# Replacing the applicant under s. 66B — first successful application

## *Daniel v Western Australia* [2002] FCA 1147

**French J, 13 September 2002**

**Issues**

This case concerned two applications under s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) to replace the applicant in:

- the consolidated Ngarluma and Yindjibarndi claim; and
- the Yaburara and Mardudhunera claim.

The Ngarluma and Yindjibarndi application was successful. This was the first time that an application made under s. 66B had succeeded.

**Background**

A future act agreement (see s. 31(1)(b) of the NTA) between the Premier of Western Australia, the Western Land Authority and the applicants dealing with the proposed compulsory acquisition of native title over part of the Burrup Peninsula in the Pilbara region of Western Australia was near completion. However, David Walker refused to sign the agreement. Mr Walker was one of the people who, jointly, were named as the applicant in the claim and, as the claim was registered on the Register of Native Title claims, the Registered Native Title Claimant. In any right to negotiate proceedings, he was included as part of the native title or negotiation party — see s. 29, s. 30, s. 61(2), s. 75 and s. 253 of the NTA. The future act agreement could not be finalised without his signature.

An application was made under s. 66B of the NTA to replace the current applicant in the Ngarluma and Yindjibarndi proceedings (the s. 66B application). The effect of the orders sought was to remove the Mr Walker (and three others, now deceased) from the group named as the applicant. It was alleged that Mr Walker was no longer authorised by the native title claim group to make the claimant application and deal with matters arising in relation to it — see s. 66B(1)(a)(i).

The s. 66B application was brought on as a matter of urgency because the state had commenced arbitral proceedings in the National Native Title Tribunal under s. 35 of the NTA, seeking a determination that the proposed acquisition should proceed unconditionally.

Members of the Yaburara and Mardudhunera claim group brought a similar application to replace the applicant in order to remove Patricia Cooper from the applicant group. Like Mr Walker, Ms Cooper was refusing to sign an agreement with the wtate in relation to the acquisition of an area covered by the Yaburara and Mardudhunera application.

**Authorisation and s. 66B**

Justice French emphasised that:

> [I]t is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so—at [11].

French J commented that, although the definition of 'authorise' in s. 251B NTA does not specifically cover withdrawal of authorisation, that section defines by analogy the process by which authorisation may be withdrawn for the purposes of s. 66B NTA. His Honour also noted that authorisation in these terms:

> [I]s hardly a matter likely to have been contemplated explicitly by traditional law and custom...[I]t should not be surprising if there is some difficulty in applying traditional decision making processes, albeit by closest analogy, to the conferring of the kind of authority contemplated by s 251B—at [14].

**Conditions to be satisfied under s. 66B**

French J noted the following conditions must be satisfied under s. 66B of the NTA:

- there must be a claimant application, as there was in this case;
- each applicant in the proceedings must be a member of the native title group, as was the case here;
- the person to be replaced must be no longer authorised by the claim group to make the application and to deal with matters arising in relation to it or that person must have exceeded the authority given to him or her by the claim group;
- the persons making the application must be authorised by the claim group to make the application and to deal with matters arising under it—at [17].

**Power to remove**

His Honour noted that:

- the court's power under s. 66B is discretionary;
- the claim group's power to remove an applicant under s. 66B(1) depended upon either a cessation of the authority conferred upon the person to be removed or action by that person in excess of the authority conferred;
- where it is alleged that the person sought to be replaced acted in excess of authority under s. 66B(1)(a)(ii), this does not require a separate decision-making process in order to establish it;
- this is consistent with a beneficial construction of s. 66B as 'a facultative provision directed to maintaining the ultimate authority of the native title claim group';
- the criterion of cessation of authority under s. 66B(1)(a)(i), which was relied upon in this case, may be more onerous;
- unless it could be said that, when the authority was originally conferred, it was limited so as to cease when certain events happened, a separate decision-making process was needed to bring about the cessation of authority;
- if the original authority was conferred subject to the continuing supervision and direction of the native title claim group, then it may be that the applicant is not authorised to act inconsistently with a resolution or direction of the claim group;

- in such a case, it could reasonably be said that the applicant has exceeded their authority in contravention of the claim group's decision;
- there must be evidence that identifies the nature of the decision-making process followed by the claim group that results in the authorisation of members to act on behalf of that group—at [15] to [17].

**Decision-making process**

French J noted that, if a decision relating to authorisation is made by a collective or representative body, then the members applying for the order to replace the applicant must be able to prove:

- that such a body exists under customary law recognised by the members of the group;
- the nature and extent of the body's authority to make decisions binding the members of the group; and
- that the body has authorised those seeking to replace the current applicant to make the claimant application and deal with matters arising in relation to it—at [18], referring to *Moran v Minister for Land and Water Conservation* [1999] FCA 1637 at [34], *Duren v Kiama Council* [2001] FCA 1363 at [5] and *Quandamooka People # 1 v Queensland* [2002] FCA 259 at [25].

