Replacing the applicant under s. 66B

Turrbal People v Queensland [2008] FCA 316

Spender J, 11 March 2008.

Issue

The issue in this case was whether orders to replace the current applicant on a claimant application should be made pursuant to s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA) in circumstances where the authority of the current applicant to make the claimant application in the first place was under challenge. The court decided to make the order to replace the applicant.

Background

The intention of the application under s. 66B(1) was to have two people constitute 'the applicant' (see s. 61(2)(d) of the NTA) on a claimant application brought on behalf of the Turrbal People because the current and sole applicant, Connie Isaacs, was frail.

A number of affidavits were filed in the s. 66B proceeding by people deposing that they were Turrbal People who had not been included in any discussions about the authorisation of the current applicant to make the Turrbal claim and who disputed that Ms Isaacs had authority to make decisions for the Turrbal People with respect to a native title claim. There was other evidence going to who should be included (or not) in any application for a determination of native title made on behalf of the Turrbal People. Justice Spender noted that the material before the court indicated there was 'a serious factual dispute' as to 'who would need to be included in a properly constituted Turrbal claim group'—at [11].

It was noted that those who raised this 'serious factual issue' were respondents to the claimant application and were 'entitled to be heard' in those proceedings—at [18].

Decision

After considering the authorities on point and noting that 'a curious feature' of the s. 66B application was that it was contended there were alternative basis for the authorisation to change the composition of the current applicant, Spender J found that:

> The hearing of a s 66B motion is not the proper occasion to explore the broader issue as to whether or not a native title determination application was properly authorised in the first place ... . Such an issue can be explored either in the course of a strike-out application under s 84C ... or at the trial of the application—at [26].

On the assumption that Ms Isaacs had authority as 'Elder' to make the original application, his Honour found she therefore had authority as Elder to decide on an 'altered composition of the applicant' and so made the orders sought—at [29] to [30], relying on *Williams v Grant* [2004] FCAFC 178.