Mediation under s. 86A — Tribunal's role

Frazer v Western Australia [2003] FCA 351

French J, 17 April 2003

Issue

This decision relates to directions made by the Federal Court that reflect 'the proper role of the Tribunal in all phases of the establishment and management of the negotiation timetable' for the mediation of a claimant application. Justice French also took the opportunity to indicate that he wanted to see a more systematic and focussed approach to the progression of native title claims than had occurred to date.

Background

French J was concerned that, for the past three years, negotiations in relation to many of the claimant applications covering the Central Desert region of Western Australia had generally taken place between the applicants and the State of Western Australia without the active involvement of the National Native Title Tribunal. All of the applications concerned had been referred to the Tribunal for mediation under s. 86B of the *Native Title Act 1993* (Cwlth) (NTA). Submissions were sought from the parties and the Tribunal as to 'the proper role of the Tribunal in all phases of the establishment and management of the negotiation timetable in the claim'.

Submissions

Submissions made on behalf of the applicants contended 'surprisingly, that the NTA does not confer any statutory role' on the Tribunal with respect to the timetabling of negotiations. The submission was that s. 86F of the NTA was the relevant provision, pursuant to which the parties may request assistance with negotiations from the Tribunal. His Honour rejected this submission as being unsustainable in the light of the provisions of the NTA such as ss. 86A and 86B—at [10] to [13].

The state filed affidavits that, among other things, indicated its priorities in dealing with native title applications and made submissions including that:

- parties could communicate directly provided the Tribunal was kept informed of the communications to the extent necessary to fulfil any requirements to report to the court;
- mediation aims to facilitate agreement on some or all of the matters that a determination of the native title must include. The state needs to be satisfied that there is a 'sufficient evidentiary basis upon which to found a negotiated outcome';
- prior to the evidentiary basis being accepted by the state, the Tribunal can monitor progress and keep other parties informed of progress or chair meetings to deal with intra-indigenous issues arising out of overlapping claimant applications;
- it is only once the state 'is satisfied from its own assessment ... that connection can be made out that mediation of other matters ... in s. 86A(1) could proceed, facilitated by the Tribunal—at [14] to [18].

WMC Resources submitted that negotiations about connection and evidentiary materials are not part of the mediation process and that the Tribunal's involvement was not necessary unless the parties requested mediation. The pastoral interests submitted that it was open to the parties to negotiate their own agreements without Tribunal assistance, provided the state and the applicant provide progress reports to the other parties—at [19] to [21].

The Tribunal did not make submissions but Deputy President Chaney provided the court with two mediation reports, stating (among other things) that the Tribunal's role is the management of the mediation process, which can cover the production and assessment of connection material. It was also pointed out that there may be advantages to involving the Tribunal in this process. For example:

- the member has the power to limit the parties to a mediation conference: see s. 136B(1);
- section 136F empowers the member to make directions about the use and distribution of a connection report if it is tabled at a mediation conference;
- section 136A mandates that things said and done at a mediation conference are without prejudice. There is no such statutory protection available in relation to negotiations that take place outside of mediation conferences—at [22] to [23].

Purpose of mediation confined by s. 86A

French J noted that the 1998 amendments to the Act introduced a 'far more detailed regime' for mediation of applications made under s. 61(1) of the NTA. Section 86 mandates the referral of these applications (which includes claimant applications) to the Tribunal for mediation unless the court orders otherwise.

The new regime also confined the purpose of Tribunal mediation of applications referred under s. 86B(1) to assisting the parties to reach agreement on some or all of the following matters:

- whether native title exists or existed in relation to the area covered by the application;
- if native title exists or existed in relation to that area:
    - who holds the native title;
    - the nature, extent and manner of exercise of the native title rights and interests in relation to that area;
    - the nature and extent of any other interests in relation to the area;
    - the relationship between those rights and interests (taking into account the effects of the NTA);
    - to the extent that the area is not covered by a non exclusive agricultural lease or a non exclusive pastoral lease–whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others. (As his Honour notes, different matters must be covered in relation to an application for a determination of compensation)—at [25].