**Evidence in Ngarluma and Yindjibarndi proceedings**

The evidence included:

- affidavits in relation to the claim group's decision-making process from 13 of the 15 people bringing the s. 66B application;
- a video recording of the meeting where the resolution to bring the s. 66B application was passed;
- copies of the notices sent out to call the meeting where the s. 66B resolution was put and details of how those meeting notices were distributed. The notice included the background to the matter and the agenda for the meeting;
- affidavits from a solicitor and Aboriginal liaison officer working for the claimant's legal representative, the Yamatji Barna Baba Maaja Aboriginal Corporation (YBBMAC), about the meeting process;
- an affidavit from an anthropologist, whose involvement with the Ngarluma and Yindjibarndi people dated back to 1982 and included work on their native title claim. (The affidavit set out his understanding of the decision-making process they employed, including his observations about that process in the lengthy period that preceded the making of the native title claim)—at [25] to [45] and see also *Ward v Northern Territory* [2002] FCA 171 on evidentiary requirements in s. 66B proceedings.

Mr Walker's evidence was that, among other things, he is as an elder, law man and custodian of traditional and customary sites of the Ngarluma people and that:

- the Burrup contains the most important sites in Ngarluma culture, tradition and custom;
- claim meetings were controlled by the YBBMAC's lawyers, who would not listen to the claimants or talk to them in a proper way about native title in the Burrup and so he and other claimants did not want to attend;

- he refused to sign this agreement because 'the Ngarluma elders must continue to manage and control our sites and our culture because it ties us to our land and it identifies us through our song, stories and dreamings and I did not understand the agreement and how it would affect this' and because he was not involved in the negotiations, was not given the opportunity to look at the documents and was not given any advice about it until he obtained it from his own lawyer—at [46] to [50].

Having noted that the question of whether Mr Walker was no longer authorised by the group depended upon whether or not there had been a withdrawal of his authority in accordance with s. 251B of the NTA, French J held that, on the balance of probability, no process of the kind contemplated in s 251B(a) (under traditional law and custom) existed for doing things of this kind i.e. deciding to replace the applicant in native title proceedings—at [51].

It was found that the evidence supported inferences that:
- decisions of that kind are taken in accordance with a process of decision-making which has been adopted by the persons in the native title claim group; and
- that process was agreed to by them over a period of time. It involved conducting community meetings on matters of major concern in connection with the native title determination application—at [51].

His Honour went on to say that:

> The process of decision-making undertaken [on 12 August 2002 to authorise the making of the s. 66B application] may be criticised as pressured [for various reasons]...However, it is not to be supposed that members of the claim group which had been for so long engaged in processes associated with their native title determination application and with the negotiation of the State agreement were not capable of making an informed decision reflected in the resolutions which were eventually passed—at [52].

**Decision in Ngarluma and Yindjibarndi**

French J held that:
- as a result of the decisions taken at the meeting of 12 August 2002, Mr Walker was no longer authorised by the claim group to make the application or to deal with matters arising in relation to it;
- the applicants put forward in the s. 66B application were authorised at that same meeting to make the application and deal with matters arising from it;
- it was appropriate to make the order under s. 66B NTA because this was a case in which one of a large number of registered native title claimants was holding up the execution of an agreement which was authorised by the native title claim group, and which was of substantial importance to its members—at [53] to [54].

**Yaburara and Mardudhunera proceedings**

Patricia Cooper, one of three people who jointly made up the applicant and, as the claim was registered, the registered native title claimant, declined to sign an agreement with the state regarding the compulsory acquisition of native title rights and interests in an area covered by that application. The Yaburara and Coastal

Mardudhunera Aboriginal Corporation (the Corporation) held a special general meeting on 3 September 2002 where it was resolved that, if Ms Cooper did not either sign the agreement or resign as a named applicant immediately, an application to remove Ms Cooper pursuant to s. 66B NTA should be made. It is to that application that these proceedings relate.

His Honour found that there was a relevant claimant application and that those bringing the s. 66B application were members of the relevant claim group—at [57] to [59].

However, difficulties arose because (among other things):

- in a number of affidavits filed by persons named as members of the claim group the deponents swore that they had never given authority for the s. 66B application to be brought on their behalf;
- the meeting where the resolution that Ms Cooper either sign or resign her position was conducted in unsatisfactory circumstances e.g. it was brought on at short notice, documents were served at short notice, Ms Cooper was not legally represented and had participated in the hearing via a telephone link up from Geraldton;
- the material before the court did not disclose whether the relevant decision-making process was made according to traditional law and custom, and there was no equivalent of the anthropological evidence given by Mr Robinson in the Ngarluma and Yindjibarndi motion— at [61], [76] and [77].

**Decision and postscript in Yaburara and Mardudhunera**

As a result of the above considerations, French J declined to make the orders sought and adjourned the proceedings to 18 September 2002. On that date, the court was advised that Ms Cooper had not yet engaged a lawyer. At a further directions hearing on 3 October 2002, it was agreed that a claim group meeting would be held in Karratha on 14 November 2002 and, if the matter was not resolve at that meeting, a further hearing of the s. 66B application would commence the following day in Karratha.