Replacing the applicant – s. 66B

Barnes on behalf of the Wangan and Jagalingou People v Queensland [2010] FCA 533

Collier J, 28 May 2010

Issue

This case concerns an application under s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) to replace the applicant in a claimant application. The main issues were whether members of claim group were intimidated and bullied at a meeting held to authorise a replacement applicant and whether those who attended that meeting were actually members of claim group. Justice Collier decided to make the order to replace the applicant.

Background

The s. 66B application related to a claimant application made by a claim group whose members identify as Wangan and Jagalingou. It covers a large area in the Central Queensland. The s. 66B application was made after an authorisation meeting of the claim group was held in Bundaberg in February 2010 (the authorisation meeting). Resolutions were passed to replace the applicant at that meeting. Notice of that meeting was given in the three newspapers on three separate occasions. It was clear from the advertisement that the meeting:

- was an authorisation meeting relating to the claimant application;
- called for attendance by persons who fit the description in the advertisement or otherwise claimed to be Wangan and Jagalingou People;
- was to be held for a number of reasons, including 'to ensure that the Applicant for the claim is properly authorised by the claim group and if not to appoint a new Applicant'.

The advertisement nominated Christine Royan, an officer with Queensland South Native Title Services (QSNTS) responsible for liaising with the claim group and the applicant, as the contact person.

Those making the s. 66B application submitted that the authorisation meeting resulted in the claim group duly authorising a new applicant. The most relevant of the resolutions passed were, in summary, that:

- the meeting confirm those in attendance who were not, in accordance with the public notice, entitled to attend, 'may remain but only as passive observers and may not speak and cannot vote';
- the meeting confirm all other persons attending were 'accepted as descendants of the pre-sovereignty society for the claim area and under the laws and customs of the claim group are entitled to fully participate in the proceedings as members of the claim group';
- the meeting decide that the current applicant was no longer authorised and determined to select a new applicant;

- the seven people making the s. 66B application constitute the new applicant.

Ms Royan gave evidence that, among other things:

- on her attendance sheet, she recorded 102 people and, on her analysis, the vast majority of them were descendants of an apical ancestor recognised as being of the Wangan and Jagalingou people;
- all of the resolutions were moved and seconded, attendees were asked whether they wished to speak for or against each resolution and, in particular, members of the current applicant group were invited to address the meeting before the resolution to replace them was put to the meeting;
- QSNTS staff left the meeting for approximately 45 minutes and, when they returned, seven claim group members had been put forward by the respective family groups to be the new applicant;
- all of the resolutions were passed by overwhelming majorities;
- the meeting was conducted in an orderly fashion over approximately six and a half hours, partly to ensure that anyone who wished to speak was given an opportunity to do so; and
- she did not see or hear anybody being coerced, rushed or bullied into making decisions at the meeting.

Those making the s. 66B order all gave evidence that (among other things):

- they were members of the claim group and supported the notice of motion to replace the applicant;
- they attended the authorisation meeting at which they were authorised to apply to the court for an order that they be named as the applicant and they consented to becoming the applicant;
- they believed that those members of the claim group in attendance were both broadly representative of the claim group and capable of making decisions on behalf of the claim group;
- while attending the meeting, they observed the decision-making process agreed to and adopted for the purpose of selecting the persons who are to constitute the applicant was properly followed.

The 'key changes to the composition of the applicant' sought were:

- the Jessie Diver and Patrick Fisher would remain as part of the group constituting the applicant;
- Janice Barnes, Owen McEvoy, and Deree King would be removed from that group; and
- Lynette Landers, Irene White, Elizabeth McAvoy, Patrick Malone and Les Tilley would be added to that group—at [5].

Janice Barnes, Owen McEvoy, and Deree King opposed the s. 66B application. Their evidence was that:

- they were invited by QSNTS to attend an authorisation meeting in Bundaberg in February 2010;

- on behalf of their respective families, they were of the opinion that the authorisation process was not transparent and that they were 'railroaded' by QSNTS and people who were not members of the claim group.

