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Arnold Franks & others v State of Western Australia & others *[2006] FCA 1811*

Facts

This case is concerned with court supervision of mediation referrals to the National Native Title Tribunal (the Tribunal). While the role of the Federal Court is unique in relation to native title mediations the case illustrates broader principle relating to the role of judges in administering and supervising the mediation process.

The proceedings arose out of the extensive delays in the progress of native title determination applications in the Geraldton and Pilbara regions of Western Australia. The relevant facts are as follows:

- Native title applications were made with respect to the Geraldton and Pilbara regions. The Geraldton claim involves 16 applicants, while the Pilbara claim involves 24 applicants.
- French J made orders providing for the development of mediation timetables. These timetables involved the applicants preparing a program setting out a schedule for the exchange of information and specific issues to be negotiated. The timetables have not been adhered to.
- 1 August 2006: Directions given to the representative bodies for Geraldton and Pilbara regions, and the Yamatji Land and Sea Council, to provide a report at the adjourned directions hearing on the feasibility of a single connection report covering a number of applications in the area.
- 13 December 2006: Yamatji Land and Sea Council filed a letter with the Court to explain the delay in progress of the native title applications in the Pilbara region. Yamatji identified staff shortages as the reason behind this delay.
- 15 December 2006: Yamatji Land and Sea Council filed a letter with the Court to explain the delay in progress of the applications in the Geraldton region. Yamatji also identified staff shortages as the reason behind this delay.
- 15–18 December 2006: The Native Title Tribunal made a report to the Court with respect to delays in the mediation process. This report included proposals for directions in the Geraldton and Pilbara regions. The Tribunal requested the Court to consider replacing the mediation protocols with programming orders if the regional applications were not resolved in accordance with the agreed timeframes.
- 21 December 2006: the case was brought before French J in the Federal Court.

Issues

This case is an interesting illustration of the problems of delay that have arisen in mediation of native title disputes, particularly in Western Australia. French J identifies this chronic problem as emanating from:

> ... the overlaps between native title determination applications and the preparation, by or on behalf of applicants, of materials sufficient to satisfy the State Government of the relationship with the area of land or waters under claim necessary to support a native title determination.[1]

These are known as 'connection' reports.

The main issue in this case was whether the Court can, and should, amend the negotiated mediation timetable to encourage the progress of the native title applications. Therefore, the questions that needed to be answered were:

1. What is the extent of the Court's supervisory role in relation to mediations conducted under the auspices of the Tribunal?

2. To what extent are the applications in the Geraldton and Pilbara regions delayed?

3. Should the Court replace the agreed mediation protocols with programming orders?

4. Should these programming orders constitute the draft orders proposed by the Native Title Tribunal?

Arguments

The Tribunal report dated 15–18 December 2006 highlighted significant non-compliance with the mediation protocols agreed to between the State and the various representative bodies. It reported that six of the nine Geraldton applications that included a mediation protocol had not been complied with. Additionally, there had not been compliance with 10 of the 17 Pilbara applications that had included a mediation protocol.

The Tribunal argued that if these two regional disputes are to be settled within a reasonable timeframe, 'the parties must adopt a more rigorous adherence to the protocols.' They subsequently submitted that this non-compliance should be addressed by the Court by replacing the protocols with programming orders.

The Tribunal offered draft orders for applications grouped according to sub-regions in an attempt to expedite the determination of the applications. These orders included revised mediation timetables to facilitate:

- greater utilisation of the Tribunal in the resolution of overlaps
- more intensive mediation of key strategic applications
- increased commitment to adhere to mediation protocols.

The Yamatji Land and Sea Council, on behalf of both the Geraldton and Pilbara regions, argued that court orders would not assist in the resolution of overlapping applications. The reason behind the delays has been inherent staff shortages, which have left the Yamatji to operate at a significantly reduced capacity to process the complicated, multi-applicant and overlapping claims.

Additionally, Yamatji expressed scepticism about the utility of the Tribunal proposals because 'the connection reports were still under preparation or research was still pending, and that subsequently the parties were not in a position to properly negotiate.'[2]

Decision

French J ruled in favour of adopting the orders sought by the Tribunal. He recognised that the mediation of native title disputes, though court-ordered, is primarily a matter for the Tribunal in accordance with ss 86A and 86B of the *Native Title Act 1993* (Cth). The dominant role of the Tribunal is also reinforced by the Federal Court's facility to request it to provide reports on the progress of any mediation (s 86E).

Nevertheless, French J noted that the Court has previously made orders requiring parties to prepare mediation protocols, as well as to adhere to mediation timetables. He stated that 'these processes were designed to provide a fairly light-handed approach to Court supervision of the mediation process.'[3]

French J highlighted the fact that the Court has discretionary powers under s 23 of the *Federal Court of Australia Act 1976* (Cth) to take steps to ensure the timely progress of mediation. He observed that the Court has the power to make orders of reasonable specificity calculated to assist mediation to proceed expeditiously, as the mediation protocols are established for the purpose of resolving pending proceedings in the Court.[4]

French J rejected the Yamatji argument on the basis that the draft orders proposed by the Tribunal offered 'a more structured basis upon which to move the mediation forward'.[5] French J's judgment provided the parties with the opportunity to formulate precise minutes of orders in respect of the applications in each sub-region to give effect to the Tribunal's proposals. He did, however, amend the Tribunal's revised timeframe to allow the Yamatji an extra month for compliance with the Tribunal's draft orders.

Implications of the decision

French J's judgment highlights the problems of delay encountered by the applicants in native title claims. These delays arose out of the time-consuming and resource-demanding task of researching and preparing connection reports that provide the basis for the claims.

In addressing the difficulties experienced by the Yamatji, French J emphasised the need for the Tribunal to exercise the 'proper maintenance of its role as a helpful neutral, which is essential for the discharge of its mediation function'.[6] He argued for closer involvement in processes between overlapping applications, and a better information flow to other respondents who tend to be left on the sidelines. It was hoped that these measures would go towards reducing the delays that continue to plague the resolution of native title disputes. ●

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Endnotes

1. *Arnold Franks & others v State of Western Australia & others* [2006] FCA 1811 at [2].
2. At [39].
3. At [35].
4. At [38].
5. At [40].
6. At [40].