Replacing the applicant under s. 66B

'Pooncarie' Barkandji (Paakantyi) People v NSW Minister for Land & Water Conservation [2006] FCA 25

Stone J, 2 February 2006

Issue
The issue in this case was whether the Federal Court should exercise its discretion under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) to replace the applicant in a claimant application. The court decided it was appropriate to do so.

Background
There had been a number of disputes within the native title claim group, including disputes about which members of that group should be 'the applicant' and what area the application should cover—at [1] and see *Dimer/Askins/Western Australia* [2006] NNTTA 70, summarised in *Native Title Hot Spots* Issue 20, on the meaning of 'the applicant'.

An earlier application made under s. 66B(1) to replace the applicant was unsuccessful: see *Johnson v Lawson* [2001] FCA 894. A subsequent application was successful: see *Lawson v Minister for Land and Water Conservation for New South Wales* [2002] FCA 1517 (Lawson), summarised in *Native Title Hot Spots* Issue 3.

The present application under s. 66B(1) arose as a result of a dispute between two of the people comprising the applicant (Ray Lawson and Noel Johnson) and the remainder of the claim group. Mr Lawson and Mr Johnson believed that:
- the term 'Barkandji' referred to a narrower group than the native title claim group described in the application; and
- this narrower group should make a separate native title claim over a smaller area than that covered by the current application—at [4] and [25].

Representation by a non-lawyer—s. 85 does not apply
Mr Lawson and Mr Johnson sought leave of the court to be represented by a non-lawyer, Mark Dengate, who had represented them in other proceedings before Justice Stone. It was noted that s. 85 did not apply because that section is only available to 'a party' to the proceeding: 'Although Messrs Lawson and Johnson are members of the applicant group they are not, as individuals, parties to this proceeding: see s 61(2) of the NTA'—at [8].

However, her Honour was satisfied that, as they were effectively contradictors in relation to the s. 66B(1) application, the court had power to do what was 'incidental or necessary to' the exercise of the powers conferred on it, including entertaining the application for leave for Mr Dengate to appear—at [8].

Having satisfied herself that she had jurisdiction, Stone J refused to grant leave because: '[D]espite his [Mr Dengate's] genuine commitment to his clients, I am convinced that he has neither the discipline nor the understanding to assist them or the Court'—at [11].

Authorisation of new applicant

A meeting of the claim group was held in October 2005 for the purpose of resolving the dispute between Mr Lawson and Mr Johnson, on the one hand, and the remaining members of the applicant group on the other. If that could not be achieved, then the meeting would consider whether the current applicant was still authorised by the claim group to conduct proceedings on its behalf. This was because, as Stone J observed:

> If an application under s 66B[(1)] is to succeed it is necessary that the evidence clearly demonstrate that the relevant persons no longer have that authority and, for this reason, it was necessary to make careful preparation for the ... meeting—at [17].

Mr Lawson and Mr Johnson did not attend the meeting.

The court applied the principles outlined by French J in *Daniel v Western Australia* (2002) 194 ALR 278 (summarised in *Native Title Hot Spots* Issue 2) to determine whether the conditions set out in s. 66B(1) had been met—at [28].

On the basis of the evidence, her Honour was satisfied that:

- all reasonable steps were taken to advise members of the claim group of the meeting;
- adequate assistance was provided to permit members of the claim group to attend where they did not reside in the town where the meeting was held;
- Mr Lawson and Mr Johnson were aware the meeting was taking place and voluntarily chose not to attend;
- the resolutions made at the meeting and the expert evidence of an anthropologist demonstrated those attending the meeting were representative of the claim group;
- the minutes of the meeting were accurate and those present made the resolutions recorded;
- the meeting resolved that there was not a process of decision-making under traditional laws and customs for decisions of this kind and this was supported by the anthropologist's evidence;
- those present at the meeting therefore adopted a decision-making process, in accordance with the requirements of s. 251B(b), and then decided to revoke the authorisation of the 'current applicant' (i.e. as presently constituted) and authorised a new group to form 'the applicant' in this proceeding—at [18] to [25] and [31] to [32].

Therefore, Stone J found that the requirements of s. 66B(1) were met—at [33].

Another member of the group comprising the current applicant, Patricia Johnson, also wanted to be removed from that group. Although there was no resolution to remove her passed at the meeting, the court was satisfied by the evidence that she

did not wish to continue to be a member of the applicant group and that her name should also be removed—at [34] and [35].

Decision

For the reasons noted above, Stone J decided to exercised the discretion available under s. 66B(2) to replace the 'current applicant' (which included Mr Lawson, Ms Johnson and Mr Johnson) with a new applicant, comprised of the remainder of those included in the 'current applicant' plus two others who were duly authorised at the meeting to join group comprising 'the applicant'—at [36].

Her Honour:

- stressed that, in making the order under s. 66B(2), the court was not reflecting adversely on the conduct of Mr Lawson and Mr Johnson;
- noted that the order neither removed them from the claim group nor affected their standing according to traditional law and custom—at [36].