



Federal Court of Australia

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Bennell v State of Western Australia [2004] FCA 228 (12 March 2004)

Last Updated: 15 March 2004

FEDERAL COURT OF AUSTRALIA

Bennell v State of Western Australia [2004] FCA 228

PRACTICE AND PROCEDURE – native title determination applications – motion to vacate trial date of part heard matter – matter combined with larger claim – motion to provide for mediation protocol in relation to claim subject to ongoing intra-indigenous dispute.

**ANTHONY BENNELL, ALAN BLURTON, ALAN BOLTON AND OTHERS (Single ↗Noongar↗
Claim (Area 1)) v THE STATE OF WESTERN AUSTRALIA AND OTHERS
W6006 of 2003**

**ANTHONY BENNELL, ALAN BLURTON, ALAN BOLTON AND OTHERS (Single ↗Noongar↗
Claim (Area 2)) v THE STATE OF WESTERN AUSTRALIA
W6012 of 2003**

**FRENCH J
12 MARCH 2004
↗PERTH↗**

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY**

W 6006 OF 2003

**BETWEEN: ANTHONY BENNELL, ALAN BLURTON, ALAN
BOLTON AND OTHERS (Single Noongar Claim (Area 1))
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA
RESPONDENTS**

**JUDGE: FRENCH J
DATE OF ORDER: 12 MARCH 2004
WHERE MADE: PERTH**

THE COURT ORDERS THAT:

1. The applicant's motion dated 27 February 2004 is dismissed in relation to application WAG6006/03.
2. The applicants, the South West Aboriginal Land and Sea Council and the State of Western Australia are to comply with the mediation protocol agreed between the South West Aboriginal Land and Sea Council and the State.
3. The mediation protocol is to be revised to include the applicants as parties to it and to specify their role in relation to it.
4. The revised protocol is to be filed by 5 April 2004.
5. The directions hearing is to be adjourned to 30 August 2004 at 9am.
6. The National Native Title Tribunal is requested to provide a mediation report on or before 23 August 2004.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY**

W 6012 OF 2003

**BETWEEN: ANTHONY BENNELL, ALAN BLURTON, ALAN
BOLTON AND OTHERS (Single Noongar Claim (Area 2))
APPLICANTS**

AND: THE STATE OF WESTERN AUSTRALIA

RESPONDENTS

JUDGE: FRENCH J
DATE OF ORDER: 12 MARCH 2004
WHERE MADE: PERTH

THE COURT ORDERS THAT:

1. In relation to WAG6012/03 Single Noongar Claim (Area 2) the applicants and the State in conjunction with the National Native Title Tribunal are to prepare a program for the negotiation and mediation of Single Noongar Claim (Area 2) commencing 8 April 2004.

The program is to set out:

(i) specific issues to be negotiated;

(ii) a detailed timetable including proposed meeting dates and venues set in a regional context;

(iii) an outline of a negotiated protocol to be adopted by the State and the applicants;

(iv) provision for the taking of connection evidence;

(v) identification of questions of law or fact which if determined by the Court could advance the resolution of a particular claim or conflict between claims.

2. A copy of the program is to be lodged with the Court by 30 April 2004.

3. A copy of the program is to be made available to any party on request to the applicants.

4. The parties are to comply with the timetable set out in the program provided that, if it appears likely to any party that it will be unable to take a programmed step within two months of the time limited for doing so by the program, it must apply to the Court to vary the program accordingly.

5. Any party may apply to the Court at any time for directions as to the taking of connection evidence.

6. Any party may apply to the National Native Title Tribunal to refer to the Court in accordance with the provisions of the [Native Title Act 1993](#) (Cth) any questions of law or fact the resolution of which may assist in the resolution of the application.

7. Any party may apply to the Court for the separate determination of any question of law or fact in accordance with the Federal Court Rules.

