Reconstituting the applicant - s. 66B does not cover the field

Lennon v South Australia [2010] FCA 743

Mansfield J, 16 July 2010

Issue
In this case, two of six people authorised pursuant to s. 251B to make a claimant application under the *Native Title Act 1993* (Cwlth) (NTA) had died. The question was whether those persons could be removed without an application under s. 66B to replace the current applicant with a new applicant comprised of the remaining four. Justice Mansfield held that a s. 66B application was not necessary. Rather, the four who remain continue to be 'the applicant' and may continue to deal with all matters arising under the NTA in relation to the application. Therefore, those four people may apply to the Federal Court pursuant to s. 62A and the court may then remove the name of the deceased person(s) 'as a party'. His Honour was of the view that O 6 r 9 of the *Federal Court Rules* (FCR) could also be relied upon—at [1] and [35].

In coming to this conclusion, Mansfield J disagreed with the finding by Justice Siopis in *Sambo v Western Australia* (2008) 172 FCR 271 (*Sambo*) at [30] that, since the 2007 amendments to the NTA, the only means by which changes can be made to the composition of the applicant is 'through' s. 66B of the NTA. See also *Bullen v Western Australia* [2010] FCA 900 (*Bullen*) at [60] where Siopis J repeats this view and *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809 (*Roe v KLC*) where Justice Gilmour appears to take the same view as Siopis J. Both cases are summarised in *Native Title Hot Spots* Issue 33.

Leave to appeal sought
Presumably in recognition of the need for an authoritative decision to resolve the difference of opinion, the Commonwealth filed an application for leave to appeal from Mansfield J's judgment and sought referral of that application to the Full Court. The first directions hearing is scheduled for 29 September 2010.

Comment on order – is registration test triggered?
The order made was that the application be amended to delete the names of the two deceased persons. When the amended application is filed, s. 64(4) will require referral by the court's Registrar to the National Native Title Tribunal's Native Title Registrar, who will then have to decide whether the amended application must be tested for registration. All amended applications must be tested unless either ss. 190A(1A) or 190A(6A) applies. An amendment to change the composition of the applicant is not within the scope of either of those provisions. Therefore, it seems the amended application will have to be tested. If that is the result, then it runs counter to the current legislative policy expressed in the NTA. In the Explanatory Memorandum (EM) to the Native Title Amendment (Technical Amendment) Bill 2007 at [1.249], it was said that:

> Item 82 would amend section 66B to expand the circumstances in which the Court may hear and determine an application to replace the applicant. To clarify the operation of the provisions, item 79 would repeal subsection 64(5) [which provided for the amendment of a claimant application to replace the applicant]. This would mean that all amendments to an application to replace an applicant would be made following an application under section 66B. The Registrar would not be required to reapply the registration test to applications amended to replace the applicant.

This was not considered by the court. Nor was the fact that, if the claim made in the application is registered and the court makes the order pursuant to s. 62A or O 6 r 9 of the FCR, then (unless the application is amended to reflect this change, then referred, tested and accepted for registration), the Tribunal's Registrar has no express power to amend the Register of Native Title Claims (RNTC) to reflect the change in composition of the applicant. Further, if no amended application is referred to the Registrar, then there will be a discrepancy between the applicant in the proceeding and the applicant as recorded on the RNTC, which has the potential to impact deleteriously on future act matters. This has more serious consequences if s. 62A or O 6 r 9 are used to add new people to 'the applicant' than it does, for example, if deceased persons are removed via those means.

By contrast, if a s. 66B(2) order is made, s. 66B(3) requires the court's Registrar to notify the Tribunal's Registrar as soon as practicable of the name and address for service of the new applicant and, if the claim made in the application is registered, s. 66B(4) requires the Tribunal's Registrar to amend the RNTC to reflect the order without the application of the registration test. This, along with the other 'knock on' effects noted above and what is said in the EM at [1.249], provide support for the view expressed in *Sambo*, *Bullen* and, seemingly, *Roe v KLC*.

