Mediation conference — 'without prejudice' privilege

Waanyi People v Queensland [2009] FCA 1179

Dowsett J, 24 August 2009

Issue

The Federal Court was considering whether the descendents of a person called Minnie are, in fact, members of the native title claim group described in the Waanyi People's claimant application. The question raised here was whether the *Evidence Act 1995* (Cwlth) applied so as to allow evidence otherwise subject to a 'without prejudice' privilege to be led. The evidence was not admitted. The comment that s. 131 of the Evidence Act should not be read into s. 136A (now s. 94D) of the *Native Title Act 1993* (Cwlth) (NTA) so as to qualify the privilege found therein is of note.

Background

The National Native Title Tribunal convened a meeting in 2007 over two days where two claims by two families to be entitled to inclusion in the claim group were considered. 'In the end', it was decided that Minnie's descendents were not so entitled. Parts of the meeting were held as a claim group meeting and attended only by people already recognised as members of that group. Other parts were mediation conferences under s. 136A(1) (now see s. 94D) held between the parties in dispute, 'namely those espousing the cause of Minnie's descendents and the accepted members of the claim group'. Pursuant to s. 136A(4), evidence may not be given and statements may not be made in proceedings before the court 'concerning any word spoken or act done at a conference' held pursuant to s. 136A(1) unless the parties agree otherwise. In this case: 'Such agreement has not been forthcoming'—at [2].

Counsel for Minnie's family sought to lead evidence of what happened at the meeting. Reliance was placed on s. 131(2)(g) of the Evidence Act, which is 'primarily concerned with protecting without prejudice discussions' i.e. exchanges 'designed to bring about settlement of litigation'. It allows evidence of such exchanges to be adduced if 'other evidence is likely to mislead' the court unless evidence of the 'without prejudice' communications is adduced. The concern was that evidence given in cross-examination might mislead the court into an inference that nobody spoke 'in favour of' the Minnie family or 'took the Minnie family's part' unless evidence of what happened during parts of the meeting that were privileged was given—at [3] to [5].

Decision

His Honour was inclined to think the evidence may not be received because there was 'no cogent argument for implying the terms' of s. 131 of the Evidence Act into s. 136A of the NTA 'so as to qualify the general prohibition in the absence of the agreement

contemplated by s. 136A(4)'. However, the court refused to receive the evidence because the 'situation contemplated by s. 131(2)(g) ... simply did not arise'. There was no risk that the evidence already adduced (or an inference from that evidence) was likely to mislead the court. Dowsett J noted that:

> One might infer that there was no support for the Minnie family at the claim group meeting [to which s. 131 did not apply] because it was clear from what had occurred in the privileged parts of the proceedings that there was a clear majority against acceptance of them into the group so that there was no point in taking the matter further. That does not exclude the possibility that people spoke in favour of the Minnie family—at [4] to [5].