Replacement of applicant—s. 66B

Coyne v Western Australia [2009] FCA 533

Siopis J, 22 May 2009

Issue

This case dealt with an application to replace the applicant in the Wagyl Kaip claimant application. The Federal Court had to decide:

- whether there was a traditional decision-making process that must be used for making decisions of that kind;
- whether the fact that persons were elders of their respective families precluded their removal as persons who jointly comprise the applicant;
- whether a resolution at a meeting was effective to revoke the authority of the current applicant and to authorise a proposed replacement applicant; and
- if so, whether that authorisation was affected by the subsequent death of two persons comprising the proposed replacement applicant.

Background

A notice of motion pursuant to s. 66B(1) of the *Native Title Act 1993* (Cwlth) (NTA) was filed on 4 July 2008, seeking an order that the current applicant be replaced. This followed a meeting of the members of the Wagyl Kaip and Southern Noongar native title claim groups held in Albany, Western Australia, on 1 December 2007. Those attending the meeting were asked to decide, on a vote by show of hands, whether to revoke the authority of the current applicant and whether to replace those persons comprising the current applicant with an applicant comprised of different persons. The notice of motion was contested by a number of people who it was proposed to replace.

Decision-making process—s. 251B

Section 251B of the NTA, which deals with how the applicant must be authorised, provides that if there is no mandatory decision-making process:

> [F]or authorising the making and dealing with a native title determination claim under the traditional laws and customs of the people in the Wagyl Kaip claim group, then it was open to the claim group to agree to and adopt a decision-making process for the purpose of granting such authorisation—at [17].

Those seeking the order to replace the applicant submitted that family groups within the Wagyl Kaip/Southern Noongar claim area did meet to make decisions about parts of the application area for which they had a particular right to speak but there had never been a traditional process by which the whole claim group would get together and make decisions about speaking for the country. Those resisting the order submitted that no family group was bound by the decision of any other family group and that each family group was akin to a 'sovereign state'. Justice Siopis held that there was nothing on the evidence to reveal a traditional decision-making process—at [20].

Position of the respondents as elders

The respondents submitted that, as elders of their families, if they were removed, no elder from their family groups would comprise part of the applicant. This would therefore void the status of the applicant as an authorised applicant. Siopis J held that there was no provision in the NTA which provided that the applicant must be comprised of representatives from each of the family groups within the claim group—at [24].

The number of people at the authorisation meeting

The respondents contended that the resolution passed at the meeting on 1 December 2007 was not effective to revoke the authorisation of the current applicant and authorise the proposed replacement applicant because an insufficient number of people attended the meeting for it to be representative of the Wagyl Kaip claim group.

It was held that, in deciding whether a sufficiently representative section of the native title claim group agreed to and adopted the process, what was significant was the extent of the distribution of the notice of the meeting and its terms, not the proportion of those attending compared to the number of potential members of the claim group—at [48], referring to *Anderson v Western Australia* [2007] FCA 1733 (*Anderson*) at [45], French J.

The notice of the meeting was sent direct to 528 people and advertised in three newspapers circulating in the Albany region. Each notice stated that members of the native title claim group were invited to attend and clearly set out the claim group description. What was to be decided at the meeting was also set out in some detail. His Honour found that:

- the notice of the meeting of 1 December 2007 was widely distributed and advertised in the newspapers;
- there was verification on the day as to who was entitled to vote (i.e. who, of those attending, were members of the native title claim group)—at [46] and [50], with the court noting that the representative body used the same notification and verification process in this case, adapted appropriately, as was used in *Anderson*.

Therefore, it was found that there was sufficient notice of the intention to hold the meeting, and of the business to be transacted at it, to infer those who decided not to attend the meeting were content to abide by any decision made by those who did. Accordingly, the decisions made at the meeting were found to be 'the legitimate binding expression of the view of the Wagyl Kaip claim group as a whole' and the resolutions passed at the meeting were effective to revoke the authority of the current applicant and to authorise its replacement with the new applicant—at [51] and [53].

Whether the replacement applicant remained authorised

It was 'significant' that the resolution passed at the meeting authorised the named persons 'or such of them as are eligible to act as an applicant and who remain willing

and able to act in respect of the application in the future' to make and deal with matters arising in relation to the application. His Honour followed the decision in *Anderson*, where it was held that each individual person's authorisation was subject to that person continuing to be willing to, and capable of, acting. Therefore, although two of the seven people authorised had since died, the remaining five remained authorised as the replacement applicant—at [53] to [56].

Decision

Siopis J ordered that those who brought the s. 66B application should jointly replace the current applicant.