Role of the Tribunal

His Honour found that:

- any suggestion that the provision of connection evidence is outside of or antecedent to the mediation process should be rejected;
- a referral under s. 86B is a referral to the Tribunal and it has a central role in mediation. The fact that the NTA mandates the referral of all native title determination applications to the Tribunal for mediation (unless the court orders otherwise) supports this proposition;
- the provisions of Div 4A relating to mediation conferences are ancillary to the referral of applications to the NNTT for mediation and do not define the limits of the Tribunal's role;
- the Tribunal has responsibility for undertaking mediation of all aspects of the application that are relevant to the purposes set out in s. 86A, including:
    - the development of a detailed negotiation protocol;
    - the exchange of information between the parties;
    - the identification of issues to be resolved; and
    - the times and venues for holding mediation conferences in furtherance of the mediation process;
- the court needed to be satisfied that any mediation proposal put to it demonstrated that there was a likelihood that the parties would reach agreement on facts relevant to some or all of the matters set out in s. 86A(1)—at [26] to [28] and [32].

Statutory mediation process should be timely

His Honour said that:

- Parliament's intention that mediation should take place in a timely fashion is reflected in s. 86C, pursuant to which, at any time after three months have elapsed since mediation commenced, any party can seek an order that mediation cease;
- while there are very substantial resource burdens placed on all parties, the court has a responsibility to ensure that the mediation process provided for s. 61 applications made under the NTA is applied in a timely fashion; and
- the court wanted to see a more systematic and focussed approach to the progression of native title claims than had occurred to date—at [27] to [28] and [31].

Setting priorities

French J found that:

- it is not open to any party, be it the state, a native title representative body or a respondent, to unilaterally announce priorities for dealing with claimant applications that have been referred to the Tribunal for mediation;
- any unilateral action by any party which is not acceptable to the others may result in a breakdown of the mediation process, leading to an order that mediation cease;
- it is legitimate for the Tribunal and the parties to:
    - have regard to resource and other practical constraints under which each of them operates;
    - develop protocols and timetables to provide for bilateral negotiations between parties with reports back to the Tribunal, provided it is understood that these bilateral discussions are an element of the mediation process

undertaken by the Tribunal in exercise of its statutory function and that the Tribunal may be required to provide a report to the court in respect of such negotiations;
- it is appropriate to develop regional timetables that stagger mediation to reflect agreed priorities—at [28] to [29].

Connection evidence

The provision of connection evidence by way of a report and the assessment of that report by the state appeared to be 'major factors' leading to the delay of the mediation process. French J suggested that this might be dealt with more expeditiously by the court hearing 'important elements of connection evidence from the applicants themselves' for the purposes of preserving that evidence. This would give the applicants 'an opportunity to tell their story ... at an early stage'. Two avenues for doing this were noted:

- referral by the Tribunal under s. 136D(1) of a suitably framed question of fact for a determination by the court under s. 86D;
- the court directing the hearing and determination of such issues—at [30].

In both cases, the court could determine the rights and interests of the native title claim group in all or part of the area covered by the application, without necessarily making reference to questions of extinguishment and without the need for tenure searches or histories—at [31].

A third option was also canvassed, where mediation would be conducted by either the court or the Tribunal in which early neutral evaluation (ENE) was used as an aid to mediation. The evaluation could have regard to connection material or evidence taken or a determination made in the circumstances noted above—at [31].

Early neutral evaluation

When handing down this decision, French J described ENE as involving a person of high standing and with suitable expertise 'who can provide a confidential, non-binding assessment of the strengths and weaknesses of the respective cases of the parties to assist in assessing their situations when they go on to re-enter the mediation process': see transcript dated 17 April 2003.

Decision

French J made orders that the applicant, any overlapping applicants and the state, in conjunction with the Tribunal, prepare a program for mediation of the applications concerned over a period of 12 months commencing 1 October 2003. The mediation program, if agreed, must be lodged with the court and is to include:

- the specific issues to be negotiated;
- a detailed timetable, including proposed meeting dates and venues set in a regional context; and
- an outline of a negotiating protocol to be adopted by the state and the applicants.

The program must be made available to the other parties on request. If the program cannot be agreed within the timeframe set by the court, then the applicant and any

other interested party would be required to show cause why the matter should not be referred to a substantive docket judge. Similar directions have been made in approximately forty applications in Western Australia.

French J also directed that:

- the applicants identify any persons who, in the applicant's opinion, should have their evidence taken in order to preserve it; and
- the applicants, the state and any other respondent wishing to do so are to discuss with the Tribunal the definition of any questions of fact that may be referred to the court for determination.