Application to vacate Wongatha trial — lack of funding

Harrington-Smith v Western Australia (No 6) [2003] FCA 663

Lindgren J, 26 June 2003

Issue
The applicants sought to vacate programming orders for the fourth and final tranche of hearing dates and for the hearing to be adjourned 'until further order of the Court'. Most respondents opposed the motion. The issue was whether a complex case that had significant implications for other proceedings and that was already well advanced in hearing should continue to a conclusion if the applicants faced the prospect of being left without a legal representative due to a lack of funding.

Background
Both the applicant for the 'Wongatha People' and the applicants in four overlapping claimant applications were represented by the Goldfields Land and Sea Council (GLSC). These applications are not in 'competition' with each other. However, a further four overlapping claims were in 'competition'. Justice Lindgren was hearing the Wongatha application, along with the others mentioned to the extent of their overlap with the Wongatha application, as required under s. 67 of the *Native Title Act 1993* (Cwlth) (NTA).

This proceeding is the first in the so-called Goldfields cases. The Wongatha People are said to be part of the Western Desert bloc. Parts of the area in question have been the subject of numerous claimant applications since 1994 and many hundreds of right to negotiate matters.

The Wongatha application was chosen to be heard first both because of the numerous interests involved and because of its likely precedent value in relation to other claimant applications in the area. The proceeding had already occupied approximately 65 hearing days and considerable oral and documentary evidence had been given. The fourth and final part of the hearing was fixed for six weeks commencing 4 August 2003.

The GLSC had relied exclusively upon Commonwealth funding through the Aboriginal and Torres Strait Islanders Commission (ATSIC) under ss. 203B and 203BB of the NTA.

The Wongatha applicant submitted that funding from ATSIC for further legal representation in the proceeding was not available at present. The GLSC presented extensive affidavit evidence to that effect. ATSIC was assessing an application for further funding at the time of the hearing of this application to vacate. A decision

was expected only one working day before the scheduled resumption of the hearing—at [12] to [31].

Points in favour of an indefinite adjournment
Lindgren J noted that, in the event of the matter proceeding without ATSIC funding, the applicants would be forced, through no fault of their own, to become self-represented litigants. This would be unsatisfactory, given the complex nature of the case—at [32].

Points against an indefinite adjournment
On the other hand, his Honour noted that, if the orders sought were made:

- the applications would 'hang over the heads' of all other parties and the applications of the four native title respondents would be at a standstill;
- the great difficulty in obtaining another bloc of six weeks for further hearing dates would mean, when time reserved for judgment was included, that at the very least there would be no decision before 2005 and no litigation 'should linger on in that way';
- the longer it takes to finalise the case, the greater the risk that witnesses will cease to be available;
- other native title applications in the Western Australian Goldfields are dependent on the conclusion of this proceeding; and
- there would remain great 'uncertainty' as to whether, and where, native title exists in the application area, the content of that native title and who holds it, which would have implications for the right to negotiate regime and other future act processes—at [34] to [41].

Extent of disadvantage to the applicants if they were unrepresented
His Honour analysed the extent of possible disadvantage as follows:

- the voluminous tenure documents to be tendered by the State of Western Australia in relation to extinguishment of native title could be analysed whenever legal representation was obtained in the future;
- the applicants would not be 'greatly disadvantaged' during the conclusion to the cross-examination of three Indigenous witnesses;
- it was 'difficult to believe' ATSIC would decline to fund the attendance of the applicant's expert witnesses;
- the 'hot tub' method of giving expert evidence adopted in this matter would still enable the applicant's expert witnesses to give useful evidence; and
- cross-examination of witnesses by the applicant on extinguishment issues was more problematical but the court would ensure what clarity in testimony it could, whilst hoping that ATSIC funding would come to the rescue—at [43] to [47].

Decision
The notice of motion was dismissed, with his Honour noting that it was best that the hearing proceed and problems be overcome as they arose, with the court taking a more interventionist approach. Lindgren J again urged the parties to consider mediation.