Background

This case concerned the Antakirinja Matu-Yankunytjatjara (AMY) claimant application, originally made in 1995. Prior to it being amended in 1999, the native title claim group authorised six people to make the amended application. On the filing of the amended application, s. 61(2) of the NTA applied so that those six people were jointly 'the applicant'. When it was further amended in 2004, those six people jointly swore a further affidavit attesting to the fact that they were duly authorised.

Recently, negotiations between the applicant and other parties had progressed well and the court had been told there was 'a good prospect' of agreement as to the terms of a consent determination. In October 2009, Mansfield J gave the applicant leave 'to amend the claim in such manner as it may be advised to accommodate' the resolution of an overlap with another claimant application. Liberty to seek that any such amendment not be allowed at the next directions hearing (which was to be held in March 2010) was also granted.

Although it is not mentioned in the judgment, this issue arose because there was a meeting of the AMY claim group in Cooper Pedy on 13 November 2009 where a resolution was passed to authorise the applicant to amend the area covered by the

application but before the amended application was filed on 12 March 2010, two of those who constituted the applicant died. The amended application was accompanied by an affidavit dated 9 March 2010 jointly sworn by the four remaining authorised persons attesting to the fact that (among other things):

> We are authorised by all the persons in the native title claim group to make the amended application and to deal with matters arising in relation to it; and
>
> We were given the authority referred to in paragraph (d) above at a meeting of claim group members in Coober Pedy on 13 November 2009 to amend [the AMY application], the amended application being attached to this affidavit and ... dated 1 March 2010.

[Note that the swearing of a joint affidavit accords with O 78 r 6(2B)(b) of the FCR, which requires that if 'the applicant is a number of individuals jointly ... the accompanying affidavit must be sworn or affirmed by each individual', i.e. a single affidavit jointly sworn by all the individuals comprising the applicant. However, this is not the usual practice.]

The amended application included the two deceased persons in the group constituting the applicant, which was to be expected since the leave to amend granted on 8 October 2009 did not extend to changing the constitution of the applicant. At a directions hearing on 31 March 2010, a question arose as to whether the remaining four authorised persons could continue to give instructions as 'the applicant'. That question was listed for hearing.

At the hearing in April 2010, the applicant's solicitor indicated an order was sought to remove the deceased persons pursuant to s. 64(1C) [which states that s. 64(1B) 'does not, by implication, limit the amendment of applications in any other way'] and O 78 r 7(3) of the *Federal Court Rules*. It is not clear how reliance could be placed on s. 64(1C). Order 78 r 7 is headed 'Form of amendment of main application'. Order 78 r 7(3) provides that: 'The Court may give the directions and make the orders it considers appropriate '. Relying on *Sambo*, the Commonwealth argued:

- the court had no power to order the removal the deceased persons other than pursuant to s. 66B;
- another meeting of the native title claim group was required to authorise a replacement applicant and then an application brought under s. 66B(1) to replace the current applicant.

Meaning of 'the applicant'

His Honour noted that the NTA provides:

- a claimant application may be made by a person or persons authorised under s. 251B by all the members of the native title claim group;
- the 'applicant' constitutes all of the persons so authorised and is defined as constituting the authorised person or persons jointly, 'as distinct from the native title claim group itself'—at [5] to [6].

However, according to Mansfield J:

> [T]he NT Act does not thereby constitute the applicant as having an independent legal existence. It is a definitional term, referring to the persons authorised under s 251B. An application for determination of native title must be instituted in the names of the authorised persons as the parties ... . [T]he parties making the application are the authorised persons—at [5].

The Commonwealth acknowledged in its submissions that:

> The original authorisation could provide for the authorisation of 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'. Although still requiring a formal change to the named persons described as the applicant in the application for a determination of native title, this would allow the continuation of the remaining named applicants. (Footnotes omitted.)

However, it went on to submit that: 'This does not ... appear to apply to the present case'.

His Honour was concerned that, if the Commonwealth's contention was correct, there was presently no 'applicant' capable of giving instructions. If so:

> [T]he application itself must therefore rest in a nether world: neither truly alive as there is no applicant ... , nor truly dead as it may be revived assuming the native title claim group authorises the remaining four persons constituting the applicant or others to maintain the claim and to make decisions with respect to it, and one or more of those authorised persons on their behalf then applies under s 66B to be substituted as the applicant—at [11].

