Replacing the applicant under s. 66B—Butchulla People

Butchulla People v Queensland [2006] FCA 1063

Kiefel J, 18 August 2006

Issue
The issue before the Federal Court was whether to make orders to replace the applicant for the Butchulla People's claimant application under s. 66B(2) of the *Native Title Act 1993* (Cwlth)(NTA).

Background
The Butchulla People's application was filed in the court on 28 August 1998. The persons who jointly comprised the applicant (the current applicant) were the respondents in these proceedings, i.e. they opposed the replacement of the current applicant. In the claimant application, the current applicant was said to be authorised for the purposes of s. 251B via a contemporary process involving a combination of:

- consent of senior members of the native title claim group;
- seniority, based on those members of the native title claim group who have established the longest connection with the area covered by the application; and
- consensus, through debate and dialogue, through all members of the native title claim group.

On 9 April 2005, a meeting was held that purportedly authorised the removal of the current applicant and its replacement with a new group of people authorised to be the applicant in accordance with s. 251B. This was to facilitate the making of the application under s. 66B(1).

Flawed notification?
The respondents submitted that:

- it had not been demonstrated that notification was given to all Butchulla People having an interest in the claim;
- in the absence of anthropological evidence or some other method of identifying those persons listed in the representative body's database who had been notified by letter and those attending the meeting as related to relevant ancestors and therefore members of the claim group, the court could not be satisfied that the authorisation was given by the remaining persons who constitute the applicant and the application should fail, relying on *Bolton v Western Australia* [2004] FCA 760 (*Bolton*), summarised in *Native Title Hot Spots* Issue 10.

Kiefel J distinguished *Bolton* for the following reasons:

- in that case, the public notice given bore the generic title of the claim but did not otherwise identify who might be members of the claim group, the connection of those attending the meeting with the native title claim group was not

demonstrated in anyway and the process undertaken was effectively self-identification;
- in the present case, the apical ancestors were known, there was a 'connection' report and a previous authorisation meeting between members of the claim group had been held;
- it could be inferred that the database kept by the Gurang Land Council (the representative body) reflected the names of persons who had previously attended meetings and persons recognised as part of the families having a line of decent from the apical ancestors—at [27].

Attendance by persons who were not Butchulla

The respondent submitted that some of the people attending the meeting were Kubi Kubi people and not Butchulla. Kiefel J held that:

- sufficient steps were taken at the meeting to ensure that only members of the Butchulla group took part in the authorisation process;
- it was 'difficult' to believe that the respondents at the meeting would not have spoken out 'if they had observed persons outside the group taking part'—at [29

Customary v contemporary decision-making—s. 251B

The respondents submitted that the process that the meeting was obliged to use under s. 251B was a customary process of decision-making.

Kiefel J held that:

- this custom was one adopted by the one family, not the wider native title claim group, and s. 251B(a) did not refer to the custom of a sub-group in a larger native title group but to the laws and customs of the whole group;
- the claim group as a whole had no law or custom that must apply and so s. 251B(b) applied, i.e. authorisation was to be given via a decision-making process that was agreed to and adopted by the claim group;
- while the claimant application referred to the claim group adopting a contemporary process of decision-making, that process did not become an 'immutable' law or custom and could be changed by the process of agreement again;
- while the respondents submitted they were given no notification of the possibility that the decision-making process could change, there was no requirement that such a proposal be notified;
- the decision-making process discussed at the meeting could be seen to have been agreed upon by the majority of those attending and it could be inferred it was agreed that a resolution may be passed by a majority;
- the respondents' submission that the meeting required something approaching a unanimous resolution should be rejected—at [30] to [33].

Withdrawal of two newly authorised persons

At the authorisation meeting, 18 people were authorised to replace the current applicant. Prior to the making of the s. 66B(1) application, two of those people withdrew their consent so that only 16 people were included in the group of people who would replace the current applicant. The respondents submitted that, as those

two persons had withdrawn, another authorisation meeting must be convened as 'the applicant' authorised for the purpose of the claimant application had a 'corporate' character and could not be viewed as made up of individuals. This relied on s. 61(2)(c), which states that the persons authorised to make a claimant application are 'jointly' the applicant.

The applicant submitted that the word 'applicant' may be seen to have more than one meaning and should not be confined for all purposes to the meaning given by s. 61(2)(c). Otherwise, the 'applicant' in native title claim proceedings would cease to exist if it transpired that just one of the persons making up 'the applicant' was not a member of the native title claim group, ceased to be a member of that group, ceased to be authorised or died.

Kiefel J held that:

- while s. 61(2)(c) permits representative proceedings, it did not create a legal entity 'which is itself capable of suing';
- while it obliged those authorised as representatives to co-operate with each other, it did not say that they are bound together in the way in which the respondent contended;
- the requirement that they act together did not imply that their ability to continue to act is dependent upon each other person authorised also continuing in the role;
- if that were the case, it must arise from the terms upon which the persons are authorised by the claim group;
- so far as the NTA was concerned, each person authorised is a representative of the entire claim group;
- the authorisation referred to in the NTA is not of the persons authorised collectively making up the 'applicant' but of each of them personally;
- the authorisation of these persons will continue until revoked and while they are willing and able to act in their representative capacity;
- it followed that the inability of one to continue did not necessarily affect the authorisation of the others (although as her Honour noted earlier, this would be a matter of fact in each case in that it would depend on the terms upon which they were originally authorised);
- ss. 66B(1) and 64(5), dealing with replacement and appointment respectively, should be read in a way consistent with this approach—at [32] to [45].

Comment

In relation to ss. 66B(1) and s. 64(5), her Honour was of the view that:

> The reference to the '*current applicant*' being no longer authorised would be taken to refer only to those persons whose authority has in fact been revoked. This may not be all persons comprising '*the applicant* '. The '*new applicant*' referred to in s 64(5) is each person who is authorised to make up the applicant when a change is made to one or more of them. The evidence that the subsection requires about their authorisation would be satisfied by those persons not newly appointed referring to their prior authorisation and the fact that it has not been revoked. For administrative convenience and clarity, their authorisation might also be ratified at the same meeting which authorises the new appointment or appointments, but this is not necessary—at [45], emphasis in original.

In relation to s. 64(5), in the Explanatory Memorandum to the Native Title Amendment Bill 1997 [No. 2], it was said to be that:

> When a claimant application ... is amended to replace the applicant with a new applicant, that new applicant must provide an affidavit showing authority from the group (and the basis for that authority) to deal with matters relating to the application *[subsection 64(5)]* . *A new applicant may be required,* for example, if ... *one of the group* of persons that *together make up the applicant*, becomes *incapacitated or dies*: at [25.42], emphasis added.

It would appear that the requirement in s. 64(5) for an *amendment* to the claimant application itself and an affidavit in relation to the authorisation by those who remain as 'the applicant' was intended to apply even where only one of the group named as the applicant needed to be removed. The court's recommendation that authorisation of those who remain might be ratified at any meeting which 'authorises the new appointment or appointments' and, one could add, authorises the removal of deceased or incapacitated members, is commended to avoid any doubt about the continuing authority of 'the applicant': see *Daniel v Western Australia* [2002] FCA 1147 at [13] and [16] to [17]. With respect, it also appears that her Honour's reading of 'current applicant' may not entirely align with the view expressed in the Explanatory Memorandum. In any case, the view expressed by Keifel J is not necessarily correct in all cases. The terms upon which a person or persons are authorised are a matter of fact which needs to be determined on a case-by-case basis.

Decision

The notice of motion under s. 66B(1) to replace the applicant succeeded and orders were made accordingly.