Replacing the applicant under s. 66B

Anderson v Western Australia [2007] FCA 1733 (Ballardong claim)

French J, 13 November 2007

Issue
The issue in this case was whether orders to replace the applicant for a claimant application should be made pursuant to s. 66B of the *Native Title Act 1993* (Cwlth) (NTA). The court decided to make the orders.

Background
The Ballardong claimant application was made in 1997 and later (in July 2000) amended to combine it with five other claimant applications. There were 16 people who jointly constituted 'the applicant' for the combined claim (see s. 61(2)(d) of the NTA).

Several earlier attempts to, among other things, replace the applicant had failed, largely due to the fact that his Honour Justice French was not satisfied that these changes were authorised by the native title claim group—see *Anderson v Western Australia* [2002] FCA 1558, *Anderson v Western Australia* (2003) 134 FCR 1; [2003] FCA 1423 and *Bolton v Western Australia* [2004] FCA 760 (*Bolton*), summarised in *Native Title Hots Spots* Issue 3, Issue 8 and Issue 10 respectively. Note that, in *Bolton*, orders were made to remove two of the 16 people who constituted the applicant. Both were deceased.

In July 2007, an application was made by 12 members of the native title claim group under s. 66B seeking orders for the replacement of the applicant. By the time of the hearing of that application, two of the 14 who constituted the 'current' applicant were deceased.

Statutory framework
Paragraph 66B(1)(a), as amended by the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth), provides (among other things) that one or more members of a native title claim group may apply to the court for an order that the member (or the members jointly) replace the current applicant where one or more of the persons jointly constituting the current applicant:

- consents to being replaced or removed;
- has died or become incapacitated;
- is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it;
- has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it.

The member or members seeking to replace the current applicant must be authorised by the claim group to make the application and to deal with matters arising in relation to it—s. 66(1)(b).

The court may make the order if it is satisfied that the grounds in s. 66B(1) are established. If the order is made, then the Native Title Registrar must be notified of the change and, if the relevant

application is registered, the Register of Native Title Claims must be amended to reflect the order—ss. 66B(2) to 66B(4).

Evidence

Substantial affidavit evidence was provided deposing to the efforts made to secure authorisation for the replacement of the applicant in this matter, which included:

- sending a notice of an authorisation meeting, to be held in Northam on 9 December 2006, to 298 people for whom the South West Aboriginal Land and Sea Council (SWALSC, the legal representative of the claimants) had addresses and who SWALSC had established as being descendants of the named ancestors in the application;
- sending a second version of the notice, along with family history forms, to an additional 107 members of SWALSC who had self-identified as Ballardong on their membership forms but for whom SWALSC had not been able to establish a link to the named ancestors on the application;
- placing notices of the meeting in five consecutive editions of *The West Australian* newspaper and in a single edition of three major regional newspapers circulating within the area covered by the application.

The evidence was that the notices (among other things):

- gave the date, time and place of a meeting 'for the members of the native title group for the Ballardong native title claim WAD 6181 in the Federal Court of Australia';
- indicated that all members of the native title claim group were invited to attend;
- indicated that the meeting was being called to consider authorising a new set of persons to be the applicant and to allow SWALSC to take instructions in relation to certain other matters.

'Importantly', the newspaper advertisement qualified its invitation to 'all members of the native title claim group for the Ballardong native title claim' by defining the members of the claim group 'by reference to the biological and adopted descendants of the…apical ancestors whose names were set out in the advertisement'—at [15].

The attendance register kept at the 9 December 2006 meeting, in which people were listed (on the advice of anthropologists working for SWALSC) as either participants or observers, with only the former being given voting cards, was in evidence.

SWALSC's principal legal officer (PLO) gave evidence that (among other things), resolutions were put to the meeting that:

- the native title claim group adopt a decision-making process whereby members of the native title claim group were authorised to make and to deal with matters arising in relation to the application by a majority of those members of the native title claim group present and voting;
- three of the 16 people constituting the current applicant were no longer authorised to make, or to deal with matters arising in relation to, the Ballardong application;
- that 13 members of the claim group or 'such of them as are willing and able to act' were authorised to make the application and deal with matters arising in relation to it. (One of the people who was authorised, 'RR', subsequently died. Nine of the remainder were part of the group constituting the current applicant.)

The first resolution was recorded as being passed by a majority of 55 to 22, the second as being passed unanimously and the third as passing by a majority of 43 to 16. According to the PLO's affidavit evidence, there was considerable discussion at the meeting preceding each of the resolutions and some people left the room between resolutions, which explained the slight differences in the numbers voting on them. Other evidence went to (among other things) the willingness of the 12 people who were to constitute the 'replacement' applicant to fulfil that role and the use of a genealogical database to identify the people who should be notified of the authorisation meeting.

Decision

His Honour Justice French was satisfied that:

- two of those who constituted the current applicant were deceased, another consented to being removed and two others acquiesced in their removal;
- the current set of people who constituted the applicant were no longer authorised by the native title claim group to make the application and deal with matters relating to it;
- the members of the claim group who made the s. 66B application (other than one person who had subsequently died) were authorised in their place;
- there was no process of decision making that, under the traditional laws and customs of the native title claim group that must be complied with in relation to authorisation (see s. 251B);
- the process of decision-making followed in this case was agreed to and adopted by 'a sufficiently representative section of the native title claim group for the purpose of dealing with matters arising in relation to the application', having regard (among other things) to the wide-ranging notification of the authorisation meeting—at [1] and [35] to [38].

Orders were made that:

- those who made the s. 66B application (other than one person who had subsequently died) jointly replace the current applicant;
- the 'reconstituted' applicant had leave to amend the application by filing a Form 19 (which is the form in the Federal Court Rules that may be used to make minor amendments);
- there be liberty to apply for further orders.

Comment

As part of the recent suite of amendments to the NTA, s. 64(5) was repealed and s. 66B was amended so that it now provides for an application to replace the current applicant where one or more of those constituting that entity, as defined by ss. 61(2) and 253, consents to being replaced or removed or has died or become incapacitated. According to the Explanatory Memorandum to the Native Title Amendment (Technical Amendments) Bill, the intent of the amendment was that s. 66B would:

> [E]xpand the circumstances in which the Court may hear and determine an application to replace the applicant. To clarify the operation of the provisions, item 79 would repeal subsection 64(5). This would mean that all amendments to an application to replace an applicant would be made following an application under section 66B. The Registrar would not be required to reapply the registration test to applications amended to replace the applicant.
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> Accordingly, proposed section 66B would be the only mechanism through which any changes to the applicant could be made—at [1.249] and [1.266].