Replacing the applicant and combining applications – Single Noongar claim

Bolton on behalf of the Southern Noongar Families v Western Australia [2004] FCA 760

French J, 15 June 2004

Issue
The main issues dealt with in this case were whether applications made under s. 66B(1) to replace the applicants in several claimant applications and to amend to combine some of those applications into a single application were duly authorised.

Background
This case relates to several claimant applications in the South West of Western Australia. The native title representative body for that area, the South West Aboriginal Land and Sea Council (SWALSC), had been trying for some time to resolve overlaps between the various applications, including by seeking orders to combine applications as provided for in s. 64(1A) of the *Native Title Act 1993* (Cwlth) (NTA).

As part of this process, orders were sought under s. 66B(2) of the NTA to replace those named as the applicants in six of the applications and then to combine all of those applications plus several others into a single 'lead' application (referred to as the Southern Noongar Claim) covering the bulk of the South West area. (On 'lead' applications, see *Bropho v Western Australia* (2000) 96 FCR 453 at [25], French J.)

Authorisation process
Prior to making these applications, SWALSC had held a series of meetings for each affected application at which resolutions were passed to, among other things, bring the s. 66B(1) applications and seek orders for combination, both of which involved questions of authorisation under s. 251B of the NTA.

The meetings were advertised in various newspapers, with the advertisements specifying the general nature of the proposed resolutions. All the members of SWALSC who identified as part of the relevant claim group as generally described (e.g. Wagyl Kaip, Yued, South West Boojarah) were sent an agenda that included the proposed resolutions, as were members of various working parties and certain Aboriginal organisations in the region. The court noted that the number of people who attended the meetings was often much lower than the number of SWALSC members who identified as part of a particular claim group and had been personally notified (e.g. 27 out of 212, 20 of 82, 37 of 233).

The court was critical of the process adopted to obtain authorisation for a number of reasons, including:

- there was no affidavit evidence from the people who were to be removed from the group named as the applicant—see s. 61(2);
- while the native title claim group in each application was defined by reference to apical ancestors, the biological descendants of those persons and persons adopted by them, the advertisements and notices for the meetings did not refer to the relevant native title claim groups except by use of the generic title of the applications in question, e.g. Southern Noongar, Wagyl Kaip, Yued;
- there was no affidavit evidence disclosing the basis upon which members of SWALSC identified as claimants nor any evidence as to those members of the group who were not members of SWALSC;
- there was no direct evidence to show that those who attended the meetings and passed the various resolutions fell within the native title claim group as described in the application;
- there was no evidence before the court to explain the 'composition, origins or purpose of' the working parties notified;
- the evidence before the court did not demonstrate that those who attended the meetings were members of the relevant native title claim group. Rather, the evidence indicated that there was 'an asserted self-identification'; and
- the connection between those who attended the meetings and the respective claim group as described in the relevant application was not established in respect of either notification or, 'more importantly', attendance—at [11] to [41] and [45].

Court's power to amend constrained

Justice French cited a number of authorities which indicate that, while the court has a general power to amend applications under O 13 r. 2 of the Federal Court Rules, that power is subject to the constraints imposed by ss. 64 and 66B of the NTA. It was noted that s. 66B(1) provides for an application to be made to the court for an order to replace the applicant in a claimant application and that s. 64:

- specifically authorises the amendment of applications made under s. 61(1) to reduce the area covered by them;
- prohibits amendments to applications that result in the inclusion of any area not covered by the original application, unless the application is a claimant application and the amendment combines it with one or more other claimant applications; and
- expressly contemplates amendments to change those named as the applicant in a claimant application—at [6] and [7].

