Programming orders, separate representation — Barkandji

Johnson v Minister for Land and Water Conservation (NSW) [2003] FCA 981

Stone J, 17 September 2003

Issue
This decision relates to programming orders in relation to mediation similar to those made in *Frazer v Western Australia* [2003] FCA 351 (*Frazer*), summarised in *Native Title Hot Spots* Issue 5. The matter of separate representation for members of the group making up the applicant representation is also considered.

Background
Two claimant applications, Barkandji (Paakantyi) People #6 and Barkandji (Paakantyi) People #7, were made under the *Native Title Act* 1993 (Cwlth) (NTA) in 1997 and have been the subject of ongoing intra-Indigenous disputes resulting in attempts to have the persons named as the applicant separately represented. In particular, attempts have been made for Dorothy Lawson and Philip Lawson to be represented by Mark Dengate (who is not legally qualified), with the other applicants to be separately represented. The applications were referred to the Tribunal for mediation under s. 86B of the NTA in July 2001, with a request that the mediation focus initially on the resolution of intra-Indigenous disputes. The disputes were not resolved through mediation.

On 19 August 2003, New South Wales Native Title Services Ltd (NSWNTS) filed notices of motion seeking dismissal of the applications or, in the alternative, orders along the lines of those made in *Frazer*. The motions were filed with the agreement of members of the native title claim group following a meeting of that group on 28 July 2003 (the meeting) at which the fact that the claims were crippled by the lack of appropriate representation for the group was considered. The Lawsons and Mr Dengate were not present at that meeting.

Interlocutory orders
Justice Stone made interlocutory orders that:
- those named as the applicant jointly nominate a legally qualified representative no later than 1 October 2003;
- the applicant, the State of New South Wales and NSWNTS, in conjunction and consultation with the Tribunal, prepare a program for the negotiation and mediation of the application over a period of 12 months commencing 30 October 2003; and
- in the event that either a mediation program could not be agreed by 30 October 2003 or a nomination for legal representation is not received by 1 October 2003,

> those named as the applicant in these matters and other interested parties to show cause why the application should not be dismissed.

Her Honour concluded that both the claim group and the court would benefit from the appointment of a legally qualified person to represent the applicants, noting that, unless the applicant had professional representation, it would be impossible to both resolve the many procedural difficulties that beset the applications and restore the substantive issues—at [16].

The court was prepared to make the programming orders sought by NSWNTS for the same reasons French J expressed in *Frazer*, namely that the court is 'concerned that there be a more systematic and focussed approach to the progression of native title claims than has occurred up to this point'. Her Honour noted that the claimant group would be advantaged by the focussing of all the parties' minds by means of the mediation program—at [17].

The court was not prepared to dismiss the applications because the programming orders had the capacity to give clear direction to the claims for the first time since their inception — at [18].

Stone J noted that:

> [T]he attempts to have the applicants separately represented revealed a fundamental misunderstanding of the role of applicants in native title determination applications. Such applicants are representatives of the claimant group; they have no personal interest other than as members of the claimant group and for this reason their interests do not differ from each other or from the claimant group and separate representation is inappropriate and unacceptable—at [8].