Note that in *Bullen*, where Siopis J was dealing with a case where all of those who constituted the applicant were dead, it was found that the application did, indeed, go into a kind of suspended animation.

Comment - inference for s. 66B(2)?
With respect, while the authority given was not (apparently) subject to a specific 'willing and able' condition, such a condition could have been implied on the facts of this case. Indeed, his Honour went on to draw that very inference:

> Although it is not express, I consider that the authorisation in its terms is one for them, or so many of them, as continue to be living and able to discharge their representative function to do so. The authorisation contemplated not simply the making of the application, but dealing with matters in relation to it, which (as experience has shown) may extend over a quite lengthy period—at [34].

It is not clear why this assumption could not have been used to support the making of an order under s. 66B(2).

The 'nether world' his Honour speaks of may have more impact in cases where it is said one or more of the applicant's constituents are no longer authorised or that they have exceeded their authority but the application to remove them is contested. In such a case, prompt resolution of the issue via an application under s. 66B(1), with a

fresh authorisation meeting if the original authority did not deal with reconstituting the applicant in the circumstances, would appear to be the appropriate course. In any case, if the route offered by Mansfield J in this case (i.e. s. 62A or O 6 r 9) was taken in a contested case, it seems the court would have to inquire as to whether those seeking to remain as 'the applicant' are authorised to do so by the claim group before agreeing to remove anyone from the group that constitutes the applicant.

Effect of the 2007 amendments – s. 66B does not cover the field

Prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth) (the Technical Amendments Act):

- subsection 64(5) provided for a claimant application to be amended to replace the applicant, provided the amended application was accompanied by an affidavit sworn by the new applicant attesting to the new applicant's authority 'to deal with matters arising in relation to the application';
- section 66B was narrower, in that it did not cover an application to replace the applicant where one or more of the persons jointly comprising the applicant had died, was incapacitated or consented to being removed.

If an application was amended pursuant to s. 64(5) to remove deceased people or those who no long wished to be part of the applicant group, the registration test was triggered. Therefore, in *Butchulla People v Queensland* (2006) 154 FCR 233 (*Butchulla*, summarised in *Native Title Hot Spots* Issue 21), *Chapman v Queensland* (2007) 159 FCR 507 and *Doolan v Native Title Registrar* (2007) 158 FCR 56 (respectively *Chapman* and *Doolan*, both summarised in *Native Title Hot Spots* Issue 24), an alternative way to reconstitute the applicant was sought. In those cases, it was found that, if one or more of those who were authorised to constitute the applicant died or was 'unwilling or unable to act as authorised', then the name of that person could be removed as a 'party' pursuant to O 6 r 9 of the FCR 'without the necessity of a further authorisation' under s. 251B—at [2] and [15].

Order 6 r 9 provides that the court may make an order that a person cease to be a party to a proceeding if that person has been improperly or unnecessarily joined or has ceased to be a proper or necessary party to a proceeding.

The Technical Amendments Act deleted s. 64(5) and substituted a new s. 66B(1) which embraced removal on the additional grounds of death or incapacity and by consent. These amendments were considered in *Sambo* at [27] to [30], where (among other things) Siopis J looked to the intent behind them before finding that:

- since the passing of the 2007 amendments 'there is only one means whereby any changes can be made to the composition of the applicant and that is through s 66B';
- *Butchulla*, *Chapman* and *Doolan* had been 'superseded by the amendments';
- it was not open to the court to remove some of those who constitute the applicant pursuant to O 6 r 9 of the FCR on the basis that each is not 'a proper or necessary party'.

After some discussion, Mansfield J directly disagreed with *Sambo* in taking the view that s. 66B:

> [D]oes not in its terms cover the field so that it is the only means by which a native title claim group can prosecute an application once one of a number of persons who are authorised under s 251B to make and deal with the application has deceased—at [22].