8. There be liberty to apply.

9. The National Native Title Tribunal is to provide a mediation report not less than seven days prior to the re-listed directions hearing.

10. WAG6012/03 be otherwise adjourned to 30 August 2004 at 9am.

11. There be liberty to the State of Western Australia to apply for directions in terms of its minute dated 15 December 2003 following the completion of notification in respect of WAG6012/03.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY**

W6006 OF 2003

BETWEEN: ANTHONY BENNELL, ALAN BLURTON,
ALAN BOLTON AND OTHERS (Single
↕Noongar↕ Claim (Area 1)
APPLICANT

AND: THE STATE OF WESTERN AUSTRALIA
RESPONDENT

W6012 OF 2003

**BETWEEN: ANTHONY BENNELL, ALAN BLURTON, ALAN
BOLTON AND OTHERS (Single ↕Noongar↕ Claim (Area 2))
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA
RESPONDENTS**

**JUDGE: FRENCH J
DATE: 12 MARCH 2004
PLACE: ↕PERTH↕**

REASONS FOR JUDGMENT ON MOTION

1 On 5 March 2004, a directions hearing was held to review the progress, through mediation, of native title determination applications in the South West region of Western Australia. At that hearing I noted that a mediation protocol had been agreed between the native title representative body for the region, the South West Aboriginal Land and Sea Council (SWALSC) and the State of Western Australia for progressing negotiations in relation to the South West claims. The object of the protocol is to achieve some form of overall agreement including a resolution of native title issues.

2 At the hearing I foreshadowed some standard directions to progress mediation in relation to those claims. They were in the following terms:

- '1. The applicants, the South West Aboriginal Land and Sea Council and the State of Western Australia are to comply with the mediation protocol agreed between the South West Aboriginal Land and Sea Council and the State.*
- 2. The mediation protocol is to be varied to include the applicants as parties to it and to specify their role in it.*
- 3. The revised protocol is to be filed by 5 April 2004.*
- 4. The directions hearing is to be adjourned to 30 August 2004 at 9am.*
- 5. The National Native Title Tribunal is requested to provide a mediation report on or before 23 August 2004'*

3 There was no objection to these orders being made in relation to the various claims.

4 There was also before the Court a motion on behalf of the applicants in the Single **Noongar** Claim (Area 1) WAG 6006/03 and on behalf of the applicants in the Single **Noongar** Claim (Area 2) WAG 6012/03.

5 The motion in relation to the Single **Noongar** Claim (Area 1) sought to vacate a trial date set down with respect to the area covered by the **Perth** Metropolitan Claims the only survivor of which had been amended by combination into the Single **Noongar** Claim (Area 1). Other directions for the filing of preliminary reports from experts by 3 December 2004 were sought.

6 In respect of the Single **Noongar** Claim (Area 2) orders were sought for a mediation protocol to be formulated and adopted. These directions were opposed by the State and by other respondents who seek programming orders to trial.

Single **Noongar** Claim (Area 1)

7 Up until 9 October 2003 there were seven native title determination applications covering areas in and around the **Perth** Metropolitan area and known as the Combined Metropolitan Claims. The claims were set down for trial by Wilcox J who had taken them over after a part-hearing before Beaumont J which had not been completed because of his Honour's ill health. Wilcox J took over the matters on the basis that his Honour would receive the transcript of evidence already taken by Beaumont J as evidence before him. The seven claims were subsequently reduced, by a process of strike-outs and discontinuance to one claim, No 142 of 1998.

