by his Honour Justice Lindgren to dismiss several native title claims in the Goldfields (see *Harrington-Smith v Western Australia* (No 9) (2007) 238 ALR 1, summarised

in *Native Title Hot Spots Issue 24*) which Sackville J thought might be relevant to both of the Sir Samuel claims—at [7] to [9].

The movers acknowledged that much of the material had been created from confidential information supplied to, or collected by, the GLSC from Indigenous sources and offered undertakings to limit access, and ensure confidentiality. They accepted that some of the communications contained in the documents to which they sought access were subject to client legal privilege but submitted that:

- since they had jointly instructed the GLSC, they had the benefit of joint client legal privilege and there was no privilege between the members of the applicant group;
- consequently, each member was entitled to copies of communications to and from, and advice given by, their jointly instructed legal advisers in their capacity as such.

Those opposing the orders sought submitted that, although the movers were entitled to access to documents for ‘purposes consistent with the maintenance of’ the Sir Samuel claims, their new solicitor was not entitled to inspect or make copies of the relevant documents because access was sought for a purpose ‘collateral to the interests’ of the claim group.

Outcome

When the motion came on for hearing, Sackville J expressed doubts as to the utility of the proceedings and invited the parties to see whether agreement could be reached. Shortly before the hearing recommenced, agreement had been substantially reached. As a result, access to the documents was ordered in the terms sought by the movers. These included undertakings by the movers’ solicitor and counsel that each would maintain the full confidentiality of anything they obtained access to under the order and neither would disclose to anyone, including their clients (i.e. the movers), the whole or any part of any such document and other communication unless:

- there was an express agreement in writing to do so or a further order of the court;
- the material came into the public domain otherwise than in breach of their undertakings;
- the material was filed with any court or tribunal in connection with an application in respect of native title rights and interests or as required under compulsion of law.