Amendment to combine — Perth metro and Single Noongar claims

Wilkes v Western Australia [2003] FCA 1206

Wilcox J, 9 October 2003

Issue
This decision relates to orders for the combination of two claimant applications pursuant to s. 64(2) of the *Native Title Act 1993* (Cwlth) (NTA), together with programming orders for trial.

Background
The claimant applications dealt with in decision were:

- a claim by Richard Wilkes and others within or near the Perth metropolitan area (WAG 142 of 1998, the Wilkes claim); and
- a recent claim by Anthony Bennell and others on behalf of the Noongar People (WAG 6006 of 2003, the single Noongar claim) that apparently overlaps the Wilkes claim.

On 2 October 2003, in *Anderson v Western Australia* [2003] FCA 1058 (*Anderson*, summarised in *Native Title Hot Spots* Issue 7), Justice French made orders to combine certain other claimant applications with the single Noongar claim. These orders included the preparation of a detailed program for the mediation and negotiation of the combined applications. There was no real opposition to the motions to combine, the issue being the manner in which the combined application would proceed to its earliest determination.

Decision
Justice Wilcox ordered that:

- leave be given to amend WAG 142 of 1998 pursuant to s. 64 of the NTA so that it is combined with and included in WAG 6006 of 2003;
- leave be given to amend WAG 6006 of 2003 pursuant to s. 64 of the NTA so that it is combined with and included in WAG 142 of 1998;
- in each case, the amended application be in the form of WAG 6006 of 2003;
- both applications be conducted as one application, with WAG 6006 of 2003 to be the lead application.

In relation to the progress of the combined application, his Honour noted the importance of mediation under the NTA and considered it desirable to allow a reasonable opportunity for further mediation of that part of the combined application as relates to the Perth area—at [17] and [24].

Wilcox J ordered that:

- subject to any contrary order by a judge, the part of the application over Perth be heard in a separate proceeding to commence during the first week of October 2004; and
- the directions made by French J in *Anderson* apply in respect of the Perth area.

His Honour also made certain programming orders to facilitate the hearing of the Perth area of the claim.

Comment

The approach taken by Wilcox J in respect of the motions to combine differs from that generally taken by the court, which is that only one of the applications is amended so as to combine it with the others. In this case, his Honour made an order to amend each application to combine it with the other. In *Bropho v Western Australia* (2000) 96 FCR 453; [2000] FCA 1, French J said:

> It is important to bear in mind that s 64 of the Act treats combination as a species of amendment of one of them. That is to say that an application can be amended by combining it with another application or applications... . Amendment by combination must be amendment of one application by combination with others. *It is not amendment of all of them*. The latter characterisation is a prescription for chaos—at [25], emphasis added.

In *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [6], the Full Court of the Federal Court referred to and endorsed French J's views on this issue. Wilcox J appears not to have taken this view.