

Injunction sought to restrain representative body

Charlie v Cape York Land Council [2006] FCA 1418

Greenwood J, 31 October 2006

Issue

The main issue in this case was whether an interim injunction restraining a native title representative body from holding a meeting to authorise amendments to a claimant application should be made. Final relief by way of a declaration that the representative body had failed to comply with its statutory duty under s. 203BB(1) of the *Native Title Act 1993* (Cwlth) (NTA) to facilitate and assist persons who may hold native title was also sought, along with consequential orders.

Background

Gordon Charlie made the application to the Federal Court for the interim injunction. He had previously been one of the people who constituted 'the applicant' for the Dingaál Native Title Application (the Dingaál application) but was removed and replaced pursuant to an order made under s. 66B on 17 September 2003.

The native title claim group for the Dingaál application is the Dingaál people. At a meeting held early in 2006, members of the claim group unanimously resolved to (among other things):

- amend the Dingaál application to include members of the Thanil, Nguuruumungu, Gulaal, Ngaatha and Thittaar People in the native title claim group; and
- convene a meeting of those five groups and the Dingaál People to provide information on the progress of the claim and the conduct of further discussions about the compiling a 'connection' report.

In March and May 2006, Mr Charlie was informed of the outcome of that meeting via a letters from the representative body acting for the claimants, Cape York Land Council (CYLC), with the May letter (among other things) also advising him that the Dingaál application may need to be amended and attaching a work plan setting out the steps to be taken, including a timetable for further meetings.

On 17 October 2006, the CYLC again wrote to Mr Charlie enclosing notice of a meeting (the proposed meeting) of all Dingaál, Ngaathawarra, Thittaar, Nguuruumungu, Thanil and Gulaal Peoples to discuss amending the native title claim group for the Dingaál application to include the other five groups and, if appropriate, to authorise other amendments that might be required. In the letter, CYLC offered to provide transport to those who wished to attend.

On 20 October 2006, Mr Charlie wrote to the CYLC advising that 85 people sought travel assistance to the proposed meeting and that a private security guard would need to be available for the duration of the meeting because of ‘an apprehension about fights and threats’. No response was received from the CYLC.

Subsection 69(2) application

Mr Charlie sought an interim injunction to restrain the CYLC from holding the proposed meeting. Since the interim relief was sought in aid of a declaration that the CYLC failed to discharge its obligations under s. 203BB(1), the court accepted this an application ‘in relation to a matter arising under’ the NTA for the purposes of s. 69(2)—at [6].

Facilitation and assistance functions

Subsection 203BB(1) provides that, among other things, the ‘facilitation and assistance functions’ of a representative body are:

- to research and prepare native title applications, and to facilitate research into, preparation of and making of native title applications; and
- to assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to native title applications.

Subsection 203BA(2) provides that such a function is to be performed in the manner that:

- maintains administrative processes that promote the satisfactory representation by the body of native title holders and persons who may hold native title in the area for which it is the representative body;
- maintains administrative processes that promote effective consultation with Aboriginal peoples and Torres Strait Islanders living in the area for which it is the representative body; and
- ensures that the processes operate in a fair manner, having particular regard to the matters set out in paragraphs 203AI(2)(a) to (f).

Mr Charlie’s contentions

The allegation was that CYLC had failed to discharge its duty under s. 203BB(1) because it failed to:

- have regard to the interests of the Dingaal native title claim group or be satisfied it’s members consented to any general course of action;
- promote the satisfactory representation of native title holders or maintain a process that promoted consultation and operated in a fair manner;
- assist Dingaal native title claim group and the Brim family group (the members of which had resided in and around Kuranda for a significant period but traced their genealogy to a Charlie family ancestor) in negotiations and proceedings in relation to the claimant application;
- give reasonable notice to claim group members.

The court noted that, on the evidence, it appeared that Mr Charlie had not informed CYLC of the Brim family group's relationship with the Charlie family (i.e. as a sub-group) at any time after the receipt of the CYLC's March and May 2006 letters—at [13].

Balance of convenience favoured allowing the meeting

Justice Greenwood found that:

- the CYLC had incurred considerable cost in convening the proposed meeting and the delay and dislocation caused by granting the interim injunction would significantly prejudice both the claim group and the CYLC in providing support to claim group members in the prosecution of the Dingaal application;
- Mr Charlie made his application for the injunction 'at the last minute' i.e. the delay in agitating the matter was considerable;
- therefore, the balance of convenience favoured allowing the meeting to proceed—at [13].

Threshold question—Mr Charlie's capacity to seek the injunction

Among other things, it was noted that, apart from question of the balance of convenience:

- the threshold issue was whether convening the proposed meeting by CYLC and consideration of the questions to be resolved by the claim group gave rise to an arguable breach of duty that was actionable by Mr Charlie;
- on the evidence, Mr Charlie had not demonstrated an 'arguable question of ... connection on the part of the Brims' and, in any case, Mr Charlie was apparently the recognised elder of the Brim family group and he had received notice of proposed meeting;
- it was the Brims who should advance the contentions made in support the injunction but, since Mr Charlie's had a 'mandate' to speak for, and represent, the Brims (via a document signed by 70 members of the Charlie and Brim families), the court proceeded on the footing that Mr Charlie brought the interlocutory proceedings as a representative of the Brim family group—at [15] to [20].

No failure to discharge obligations

It was found that:

There is no evidence in any of the material that the CYLC has failed to discharge any of the obligations conferred upon it by ss. 203BA, 203BB, 203BC or 203BJ. As to s. 203BJ(b), there is no evidence that the CYLC has failed to identify persons who may hold native title in the area the subject of the claim for which the body is the representative body. That function, of course, is not absolute, it is a function to be discharged 'as far as is reasonably practicable'. The CYLC has established processes reflected in the correspondence, Work Plan and steps taken to convene meetings of relevant claim group members or those members asserting interests in respect of the lands the subject of the claim, to discharge that obligation—at [27].

Court intervention may not be appropriate where review available

After noting that s. 203BI provides for an internal review of a representative body's performance of its functions, his Honour found that the matters raised by Mr Charlie

were arguably matters which ought properly be dealt with via the NTA review process—at [29] and [30].

Failure to give reasonable notice

As the evidence was that Mr Charlie had responded to the CYLC's correspondence regarding the proposed meeting 11 days prior to the date of that meeting, the court was not satisfied that the notice of meeting was too short and so there was no failure on the part of the CYLC to perform functions in this respect.

Decision

Mr Charlie's application was dismissed.

Postscript

On 5 December 2006, Greenwood J dismissed a second application for an interim injunction to restrain CYLC from holding the authorisation meeting, this time with an order that Mr Charlie pay the CYLC's costs: see *Charlie v Cape York Land Council* (No. 2) [2006] FCA 1683. It will be summarised in *Native Title Hot Spots Issue 22*.