8 On 9 October, Wilcox J made orders allowing the applicants in No 142 of 1998 to amend their application and to combine it with the Southern **Noongar** Claim (Area 1). Both of the applications were thereafter to be conducted as one. His Honour directed:

*'6. Subject to any contrary order by a judge that part of the combined application as relates to the land and waters covered by Application WAG142 of 1998 ('the **Perth** Section claim') shall be heard in a separate proceeding to commence during the first week of October 2004. In order to facilitate that hearing:*

*(a) the applicants in WAG6006 of 2003 are to provide to all respondents to that proceeding by 15 May 2004, copies of reports from all anthropologists or other experts intended to be called as witnesses by them in relation to the **Perth** Section claim; and
(b) the respondents are to provide to the applicants and all other respondents by 31 August 2004, copies of reports from all anthropologists or other experts intended to be called as witnesses by them in relation to the **Perth** Section claim.'*

9 The applicants in the Single **Noongar** Claim (Area 1) seek to vacate the trial dates ordered by Wilcox J. Counsel for the applicants submitted that there were benefits in allowing the parties to the **Perth Section of the Single Noongar** Claim (Area 1) to pursue the mediation process as part of that application. He referred to resource limitations and the late engagement of Dr Kingsley Palmer as an expert anthropologist.

10 An affidavit sworn by Dr Palmer was before the Court. In that affidavit he said that he was engaged by SWALSC in late September 2003. He will be assisted by three other anthropologists in relation to

research and a field work program. He was not available to commence work in any substantial way on the project until December 2003. At a workshop on 16 and 17 December 2003, the timetable and methodology for a research and field work program were discussed. The literature review for the claim commenced on 19 January 2004. Field work commenced on 16 February 2004. Due to the size of the claim area he anticipates that ongoing research and field work will be completed by the end of July 2004.

11 Dr Palmer said he will require at least four months from the completion of the research and field work to write the report and anticipates that the report on current estimates will be completed by the end of November 2004. The report is to provide information and draw conclusions about the continuity of the claimant group as a whole and the normative rules constituting the laws and customs and the resulting rights and interests. He said that the timeframe for the completion of the research and field work and delivery of the report have been extremely concentrated in an attempt to complete the work in the shortest time possible without compromising the integrity of its methodology.

12 Dr Palmer referred to the direction given by Wilcox J that expert reports in relation to the **Perth** Section be filed with the Federal Court by 15 May 2004. He said that given the timeframe currently set by the Court it would not be feasible to truncate the research and field work timetable to produce a report for the **Perth** Section. He said that in order to provide an accurate representation of the claim it is essential that the Court be provided with a report that refers to the entire claim area. Any approach that involves excising sections of the report would undermine the research methodology, be 'anthropologically undesirable' and be an inefficient and ineffective use of resources. He considered that it was not effective to compartmentalise the production of the report and present it in such a way as to produce a piecemeal representation of just one section of the Single **Noongar** Claim.

13 It appears from his affidavit that field work carried out between now and the end of July may also be relied upon by SWALSC for a connection report to be provided to the State of Western Australia.

14 In a supporting affidavit sworn by Mr Darryl Pearce, the Chief Executive of the SWALSC, he said that the SWALSC has been participating in a mediation program. There has been significant progress towards a mediated resolution of the Single **Noongar Claim Area 1) inclusive of the Perth** Section. Given the progress that has been made in the negotiations and the work being undertaken by Dr Palmer, he seeks the vacation of the hearing dates for the '**Perth** Section' and variation of filing dates for the expert report so that they correspond with dates agreed to by the parties in Schedule A of the mediation protocol.

15 The State opposes the motion on the basis of the long period that the Combined Metropolitan Claim has been extant both as a group of separate claims and, more recently, as part of the Combined Single **Noongar** Claim (Area 1).

16 In my opinion, the **Perth** Section of the claim having already been part heard by one trial judge and now under the control of another with directions made for the resumption of the hearing, it is not appropriate that I make any order varying the orders made by Wilcox J. While there may be compromises necessary in order that the expert reports required by his Honour be filed within the time that he has prescribed, I do not consider that there is evidence that the applicants in the **Perth** Section claim will suffer any irremediable prejudice by being required to produce evidence relevant to their area of their section of the claim. Dr Palmer has been engaged relatively late in the piece and I do not consider that that fact should be given great weight as a reason for vacating the trial date and the directions made by Wilcox J. It may be that the applicants will wish to apply to Wilcox J for some leeway in the dates for filing the expert reports required to be filed under his existing directions. In my opinion, however, his Honour's orders ought not to be disturbed pursuant to this motion.