Conditions of exercise of discretion under s. 66B(2)

French J noted that the conditions under which an order will be made under s. 66B(2) are:

- there is a claimant application;
- each applicant for an order under s. 66B(2) is a member of the native title group;
- the person to be replaced is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it;
- alternatively, the person to be replaced has exceeded the authority given to them by the claim group;

- the persons making the application under s. 66B(1) are 'authorised' (see s. 251B) by the claim group to make the application and to deal with the matters arising under it;
- a decision made by a representative or other collective body exercising authority on behalf of the claim group under customary law or, absent applicable and mandatory customary law, by an agreed and adopted process, will suffice to prove the decision-making processes required—at [42], citing *Daniel v Western Australia* (2002) 194 ALR 278; [2002] FCA 1147 (*Daniel*) at [17], French J and *Anderson v Western Australia* (2003) 204 ALR 52; [2003] FCA 1423 at [39], French J, summarised in *Native Title Hot Spots* Issue 2 and Issue 8 respectively

Authorisation for s. 66B(2)

The issue of authorisation in relation to the s. 66B(1) applications proved to be the crucial point. His Honour repeated what he said in *Daniel* at [11] that:

> [I]t is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title—at [43].

If, 'as may well be the case', there is no relevant and mandatory traditional decision-making process applicable to the making and conduct of a claimant application, then a process 'agreed to and adopted by the persons in the native title claim group' will suffice as the source of authority for an applicant representing members of a claim group—at [44] and see s. 251B.

However, his Honour emphasised that this is 'no light requirement':

> It means that the authorisation process must be able to be traced to a decision of the native title claim group who adopt that process. The conferring and withdrawal of authority for the purposes of a s. 66B application must be shown as flowing from the relevant native title claim group—at [44].

French J warned against:

> [A]ccepting a constructed 'decision-making' process which cannot be demonstrated, to reflect in any legitimate sense, the informed consent of the members of the native title claim group or persons properly representing them as a substitute for the authorisation required by the Act—at [46].

Decision on s. 66B(1) applications

His Honour found with 'regret' that:

- the evidence and the processes adopted in this case were not adequate to meet the conditions necessary to make an order under s. 66B(2); and
- each of the motions for amendment suffered from the same 'fatal deficiency', namely, there was no evidence that meetings held where authorisation was purportedly given were, 'in any sense', fairly representative of the native title claim groups concerned, i.e. the group as defined in the relevant application.

The 'deficiency' arose because the evidence was insufficient to demonstrate that:

- there had been notification to members of each native title claim group as defined in the relevant claimant application; or
- those who attended belonged to the relevant native title claim group and were representative of the various components of the native title claim group concerned (even if it was accepted that each of the members who attended each of the meetings was a member of the relevant native title claim group)—at [45] and [46].

His Honour was at pains to note that:

> It may be that there is a chronic difficulty that cannot be overcome despite its [SWALSC's] most heroic efforts because of the apathy, lack of interest, or divided opinions held by members of the relevant native title claim groups—at [46].

French J observed that, if this proves to be the case, then this 'may be a reason for reconsidering' whether the claimant applications dealt with in this case 'should proceed at all'—at [46].

Decision on combination

It was found that:

> The difficulties underlying the s 66B motions in this case go to the heart of the proposed combination applications. Counsel for the applicants in each of the matters...accepted, without making any formal concession that failure to achieve the orders sought under s 66B would have the practical consequence that there would be no authority to proceed with the combination applications. In my opinion, that is a correct appreciation of the position. The combination motions cannot succeed as they want authority. They must therefore be dismissed—at [54].

Amendment to reduce

His Honour had earlier given directions that an amended motion be filed in the Ballardong application. The proposed amendment subsequently filed involved contracting the Ballardong application so as not to overlap the Single Noongar Claim. His Honour observed there were 'internal difficulties among the applicants and the absence of evidence of a truly representative meeting' and, therefore, the order sought could not be made—at [57]. French J has earlier considered an application to amend the Ballardong application and observed similar 'internal difficulties'—see *Anderson v Western Australia* (2003) 204 ALR 522; [2003] FCA 1423, summarised in *Native Title Hot Spots* Issue 8.

Comment

The s. 66B(1) applications were dismissed, 'save for' the removal of the names of certain deceased persons from the group named as the applicant. Given his Honour's finding that authority was lacking, it is not clear on what basis these orders were made, since (as French J noted) under both ss. 64(5) and 66B(2), authorisation is central to the exercise of the court's powers to amend to change the constitution of 'the applicant' as defined in s. 61(2).

On appeal

On 22 June 2004, the applicants filed an application in the Federal Court for leave to appeal against French J's judgment.