

# Replacing the applicant under s. 66B — Full Court

## *Foster v Que Noy* [2008] FCAFC 56

Finn, North and Reeves JJ, 11 April 2008

### Issue

The issues before the Full Court of the Federal Court in this case were:

- whether to grant leave to appeal against orders made on 22 November 2007 removing Marjorie Foster from the group constituting ‘the applicant’ on the Douglas North and Fish River claimant applications; and
- if leave was granted, whether the trial judge had erred in concluding that Ms Foster had been properly removed pursuant to s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA)—at [2] and [5].

Leave to appeal was granted, both appeals were dismissed and Ms Foster was ordered to pay the respondents’ costs of the appeals.

### Background

For the background to these appeal proceedings, see *Parry v Northern Territory* [2007] FCA 1889 and *Que Noy v Northern Territory* [2007] FCA 1888, summarised in *Native Title Hot Spots Issue 27*. Applications by Ms Foster for leave to appeal against those decisions were heard together. In both cases, Ms Foster sought to be reinstated as one of the people who are jointly the applicant (see s. 61(2)(d) of the NTA) on each claimant application.

The question as to whether or not Ms Foster’s membership of the applicant group for each claim had been properly terminated revolved around a meeting of the Kamu People held on 9 February 2007 (the Kamu meeting). Specifically, the issue was whether or not the critical decision (i.e. to remove Ms Foster) was made in accordance with the traditional laws and customs of the Kamu people. It was common ground that Ms Foster had not been given notice of the purpose of the Kamu meeting. All parties accepted that the process of decision making that had to be followed by the native title claim groups was one that accorded with the Kamu people’s traditional laws and customs for making decisions of that kind, as required by s. 251B(a) of the NTA.

At first instance, Justice Mansfield found (among other things) that:

- the Kamu people traditionally made decisions by a process of comprehensive consultations, with emphasis on senior persons (being the upper two generations) who have been actively involved in Kamu matters;
- the decision to withdraw Ms Foster’s authority was made by the Kamu people at the Kamu meeting; and
- at the same meeting, a decision was made to replace her with her daughter, Margaret Foster, as a member of the group that constituted the ‘applicant’ on each claim.

### Full court’s consideration

In joint reasons for judgment, Justices Finn, North and Reeves noted that:

- most of the relevant evidence was in the form of affidavits from two experienced anthropologists, both of whom agreed that the Kamu people's traditional decision-making process was followed at the Kamu meeting;
- it was significant that Ms Foster was represented at trial by senior counsel and had been granted the opportunity to challenge that evidence and to call her own contradictory evidence but did neither;
- as the anthropologists were not cross examined, they were deprived of the opportunity to explain whether there was any ambiguity or inconsistency in their respective opinions as to the need for 'comprehensive consultations' within the Kamu people's traditional decision making process;
- Ms Foster's submission that 'comprehensive consultations' necessarily required that she be given notice of the purpose of the Kamu meeting was inconsistent with the evidence of one of the anthropologist (with which the other agreed) that the meeting had been conducted in accordance with the Kamu's traditional decision making process and, moreover, Ms Foster's counsel accepted that this construction was not raised at trial;
- the trial judge conducted a thorough review of the relevant evidence—at [13] and [18] to [20].

### **Decision**

The court concluded that:

- the trial judge's decision was firmly founded on the evidence and the arguments the parties chose to place before him;
- the appellant had failed to establish in each of the appeals the requisite error in the trial judge's decision that would allow an appellate court to interfere with that decision;
- leave to appeal should be granted and the appeals dismissed;
- the appellant should pay the respondents' costs of the appeals—at [20] to [22].