Federal Court of Australia

Nona of behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland (No 4) [2022] FCA 566

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| File number: | QUD 9 of 2019 |
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| Judgment of: | **MORTIMER J** |
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| Date of judgment: | 13 May 2022 |
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| Date of publication of reasons: | 16 May 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application to vacate hearing of expert evidence in contested native title claim – where the expert witness of the moving party affected by catastrophic flooding – relevance of the present proceeding to the resolution of native title claims in neighbouring areas – application granted |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Native Title |
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| Number of paragraphs: | 18 |
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| Date of hearing: | 13 May 2022 |
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| Counsel for the Applicant: | Mr R Blowes SC |
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| Solicitor for the Applicant: | Mr D Knobel of P&E Law |
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| Counsel for the First Respondent: | Ms N Kidson QC |
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| Solicitor for the First Respondent: | Ms A Olsen of Crown Law (Queensland) |
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| Counsel for the Second Respondent: | The second respondent did not appear |
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| Counsel for the Third to Seventh respondents: | Mr A McAvoy SC |
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| Solicitor for the Third to Seventh respondents: | Mr B Bero of Jaramer Legal |
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| Counsel for the Intervener: | Ms R Webb QC |
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| Solicitor for the Intervener: | Mr G Kennedy of Australian Government Solicitor |

ORDERS

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|  | | QUD 9 of 2019 |
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| BETWEEN: | TITOM NONA ON BEHALF OF THE BADULGAL, MUALGAL AND KAURAREG PEOPLES  Applicant | |
| AND: | STATE OF QUEENSLAND  First Respondent  TORRES SHIRE COUNCIL  Second Respondent  ALBERT BOWIE (and others named in the Schedule)  Third Respondent | |
|  | ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA  Intervener | |

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| order made by: | MORTIMER J |
| DATE OF ORDER: | 13 May 2022 |

THE COURT ORDERS THAT:

1. Order 3 of the Court’s orders dated 2 December 2021, as varied by order 2 of the Court’s orders dated 24 February 2022, be vacated in respect of the Badulgal respondents.
2. Order 4 of the Court’s orders dated 2 December 2021 be vacated.
3. Orders 5 to 7 of the Court’s orders dated 2 December 2021 be vacated.
4. The hearing of expert evidence in this proceeding listed to commence in Cairns on Monday 16 May 2022 for a period of five days be adjourned to Monday 18 July 2022, and remain as a listing for a period of five days.
5. The Badulgal respondents have leave to file and serve an expert report of Mr Daniel Leo on or before 4pm on Tuesday 28 June 2022.
6. Subject to further order, expert evidence to be given on behalf of the applicant which is responsive to the expert report of Mr Leo is to be provided:
   1. by way of a summary responsive opinion in writing, to be filed on or before 4pm on Tuesday 12 July 2022; and
   2. orally in chief at the hearing, to the extent any expert considers it necessary to expand upon the matters contained in the summary responsive opinion.
7. Oral expert evidence in the proceeding is to be given sequentially rather than concurrently.
8. On or before 4pm on Thursday 14 July 2022, the parties are to file an agreed timetable for the expert evidence hearing, including the order of expert witnesses, and estimated times for examination in chief, cross examination and re-examination.
9. Final oral closing submissions in the proceeding are to be listed for the week commencing 10 October 2022.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Delivered ex tempore and revised)

MORTIMER J:

