

Party status – members of claim group seek joinder

Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland [2004] FCA 1632

Kiefel J, 14 December 2004

Issue

The questions here were whether:

- four persons, all members of the native title claimant group, should be joined as parties to the native title claim proceedings; and
- alleged conflicts of interest of the North Queensland Land Council (the NQLC) should be investigated.

Background

The relevant claimant application in this matter is a combination of three earlier claims. The person representing those seeking to be joined, Dona Gibbs, contended that the applicant in the native title proceedings was not properly representative of all persons in the claimant group. Two previous applications for joinder by another person who made the same contention had been dismissed: see *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2002] FCA 1370 and *Combined Dulabed & Malanbarra/Yidinji Peoples v Queensland* [2004] FCA 1097 (summarised in *Native Title Hot Spots Issue 11*).

Mrs Gibbs made the following submissions (among others):

- the genealogy, so far as it related to her family, and some anthropological reports prepared for the NQLC, were incorrect;
- her family had been shut out of the decision-making process;
- the authorisation claimed by those named as the applicant was not properly given because she was not present;
- the Yidinji people (to which Mrs Gibbs belonged) generally were not properly represented by those named as the applicant and the Malanbarra applicants were the ‘wrong people’ for the claim area—at [5] to [7].

Allegations against NQLC

Her Honour Justice Kiefel was unaware of any provision which gave the court power of investigation and could not discern any other appropriate order which might be made, having regard to the general and diffuse nature of the complaints against NQLC:

After hearing Mrs Gibbs’ expressions of concern it seems to me that the real complaint of conflict relates to the representation of her people by Malanbarra persons—at [9].

Authorisation

Her Honour found that there was no evidence to suggest a lack of proper authorisation, a matter that the two previous decisions noted above also dealt with. Kiefel J observed that:

[A]uthorisation under the Native Title Act... refers to authority for persons to act on behalf of the whole of the Native Title Group by a process which is required to comply with custom. It does not require authorisation by every individual in the group, as Mrs Gibbs seems to think. A representative applicant is given full authority by s 62A of the Act to 'deal with all matters arising under [the Native Title Act] in relation to the application' — at [10], emphasis in original citing Drummond J in *Kulkalgal People v Queensland* [2003] FCA 163 at [6], summarised in *Native Title Hot Spots Issue 5*.

Kiefel J observed that the 'only avenue' under the NTA for a person dissatisfied with the way their interests were being represented in native title proceedings is an application under s. 66B(1) to replace the applicant. But those making such an application must have the authority of all the members of the claimant group to do so. There was no such application before the court and no suggestion that Mrs Gibbs enjoyed the support of the claimant group — at [11].

Joinder under s. 84(5)

The only other alternative was to join a person as a respondent under s. 84(5) of the NTA, which provides that the court may, at any time, join any person as a party to the proceedings if the court is satisfied that the person's interests may be affected by a determination in the proceedings.

While it was not necessary to decide the point in this case, because Mrs Gibbs did not want to be joined as a respondent, her Honour was of the view that:

Assuming [without deciding] there to be [such a] power one would expect that it would not be granted as a matter of course and upon assertions about lack of representation. There would at the least need to be shown a real difficulty in that person's interests being represented — at [12].

In any case, her Honour would have been disinclined to apply s. 84(5) because the application was made far too late in the proceedings and there was no sufficient evidence that:

- NQLC or their anthropologists would not consider any corrections that Mrs Gibbs wanted made to her family's history;
- the Yidinji people were not being adequately represented — at [13].

Decision

The application was dismissed with no order as to costs.