Authorisation – Combined Gunggangji appeal

Noble v Murgha [2005] FCAFC 211

North, Weinberg and Greenwood JJ, 30 September 2005

Issue

The main issue in this appeal to the Full Court of the Federal Court was whether the authorisation provisions of s. 251B of the *Native Title Act 1993* (Cwlth) (NTA) had been applied correctly to support the removal and replacement of the applicant under s. 66B(2).

Background

This case deals with an application for leave to appeal from a decision of Justice Dowsett to make an order under s. 66B(2) that Frederick Noble be removed from the group of three people who were jointly the 'applicant' in the Combined Gunggandji native title claim and that the two remaining people were authorised under s. 251B to 'replace' the applicant. The claim group in this matter consisted of the members of three clans, each associated with one of the three individuals in question. On the definition of 'the applicant', see ss. 61(2) and 253

The Gunggandji people were involved both in this claim and in the combined Mandingalbay Yidinji-Gunggandji claim. The State of Queensland had offered to settle both claims. Mr Murgha and Mr Harris favoured accepting that offer but Mr Noble did not and declined to sign the necessary documentation. (On the removal of Mr Noble under s. 66B(2) in the other matter, see *Noble v Mundraby* [2005] FCAFC 212, summarised in *Native Title Hot Spots* Issue 16.) A meeting of the Combined Gunggandji claim group was held in November 2004 to resolve the impasse.

At first instance

At first instance, Dowsett J:

- found, as a fact, that the Combined Gunngandji claim group decided at a meeting in November 2004 to refer the possible removal of Mr Noble to the elders for their decision and to abide by that decision;
- noted that Mr Noble did not accept that the laws and customs of that group provided for that course to be followed but rejected Mr Noble's complaint, basing his decision upon the reasoning of Spender J *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2004] FCA 1703, summarised in *Native Title Hot Spots* Issue 13 and see *Noble v Mundraby* [2005] FCAFC 212, summarised in this edition of *Native Title Hot Spots*;
- found, as a fact, that the elders unanimously agreed that Mr Noble should be removed and advised the meeting accordingly;
- apparently decided that s. 251B(b), rather than s. 251B(a), was satisfied.

Section 251B is pivotal

In a joint judgment, Justices North, Weinberg and Greenwood commented that:

> Section 251B … is pivotal. It makes provision for the authorisation of a person or persons to make a "native title determination application" on behalf of a "native title claim group". Relevantly, it provides that all the persons in such a group can authorise a person or persons to make such an application, and to deal with matters arising in relation to it, provided that one or other of the…conditions [in 251B(a) or (b)] is satisfied—at [7].

The two relevant 'conditions' are:

- where there is a process of decision-making that, under the traditional laws and customs of the native title claim group must be complied with in relation to authorising things of that kind—the persons in the native title claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
- where there is no such process —the persons in the native title claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind—see s. 251B(a) and (b).

The appeal

The court noted that the evidence in this case was that:

- the authorisation meeting was publicised, including via advertisements in newspapers, and notices were sent well in advance to all Gunggandji people;
- those who attended were provided with a proposed agenda, two proposed resolutions and reasons why the meeting was necessary;
- Dr Gaye Sculthorpe, a member of the National Native Title Tribunal, and Mr Murgha chaired the meeting;
- during the course of the meeting, s. 251B was discussed;
- all those present at the meeting agreed there was a decision-making process under Gunggandji traditional law and custom applicable to the decision whether Mr Noble should be removed, described as 'the elders meet and decide' and Gunggandji people accept and respect decisions of the elders;
- when the resolutions were put to the meeting, there was no dispute that it was up to the elders to make the decision and all those who were not Gunggandji elders left the meeting, with no-one raising concerns about the process;
- after the elders discussed the matter, the other members of the group came back to the meeting, except Mr Noble and his family, who had left;
- the elders advised the meeting that Mr Noble should be removed and Mr Murgha and Mr Harris should, in future, be 'the applicant';
- the meeting 'accepted and respected' that decision.

The evidence as to what happened at the meeting, as given by Mr Murgha, was supported by evidence from four other Gunggandji elders who participated and by the minutes of the meeting prepared by Dr Sculthorpe —at [11] to [20].

Submissions on appeal

It was argued for Mr Noble that:

- it was implicit from his Honour's reasons that he relied upon s. 251B(b) as the basis for ordering Mr Noble's removal;
- that 'condition' required evidence of the existence of a systemic decision-making process that had been agreed to, and adopted, before the ultimate decision to remove him was made;
- the evidence did not demonstrate the existence of such a process, referring the 'elaborate' analysis of s. 251B in *Daniel v Western Australia* (2002) 194 ALR 278 (summarised in *Native Title Hot Spots* Issue 2) to support a contention that Dowsett J's 'sparse' reasoning did not meet the requirements of that section.

Mr Murgha and Mr Harris submitted that:

- there was nothing in the language of s. 251B(b) that required an anterior systemic process to have been agreed, or adopted;
- a court could infer that a process of decision-making had been agreed, or adopted, from the conduct of a meeting that voted on a resolution to have an applicant removed, particularly when it appeared that the vote was unanimous;
- in the present case, the elders had unanimously determined that Mr Noble should be removed and their decision had been accepted, apparently without dissent.

Decision

While acknowledging that Dowsett J's reasons for decision were 'brief in the extreme' (amounting to only four paragraphs), their Honours were not persuaded that Dowsett J erred in finding that the requirements of s. 251B(b) were met. In particular, the court said:

> We are unable to accept the submission that there must be a system of decision-making, separately agreed and adopted, before the members of the native title claim group can validly resolve to remove a person from the group that is "the applicant" in a native title determination application—at [34].

The fact that Dowsett J concluded that all of the requirements of s. 66B had been satisfied 'without elaboration' and 'without any detailed reasons', did not, of itself, show an appealable error. Therefore, if leave to appeal was required, it was refused and if not, the appeal was dismissed—at [35].

Comment on meaning of 'the applicant'

At [6], their Honours observed that one of the notes to s. 61(1) states that the person or persons who make up the group of people authorised by the native title claim group 'will be the applicant' and this explained 'why the somewhat awkward designation "the applicant" is applied to a group of individuals, each of whom is separately named'. However, with respect, it is s. 61(2)(c) that so provides. Note also that s. 253 provides that 'applicant' has 'a meaning affected by' s. 61(2).