17 This result does not mean that mediation cannot continue in respect of the **Perth Section of the Single Noongar** Claim (Area 1). Indeed, it might be that the ongoing litigation in respect of this section could have a bearing on producing some outcomes relevant to the larger claim.

18 The motion is therefore dismissed in respect of the orders sought in the Single **Noongar** Claim (Area 1). I will, however, make directions of the kind foreshadowed at the review hearing on 5 March.

Single Noongar Claim (Area 2) – W6012/03

19 The Single **Noongar** Claim (Area 2) is a native title determination application which overlaps completely with the application of the Harris Family – WAG6085/98. The State, being of the view that mediation between the applicants in the Harris Family claim and those in the Single **Noongar** Claim (Area 2) has either stalled or been exhausted proposes directions for the programming of the matter towards trial. However the applicants in the Single **Noongar** Claim (Area 2) seek orders for the preparation of a mediation protocol and program to be lodged with the Court by 31 March 2004.

20 In his affidavit in support of these orders, Mr Pearce says that the SWALSC filed the Single **Noongar** Claim (Area 2) on 28 November 2003. It overlaps with both the Harris Family application, WAG 6058/98, and another application known as the South West Boojarah application. Mr Pearce says that the State's proposed orders in relation to the Harris Family application would impact on the Single **Noongar** Claim (Area 2). He said that SWALSC has previously directed resources into seeking a mediated settlement of issues between the claimants of the overlapping claims. Last year with the assistance of the National Native Title Tribunal the parties were close to reaching an agreement. The SWALSC is keen to provide them with a further opportunity of doing so. To that end, it has offered the Harris Family a grant of legal assistance to enable them to have the benefit of independent representation at a mediation. The National Native Title Tribunal wrote to Ms van Leeuwen of the Harris Family group offering assistance in relation to mediation between the two groups. The SWALSC has accepted this offer. In light of progress being made in the mediation of the Single **Noongar** Claim (Area 2), Mr Pearce says that the opportunity should be extended to the parties in this area of the South West to also benefit from any mediated agreement. To this end, the SWALSC is asking that the Single **Noongar** Claim (Area 2) be afforded the same opportunity as that in relation to Area 1 and be referred to mediation.

21 Counsel for the State submitted that they had been told and the Court had been told on a number of occasions that there was hope for a new agreement between the Harris applicants and those in the overlapping applications. However nothing has come of that hope. In the State's view the dispute between the Harris Family applicants and overlapping applicants was 'fairly intractable' and it was very difficult for respondent parties to seriously entertain any meaningful mediation in relation to that matter. In any event, the timetable proposed in the State's minute was 'fairly gentle'. It was not inconsistent with further negotiations between the applicants.

22 In my opinion, given that the Single **Noongar** Claim (Area 2) has yet to be notified and its parties settled, I do not think that there is anything to be gained by making the programming orders proposed by the State at the present time. The SWALSC seems to be doing its best to pursue a reasonably focussed strategy for the resolution of intra-indigenous disputes affecting these applications. In the circumstances, I will accede to the applicant's motion in relation to Single **Noongar** Claim (Area 2). There will be liberty to the State to apply for directions in terms of its minute following completion of notification in respect of W6012/03.

I certify that the preceding twenty two

(22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice French.

Associate:

Dated:

Counsel for the Applicant: Mr M Rynne

Solicitor for the Applicant: South West Aboriginal Land and Sea Council

Counsel for the State of Western Australia: Mr G Ranson

Solicitor for the State of Western Australia: State Solicitors Office

Date of Hearing: 5 March 2004

Date of Judgment: 12 March 2004