Mediation of claimant application — deferral sought

Jones v South Australia [2003] FCA 538

Mansfield J, 30 May 2003

Issue
The question in this case was whether orders should be made allowing for limited mediation in respect of a claimant application because a state-wide Indigenous Land Use Agreement (ILUA) strategy for dealing with native title was on foot.

Background
The representative body for South Australia, the Aboriginal Legal Rights Movement (ALRM), sought an order that would severely limit the extent of the Federal Court's referral of a claimant application to the National Native Title Tribunal for mediation under s. 86B of the *Native Title Act 1993* (Cwlth) while a state-wide ILUA strategy for dealing with native title was being pursued. The limited issues in respect of which the motion sought an order for referral under s. 86B related to:

- the resolution of overlapping claims;
- issues relating to various licences;
- the identification of areas where extinguishment was confirmed under the state's native title legislation; and
- the identification of the nature and extent of non-native title rights and interests.

Justice Mansfield noted that:

- subsection 86B(1) obliges the court to refer every application to the Tribunal for mediation unless an order is made under s. 86B(2) that there be no mediation in relation to the whole of the proceeding or a part of the proceeding; and
- the intent underlying the motion was that all claimant applications within South Australia not be referred for mediation under s. 86B while the state-wide ILUA strategy was being pursued.

The motion was opposed by various pastoral parties.

Power of court to defer mediation in relation to part or all of a proceeding
In finding that the court had the power to defer mediation under the NTA in respect of some parts or all of a proceeding, Mansfield J noted that:

- the broad scope of the matters set out in s. 86A confirms that the court may, if appropriate, refer a particular part of a proceeding for mediation from time to time;
- the expression 'a part of the proceeding' in s. 86B means simply 'an issue or any issue which arises in the proceeding';
- the requirement in s. 86B(1) that referral to mediation be made 'as soon as practicable' does not impose an obligation to refer to mediation in any narrow

sense. The issue of practicability is a matter for the court and may encompass a deferral of mediation—at [14].

State-wide ILUA Strategy

Mansfield J noted that the applicants, the state, the ALRM and peak bodies representing mining and pastoral interests have developed, and are implementing, a strategy for the resolution of the major native title issues in South Australia through the negotiation of indigenous land use agreements separate from, and outside of the framework for, mediation by the Tribunal—at [16].

In considering whether it was appropriate to make the orders sought, Mansfield J considered the strategy and its progress in some detail, including the fact that:

- it had already produced a number of significant initiatives which may provide a very useful vehicle for further progressing resolution by agreement of the subject application and other claimant applications; and
- three sets of pilot project negotiations were on foot that were intended broadly to cover the areas of pastoral land, minerals exploration, national parks and other protected areas, local government and future acts and fishing and sea rights—at [23] to [31].

His Honour noted that:

- while the achievements to date under the ILUA strategy were significant, they were made at the 'macro' level;
- only one of the pilot project negotiations was relevant to the application, with those negotiations being relevant only to the pastoral party supporting the motion;
- the opposing pastoral parties had not participated in the pilot negotiations, nor been asked to do so and were not privy to details as to the content or progress of those negotiations;
- there was no basis for concluding that the pilot projects will progress in a speedy fashion and that although the strategy had been in place for some time, there was 'no clear light at the end of the tunnel'; and
- there were difficulties with resources, time and expertise and that the resolution of native title determination claims involves complex and extensive issues—at [32] to [33].

Mansfield J observed that the motion, if granted, carried the assumption that it is appropriate for those who are parties to the application but not directly involved in the pilot program to simply abide the course of development of the strategy, even if they are anxious for the claim to be heard so that their position in respect of the application is resolved—at [33].

With regard to the benefits of the strategy as a quicker and cheaper alternative to litigation, it was said that those benefits are also available via the mediation process contemplated under the NTA:

> It does not follow that such benefits should be sought to be achieved by a form of mediation outside that contemplated by the NT Act and at the exclusion of certain parties

> from the process even if there is a real prospect that ultimately forms of template agreements may be able to be achieved which would be available to the other parties in the litigation and in other applications—at [44].

The proposal put to the court would, if accepted, give responsibility, in the first instance, to 'peak bodies' rather than to the individual litigants. It was based on an assumption that the individual litigants would then 'accede to agreements proposed on their behalf to which they have had no direct input'. Accepting the proposition would remove:

- the entitlement of the parties to the litigation to progress the claims to finality;
- the function of controlling the timing of the progress of the proceedings from the court.
- each individual party's capacity to participate in the process of mediation—at [44].

Role of the Tribunal in mediation

Mansfield J found that the orders sought did not pay sufficient regard to the central role of the Tribunal in the mediation process under the NTA. His Honour agreed with and adopted the findings by Justice French in *Frazer v Western Australia* [2003] FCA 351 (summarised in *Native Title Hot Spots* Issue 5) as to the Tribunal's role in this context—at [36] to [37].

His Honour noted the proponent parties' acknowledgment that:

- the Tribunal has the resources and expertise to deal with matters such as the limited issues;
- until overlapping claim issues are resolved, there will be little chance of reaching agreed outcomes (by mediation or private negotiation under the strategy); and
- issues such as extinguishment and the identification of the extent of claimed rights and interests, are matters 'which need to be clarified ... before agreements can be formalised'—at [34].

Mansfield J expressed the firm view that mediation by the Tribunal pursuant to s. 86B and the progress and successful implementation of the strategy were not mutually exclusive or conflicting processes. It was noted that:

- the purpose of mediation was the same as the objective of the state-wide ILUA strategy and the Tribunal was unlikely to impede or impair the progress of that strategy; and
- it was unclear why the mediation power of the Tribunal should be inhibited because the strategy was being pursued—at [38] to [41].

His Honour took the view that referral to the Tribunal for mediation would address the interests of those parties to claimant applications who were not directly involved in the strategy and who wished the claim to proceed in the normal manner—at [39] and [40].

Decision

The motion was adjourned for further hearing. However, Mansfield J made it clear that the court did not accept that it should order that there be only limited mediation

as a matter of principle because of the state-wide ILUA strategy. It was noted that whether the court should refer the whole or part only of a proceeding to the Tribunal is to be considered on a case-by-case basis, having regard to the particular circumstances. It must ultimately be borne in mind that the purpose of mediation is to assist the parties to reach agreement on some or all of the issues which arise in the proceeding—at [48].