Reference was made to *Doolan* at [125], where it was said that, since one of the purposes of the NTA was to recognise native title wherever it survives, 'the duty of the courts' was 'to ensure that that purpose was achieved ... even if it meant giving a strained construction to or reading words into' the NTA. Mansfield J thought s. 66B(1) should be construed to reflect that approach and to avoid 'potential frustration of the application for a lengthy period', drawing support from the 'practical consequence of the contrary construction' (i.e. that a fresh authority at a claim group meeting must be given in every case). This was seen to be 'obviously antithetical' to the purposes of the NTA at both 'an aspirational level having regard to the Preamble' and 'at the practical level' of how the NTA 'provides for Indigenous persons to make and maintain a claim' under s. 61(1)—at [23], [26] and [32].

Comment – assumption that separate meeting required in every case
With respect, his Honour's concerns about frustrating the process seems to be based on an assumption that s. 66B mandates a claim group meeting to obtain separate authorisation to replace the current applicant before a s. 66B(1) application can be made. However, there is no such directive in s. 66B. Whether or not this would be required would depend on the facts. What is required is credible evidence that those who seek to replace the current applicant are authorised to do so. This is hardly surprising, given that the proper authorisation of a claimant application is a 'fundamental requirement' of the NTA and 'of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration'—see *Moran v Minister of Land & Water Conservation for NSW* [1999] FCA 1637 at [48] and *Daniel v Western Australia* (2002) 194 ALR 278 at [11] respectively.

In uncontested cases where those making a s. 66B application are legally represented and there is evidence that persons included as part of the current applicant are deceased or incapacitated or consent to being removed, it seems that (for the very reasons his Honour notes) an order could be made under s. 66B(2) based on an inference of ongoing authority. And, as noted earlier, in contested cases, it seems the court would have to consider whether or not those seeking to alter the constitution of the applicant are authorised to do so, regardless of whether the application is made under ss. 62A or 66B of the NTA or O 6 r 9 of the FCR.

Proper construction of s. 66B – it's permissive
His Honour found that s. 66B(1):

- was (i.e. prior to the 2007 amendment) and is now permissive;

- indicates a legislative purpose that it not be 'the only means in every circumstance, by which the persons as parties constituting the applicant may be changed';
- is 'empowering' and 'clearly should exist' to enable the claim group to change the persons it authorises in any one or more of the circumstances referred s. 66B(1)(a) from time to time—at [25].

However, his Honour thought it would be 'inconsistent with the autonomy of the claim group that – at considerable expense and delay and inconvenience – it should ... be obliged to proceed' under s. 66B(1). Mansfield J could see no reason why 'the legislature would wish to impose upon a claim group such an obligation' in circumstances where, for example, where one of 20 authorised persons died or became incapacitated and the claim group did not wish to change the remaining authorised persons. Why, he asked rhetorically, would the legislature insist upon a further authorisation meeting? In those circumstances, s. 62A of the NTA or O 6 r 9 of the FCR provide 'a ready and economical means' to make that change—at [26].

(With respect and as noted above, s. 66B does not insist on a further meeting in all cases and it could also provide 'a ready and economical means' for change in the circumstances described if an inference of ongoing authority is available.)

His Honour considered the changes in the wording of s. 66B(1) introduced by the Technical Amendments Act, concluding they were 'generally not indicative of a significant legislative policy change from the position previously obtaining'. According to Mansfield J, the 'clear reason' for the changes was to 'more accurately reflect' the fact that s. 61(2) 'makes the authorised person or persons the applicant'. His Honour saw the repeal of s. 64(5) as merely 'facultative' of the claim group's right to act in relation to individual authorised persons 'if it wishes to do so'—at [27].

With respect, [1.249] of the EM to the Technical Amendments Act (quoted earlier) clearly indicates that one of the other reasons for the amendments was to allow for the applicant to be reconstituted without an amendment to the application that triggered the registration test. It also makes it clear that it was intended that 'all amendments to an application to replace an applicant would be made following an application under section 66B'. Both of these seem to indicate 'a significant legislative policy change', contrary to his Honour's view.

Applicant was not constituted on a representative basis

In this case, the evidence indicated that the 19 family groups that made up the claim group did not 'claim identity as subgroups within the wider claim group ... or geographical association with any particular part of the claim area, or in some other way'—at [36].

