Murray v Western Australia (No 3) [2010] FCA 1455

McKerracher J, 21 December 2010

Issue

This case deals with programming orders for the Yilka claimant application, which covers the area previously subject to the Cosmo-Newbury claim which was heard and dismissed by Lindgren J in *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (Wongatha). An appeal from the decision to dismiss the Cosmo-Newbury claim is still on foot (Cosmo appeal).

Background

The Yilka claim was in mediation but an order was made pursuant to s. 86C(1) that mediation cease. At the same time, orders programming the matter to trial were made. Justice McKerracher noted that: 'It seems there is no prospect at this stage of the matter being resolved by agreement'. The applicant put forward draft programming orders, most of which were agreed. It was also accepted that the pleadings, in accordance with requirements of s 37N of the *Federal Court Act 1976* (Cwlth), 'serve the purpose of identifying the real and substantive issues, *bona fide* in dispute'—at [3], [9] to [10]. The reasons for decision summarised here deal with the main areas of disagreement between the parties.

Section 67

According to the court, s. 67(1) had to be considered because the Yilka proceeding and the Cosmo appeal cover the same area. Subsection 67(1) provides that:

> If 2 or more proceedings before the Federal Court relate to native title determination applications that cover (in whole or in part) the same area, the Court must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding.

His Honour agreed with Finn J's finding in *Kokatha Native Title Claim v South Australia* [2006] FCA 838 at [5] that s. 67(1) requires 'facilitating the orderly and efficient administration of justice where claims overlap'. According to McKerracher J, the best way to achieve those objectives in this matter was to adjourn the Cosmo appeal until the outcome of the Yilka proceedings—at [8].

Comment on application of s. 67

On one view, there is no native title determination application that overlaps the Yilka application area because the Cosmo-Newbury application was dismissed. If this is correct, then s. 67(1) has no application. On the other hand, if the Cosmo appeal is a proceeding before the court that relates to a native title determination application (e.g. the Cosmo-Newbury application) and so s. 67(1) is attracted, then (again with respect) the orders made in this case do not appear to 'ensure' those applications 'are dealt with in the same proceeding'. However, assuming s. 67(1) is attracted, it is difficult to envision how this statutory direction could be fulfilled in this case other than to take the pragmatic stance adopted by his Honour.

Yilka claim should be resolved before the appeal is finalised

It was likely there would be 'a considerable overlap in the evidence sought to be led' if both the Cosmo appeal and the Yilka claimant application proceeded at that time. Therefore, his Honour found the Yilka proceeding should be determined first, accepting the Yilka applicant's submissions that:

- determining the Yilka claim before the Cosmo appeal was finalised would remove (or limit) the duplication of evidence;
- the Yilka claim was different from the claim made in the Cosmo-Newbury application because the former was a claim for individual native title rights and interests and the latter a claim for group rights and interests—at [4] and [6].

Timing of amendments to Form 1

The applicant submitted that amendments to the Form 1 (which it was acknowledged would be required) should be made after pleadings were completed. The state argued the amendments should be made when points of claim were filed. It was found that, when the applicant submitted its points of claim, it 'should at least indicate in writing' the parts of the Form 1 to which the respondents should, or should not, have regard in responding to those points of claim—at [12] to [17].

Points of claim and verification of pleadings

It was agreed that the pleadings should identify and narrow the issues but there was disagreement on particular points. The state argued (and the court accepted) the applicant should furnish:

> [A] statement of facts and inferences which are said to arise from facts and contentions ... on which the applicant relies in seeking the making of that determination be added to the pleading requirement—at [21].

Restriction on raising preliminary matters

The applicant sought orders modelled on O 52 r 18 of the FCR which deals with challenges to the competency of an appeal, placing certain constraints on a respondent wishing to raise any issue going to 'the viability of the proceeding' or any issue that relied on findings or orders made in relation to the Cosmo-Newbury application or the Wongatha proceedings. As McKerracher J noted:

> The applicant argues that the State should be required at the close of pleadings to inform the Court as to whether it will make such an application. Similarly, if pleadings are further amended, a similar requirement should be imposed—at [27].

While this much could be accepted, the court refused to make the orders because:

> [I]t is not clear that an applicant that may have such concerns as to its vulnerability is entitled to bind the other parties and the Court to make a final determination on such a matter at a time or stage in the proceedings of its choosing. In particular, that is so in the present situation when the possibility of a subsequent further amendment of the applicant's claim has not been excluded. ... [T]here is no basis upon which the respondents should be prevented from relying on particular principles or the applicant should be protected from the operation of those principles by the imposition of a pre-emptory deadline—at [28].

Conference of experts

It was agreed that the court's Native Title Registrar should convene a conference of the expert witnesses from time to time as considered appropriate by the Registrar and limited to experts of a particular discipline. The state proposed that:

- the conference should not be convened under O 34A r 3(2) of the *Federal Court Rules* but should be 'intended to promote the informal development of experts opinions through interchange between them';
- the Registrar would produce a report 'for the use and guidance of the experts in finalising their reports' which identified the matters and issues on which the Registrar perceived the experts to be agreed and those on which the Registrar perceived they differed;
- 'in the interests of promoting frank discussion', any such report would not be received as evidence in the proceedings or referred to in the experts' final reports, be put to an expert on cross examination or 'directly or indirectly be made the subject of a notice to admit facts'.

McKerracher J made orders essentially as proposed by the state because this would:

- 'guard against a misunderstanding as to the approach to be taken in this conference';
- encourage 'the free exchange of ideas between experts ... before final reports are filed and served';
- ensure the conferences do not become 'an opportunity to lay groundwork work for cross-examination, the securing of admissions or otherwise gaining procedural advantage'
- make it clear that 'the report of the Registrar is not to be used by the Court but is to guide the experts in finalising their reports'—at [42].

Applicant's evidence in chief – written statements required

The state argued that:

> [T]he process favoured by the applicant appears to be one in which the case will gather specificity as it advances towards the completion of the oral evidence which it is proposed to be given in remote places over several weeks. Summaries that do not adequately capture the detail of the evidence, even if provided together and with ample opportunity for them to be understood as a whole before the commencement of the exercise, would place the respondents in a position of not really knowing what evidence should be treated as significant or even momentous when taken with other evidence to be given later—at [50].

The applicant argued that:

- reducing the evidence in chief of all indigenous witnesses to writing 'would run to hundreds of thousands of dollars at least' and that it would 'take much longer to prepare evidence to be led orally';
- the state's proposal for 'the election of evidence to be led orally would add significantly to the applicant's costs';
- there was 'an appearance of unfairness and discrimination in that lay witnesses of the respondents will not be subject to the discretionary requirement of evidence to be led orally' but, rather, be subject to the ordinary 'objection' regime;
- further, the state's proposal was arguably unfair in that respondents 'would have the advantage of all the evidence in writing well in advance of the hearing at the considerable expense of the applicant'—at [47].

His Honour adopted the regime proposed by the state, noting that:

> As witnesses will have to be prepared, in any event, completion of a written statement will not greatly increase the cost or delay of case preparation. It will add significantly to the efficiency of the hearing where the cost to a greater number of people will be a real consideration—at [53].

Decision

Having resolved all of 'the debates about those matters so that a final form of a minute for directions until trial could be agreed and made', the court left it to the parties 'to file a consent order reflecting these reasons'—at [64].