

Replacing the applicant under s. 66B — Miriuwung & Gajerrong

***Ward v Northern Territory* [2002] FCA 1477**

Mansfield J, 2 December 2002

Issues

This case dealt with a successful application under s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) to replace the applicant in a claimant application brought on behalf of the Miriuwung and Gajerrong people.

Background

This decision followed a similar application by the Northern Land Council (NLC), dealt with in *Ward v Northern Territory* [2002] FCA 171. That application was dismissed by O'Loughlin J on 8 February 2002, primarily on the ground that the evidence did not establish that the applicant had been authorised by the native title claim group.

A further s. 66B application was filed by the NLC on 27 May 2002. It sought orders that would, in effect, replace the 17 people currently named as the applicant (the current applicant) with 15 people (the proposed applicant). The application was supported by affidavit evidence of 11 of the 15 people named as the proposed applicant and three affidavits from an anthropologist, Kim Barber.

On 9 August 2002, a joint affidavit was filed by counsel acting for 12 of the claimants who opposed the s. 66B application and who alleged, amongst other things, that certain assertions made by Mr Barber in his affidavits were wrong 'in fact and in traditional law'. Counsel for those bringing the s. 66B application drew the court's attention to s. 77A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth), which mirrors the concept of authorisation set out in section 251B.

Referring to *Alderson v Northern Land Council* (1983) 67 FLR 353, Justice Mansfield recognised that the complexities involved in deciding who are the traditional owners meant that decisions on this point cannot be made quickly or without both a consultative process and an understanding of the relevant Aboriginal lore, traditions, observances, customs and beliefs.

Daniel principles applied

In approaching the application of s. 66B, Mansfield J adopted the principles set out by Justice French in *Daniel v Western Australia* [2002] FCA 1147 (*Daniel*), which are summarised in *Native Title Hot Spots* **Issue 2**.

Reliance on anthropological evidence

As in *Daniel*, reliance was placed on the evidence of a qualified anthropologist (Kim Barber) with 'considerable experience in anthropological research concerning the native title claim group since 1983', a date well prior to the commencement of the native title proceedings in 1995. Little weight was placed on the joint affidavit challenging the evidence of Mr Barber because the affidavit was assertive rather than detailed, did not address much of the material advanced, provided no description of facts or matters on which Mr Barber's view may be tested, and none of the eight deponents attended for cross-examination.

Findings

Based on the material before the court, Mansfield J found that:

- the native title claim group is organised on the basis that responsibility for, and control of, the land which is the subject of the claim area is exercised by various estates or local groups. Members of the local groups, who refer to their local areas as their *Dawang* or country and who are responsible for speaking for, and looking after, the local areas are called *Dawawang* (traditional owners);
- the local groups make decisions in relation to particular land under the traditional law and custom of the native title claim group and not by some consensual or democratic process;
- traditionally, senior persons who have acquired appropriate knowledge are responsible for looking after sacred sites and rituals and also have responsibility for secular matters, such as the authorisation of persons to make a native title claim and deciding who to instruct as solicitors to conduct it;
- decisions made about the claim area, including those concerning the claim, involve consultations between the *Dawawang* for the particular areas comprising the claim area and other senior Aboriginal persons who are knowledgeable about the claim area or parts of it and who have custodial responsibility for it;
- the individual members of the native title claim group who do not agree with the decisions reached by the 'elders' by this process do not have a right of veto. Decisions reached in the manner described are not invalid or ineffective because some individual members of the native title claim group do not agree with them—at [31] to [33].

Consultation

The members of the native title group conducted meetings on both 26 January 2002 and 9 May 2002 where the proposal to vary the persons named as the applicant was discussed. His Honour was satisfied that:

- the meeting on 9 May 2002 was attended by representatives of the *Dawawang* and by senior ceremonial or law persons (*Madjang*) for the claim area and that sufficient notice of the meeting had been given to all concerned;
- those present at the meeting decided that the current applicant be replaced by the proposed applicant and it was also decided that NLC represent the applicants;
- all of these decisions taken at that meeting were made in accordance with Aboriginal law and with the traditional decision-making processes required by the traditional laws and customs of the native title claim group—at [35] to [38].

Decision

Based on these findings, it was held that

- those named as the current applicant ceased to be authorised by the claim group following the decision made on 9 May 2002;
- those named as the proposed applicant are members of the native title claim group and are authorised as and from that date to maintain the application and to deal with matters arising in relation to it;
- that authorisation is subject to the expressed limitation that the Northern Land Council solicitors are to be engaged by the proposed applicants to act in the conduct of the claim.

Orders were made pursuant to s. 66B replacing the current applicant with the proposed applicant. The proposed applicant is to file both a notice of address for service within 28 days and an amended application to give effect to this order.