1. After careful consideration of the matters put to the Court this morning, the Court has determined the interlocutory application should be allowed. The Court finds that the most appropriate course in the circumstances is to adjourn the expert evidence hearing scheduled for next week and relist it in the week commencing 18 July 2022, dates which have previously been fixed for final oral closing submissions in this matter.
2. It would not be fair in all the circumstances to compel the Badulgal respondents either to abandon having any expert evidence or to call Mr Leo next week. I accept Mr Bero’s evidence about the very difficult circumstances faced by Mr Leo on and from 28 February 2022, because of the catastrophic flooding in Lismore. That finding should not be taken as an acceptance of the other submissions put on behalf of the Badulgal respondents about why they have been unable to comply with the existing timetable for expert evidence or whether they would or would not be able, properly, to cross-examine the applicant’s expert witnesses next week. However, the finding about Mr Leo’s circumstances is sufficient to make it clear that it would be unfair to commence and complete the expert evidence in this proceeding next week. I am satisfied the Badulgal respondents could not have a fair trial if that course was taken.
3. That leaves two other proposed options: to deal with the applicant’s three expert witnesses next week and deal with Mr Leo’s evidence and any responsive evidence from the applicant’s experts at another time; or, to adjourn the expert evidence hearing completely.
4. As I have stated, a full adjournment, in my opinion, is preferable. This, of course, has the advantage of keeping all the expert evidence together and ensuring the applicant’s experts can respond to Mr Leo’s opinions and that Mr Leo has the time he has said he needs to consider not only the questions posed to him, but the three expert reports filed by the applicants. I consider this course is likely to be beneficial to all of the experts in giving their evidence and to all counsel involved in examination and cross-examination.
5. It also means the Court can listen to and consider the expert evidence in a more holistic way, which is likely to be of the most assistance to the Court.
6. Having only one hearing is also more cost-effective in terms of the expenditure of public resources by the Court, both for the hearing in Cairns and for the travel and accommodation for Court staff and contractors.
7. This course also enables all members of the claim groups and other members of the public who wish to listen to the evidence to do so at one time and in one place.
8. I have found that a full rather than a partial adjournment is also likely to be the most cost-effective and efficient for the parties. Undoubtedly, that is true for the State and the Commonwealth, who also utilise public funds.
9. As for the applicant and the Badulgal respondents, a little more needs to be said about this matter. A considerable portion of the funding presently allocated to each of the applicant and the Badulgal respondents will, I infer, now not need to be spent next week or perhaps even from today onwards. In substance, the expenditure for next week is being transposed to July 2022. In substance, I emphasise, that proposition is undeniable.
10. However, I have had regard to the position of the **T**orres **S**trait **R**egional **A**uthority (the native title representative body for the area) and through the TSRA, the National Indigenous Australians Agency (the NIAA), as communicated by email to Mr Knobel today and to which Mr Knobel deposes in his second affidavit filed today. It is difficult to see any rational or logical reason why approved expenditure for an expert evidence hearing originally listed for next week, but which in the Court’s judgment now needs to be adjourned to ensure a fair trial, will not remain available for a hearing in July. The TSRA’s communication does not suggest any irrational or unreasonable position is going to be taken, in my view, but rather adverts to what are no doubt reasonably complex transitional arrangements, including as to the provision of public funds, as a new representative body takes responsibility for the Torres Strait region from 1 July 2022.
11. Whether or not there are transitional arrangements which need to be put in place for this to occur is not a matter for the Court, but in terms of the most cost-effective and efficient disposition of this proceeding, I remain of the view that the applicant and the Badulgal respondents, having been allocated very considerable funding for the expert evidence tranche of this proceeding, are likely to remain, in substance, sufficiently funded after 1 July 2022 if a rational and reasonable approach is taken by the new representative body, especially in light of the Court’s decision today about what is required for a fair trial.
12. At the very least, the course I consider preferable means there will be no need for doubling-up on preparation, a matter to which Mr Blowes referred, and rightly so. I agree that a partial hearing next week and a resumed hearing after Mr Leo’s report is filed is likely to lead to substantially increased costs for all parties and for possible further funding disputes between the applicant, the Badulgal respondents and the representative body, whichever that might be.
13. In a case contended to have been beset by funding difficulties, this consideration is of some weight. On the evidence before the Court on this interlocutory application, it might well be said that the TSRA has acted properly and reasonably after a funding request by the Badulgal respondents on Christmas Eve 2021 and that some responsibility for the predicament in which the Badulgal respondents find themselves lies elsewhere than with the TSRA. But I need not make any particular findings about that. What is undeniable is that both the applicant and the Badulgal respondents have drawn the Court’s attention consistently to their difficulties in securing funding to present their clients’ cases in this proceeding in accordance with the orders made by the Court. I consider a full adjournment is a course which is likely to reduce the prospect of any further disputes about funding, given the funding approvals that have been made to date, and therefore reduce the likelihood of funding disputes interfering with the further course of this trial.
14. My initial concerns about the effect of delays and finalisation of this proceeding on other Torres Strait native title claims have been sufficiently addressed by what was put on behalf of the State by Ms Kidson, supported by Ms Webb for the Commonwealth and substantially confirmed in a communication to the Court from Mr Walkley on behalf of the legal representatives for the applicants in what I will call the Northern Cape and Torres Region claims. My main concern is that the consent determinations presently contemplated in those claims for November 2022 not be affected by any delays in the finalisation of this proceeding. I am satisfied that they should not be so affected.
15. The orders I make today give effect to this conclusion and make provision for the filing of a report by Mr Leo in accordance with the timing he has nominated through Mr Bero’s evidence. They also make provision for responsive evidence from the applicant’s three experts. The orders reflect my view about the appropriate form for that evidence and the professionalism the experts ought to be able to apply to being brief and concise in their written responses. Additional oral evidence-in-chief will also be permitted from those three experts if the experts consider that necessary.
16. I will make an order that expert evidence will be sequential and not concurrent. At the 2 December 2021 case management hearing, the transcript reflects that I very clearly told the parties that I would leave the form of expert evidence to them, whether it was to be concurrent or not and how it was to be presented. That is somewhat contrary to the position put in the document sent to the Court today, which seemed to imply the Court had been, and I quote, “silent” on this issue. However, having seen the recent document filed by the applicant and the disputes apparent from Mr Knobel’s first affidavit evidence about how expert evidence should be presented, I have reflected over the course of today on the view I expressed last December. I have decided, in light of the ongoing differences of view between the parties, it is more appropriate for the Court to stipulate how the expert evidence should be given. My present view is that it should be given sequentially and there will be an order to that effect. If any party or parties feel strongly that this is not the best way to assist the Court and wishes to have the Court reconsider this position, then there will be time to do that before the 18 July hearing.
17. The Court’s decision today, of course, means there will need to be a further hearing scheduled for final closing submissions. As I indicated to the parties this morning, on my present commitments that will need to occur in October 2022 if the hearing is to be completed this year, as in my opinion it should be. I will vacate the existing order relating to closing submissions and expect the parties to advise the Court of proposed dates for the filing of written closing submissions in due course.
18. The Court is grateful for the parties’ assistance at short notice on this application.

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| I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer. |

Associate:

Dated: 16 May 2022

SCHEDULE OF PARTIES

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|  | QUD 9 of 2019 |
| Respondents |  |
| Fourth Respondent: | WALTER TAMWOY |
| Fifth Respondent: | GEORGE NONA |
| Sixth Respondent: | RONNIE NOMOA |
| Seventh Respondent: | TOMMY TAMWOY |