Jessie Diver gave evidence expressing similar concerns, despite having earlier given evidence as to the contrary. Ms Diver did not appear at the hearing. Since the inconsistencies in her evidence were not explained, Justice Collier found no weight could be attached to any of her evidence—at [16].

Were individuals intimidated and bullied?

The main question the court considered was whether 'participants were given a reasonable opportunity to put forward their respective points of view before the resolutions were carried'. Her Honour was not satisfied 'that individuals were intimidated or bullied at the authorisation meeting, or prevented from giving their views'. In her Honour's view:

- there was 'sound evidence that effective processes were followed which gave participants fair and reasonable opportunities to promote their views';
- there was no evidence to support the claim that members of QSNTS intervened in the deliberations of the members of the claim group and 'ample evidence' indicating this did not occur;
- the 'strong demeanour' of Ms Barnes and Mr McEvoy suggested that it would have been 'very difficult for either one of them to be intimidated or bullied' at the meeting;
- the 'significant period of time' over which the meeting was conducted suggested that 'anyone who wished to speak had the opportunity to do so'—at [22] and [23].

Were attendees claim group members?

The description of the Wangan and Jagalingou People in the public notice advertising the authorisation meeting was the same as the description of the claim group in the claimant application, although the advertisement also referred to descendants of four other apical ancestors identified as being associated with the Wangan and Jagalingou People. The resolutions noted earlier indicated that:

> [N]ot only were those entitled to attend and vote at the authorisation meeting required to be members of the Wangan and Jagalingou People, but that the significant majority of the persons in attendance at the authorisation meeting accepted that this was the case—at [28].

Collier J accepted that the process of recording attendance as described in Ms Royan's evidence 'was an adequate one' and that Ms Royan's record of attendance was accurate and 'reflective of the right of such persons to attend'. The evidence indicated that 90 of 102 attendees were entitled to vote. Ms Royan's evidence included the details of who moved and seconded each resolution and how it was carried. While only the numbers of those opposing each resolution were recorded, 'given the large numbers of people voting and the very small numbers opposing each resolution ... I do not consider that the failure to specifically count those voting in favour of each resolution detracts from the validity of the process'. There was no

evidence of 'a significant presence of persons who were not recognised as members of the claim group'—at [31] and [34] to [35].

Incomplete anthropological and genealogical reports

In compliance with orders made in June 2009, the QSNTS commissioned an anthropological report and a genealogical report. Preliminary reports had been prepared. Mr McEvoy was concerned about the replacement of the applicant in circumstances where uncertainty of the composition of the claim group had been generated by the unfinished reports. While her Honour thought these were proper concerns:

> Nonetheless, the primary issue for determination at present is the validity of the authorisation process. With this in mind, I do not find that the status of the anthropological and genealogical reports invalidates the process whereby the Applicant was replaced on 6 February 2010—at [42].

This was largely because:

- the applicant 'appears to have an important role in providing instructions and information to QSNTS in relation to the completion of the reports';
- it was 'counter-intuitive to disallow the authorisation' of the applicant because of the incomplete reports 'when this group is integral to the satisfactory completion of the reports';
- the resolutions to replace the applicant were carried 'by overwhelming majorities' and so the 'desire of the claim group' to replace the applicant was 'abundantly clear'—at [43] and [45].

Did Mr McEvoy second the resolution confirming entitlement to vote?

It was submitted that Mr McEvoy seconded the resolution the sought confirmation from the meeting that persons present and entitled to attend the meeting in accordance with the public notice were (among other things) entitled to vote for or against the resolutions authorising the new applicant (Resolution 2). While on the weight of the evidence it was found he did do so, the strong objections he maintained in these proceeding led the court to place little weight on this finding of fact—at [51].

Decision

The court was satisfied that (among other things):

- no individuals were intimidated or bullied;
- those in attendance and authorised to vote were recorded accurately;
- sufficient members of the claimant group were in attendance at the authorisation meeting to authorise the resolutions sought;
- Those making the s. 66B application were found to have satisfied ss. 66B(1)(a)(iii) and 66B(1)(b)—at [54] to [55].

Therefore, her Honour made an order pursuant to s. 66B(2) that the current applicant be replaced.