In cases where the sectional interests within the claim group were 'balanced by the particular combination of authorised persons', s. 66B was said to empower the claim group 'in its terms and in the circumstances it specifies'. On the other hand:

> It would not be consistent with the clear objectives of the NT Act ... to impose the s 66B procedure on the claim group where there were no such considerations. One might ask rhetorically why a native title claim group should have removed from it the capacity to make decisions for itself about whether, in particular circumstances, such as the death of an authorised person, it wishes to enliven s 66B or whether it is content to allow the remaining authorised applicants to continue to act in accordance with their authorisation?—at [29].

His Honour found further support for his view in the fact that:

- as with s. 66B(2), the power available under O 6 r 9 of the FCR is discretionary and so, where the applicant is constituted on a sectional basis but the claim group 'did not choose to react' to the death of an authorised person who represented a sectional interest, this could be brought to the court's attention 'and its significance determined';
- claimant applications are 'almost invariably' accompanied by a certificate under s. 203BE by the relevant representative body (note that, in fact, only about 50% of applications are certified but nothing seems to turn on this assertion);
- since s. 66(3)(a)(iii) ensures the representative body is given a copy of any application made under s. 61 and that body is then entitled to become a party to the proceeding pursuant to s. 84(2), if an application to 'remove a party as one of the persons constituting the applicant' is made either by 'the surviving authorised persons' or under O 6 r 9, the court would have the benefit of submissions from the representative body if necessary (with respect, this is only true in cases where the representative body is a party or, at least, is providing legal representation);
- support from a representative body for an application by the surviving authorised persons, whether under s. 62A or O 6 r 9, would 'indicate that no such [sectional representation] considerations ... are in play';
- if such considerations were 'real', the court 'could and would have regard to them in deciding whether to make the order sought'—at [30].

Again, with respect, none of these factors take the matter much further. If the change in the constitution of the applicant is uncontested, and those seeking the order for that change are legally represented or the representative body is a party to the proceedings, then shouldn't the discretion under s. 66B(2) be available to the court for precisely the same reasons as his Honour says the discretion under O 6 r 9 of the FCR would be available?

Comment – Parliament's intent

Before deciding that the surviving authorised persons could bring an application either 'in accordance with' s. 62A of the NTA or under O 6 r 9 of the FCR to remove 'from the names of the parties' the names of the two deceased persons, Mansfield J made one final point:

> The Explanatory Memorandum at 1.261-1.263 refers to the then existing s 66B as enabling the member or members of the native title claim group to apply to the Court to replace the applicant. It notes that the amendment proposed "would expand the scope of s 66B to provide for other circumstances in which the native title claim group may seek to replace the applicant". It uses the permissive word "may" at least twice. ... . It is clearly expressed

> as providing an extended opportunity to, rather than imposing a confining obligation upon, a claim group to replace a person or persons who are authorised to act as an applicant. The Explanatory Memorandum at 1.266 also contains the passage referred to by Siopis J in *Sambo* quoted above at [19], but in its context as the final sentence relevant to the proposed amendment, it represents a conclusion inconsistent with the preceding test, and in my view inconsistent with the wording of the amended s 66B(1)—at [31].

With respect, as noted earlier, this ignores [1.249] of the EM where the intention of the amendment is said to be:

> To clarify the operation of the provisions [s. 64(5) and 66B], item 79 would repeal subsection 64(5) [which provided for the amendment of a claimant application to replace the applicant]. This would mean that all amendments to an application to replace an applicant would be made following an application under section 66B.

It is also of note that in the EM at [1.288], it was said in relation to what became s. 84D that:

> Any application to replace the applicant *should be made under s 66B*, rather than by the Court directly under proposed s 84D(4), *as an order made pursuant to s 66B will have certain consequences*. In particular, the Registrar is required to amend the Register of Native Title Claims following an order under s 66B so that the details of the applicant are up-to-date (emphasis added).

Again, it seems clear that Parliament's intention was that s. 66B would be the sole route to reconstituting the applicant, given this is said in relation what is otherwise a broad discretionary power vested in the court by s. 84D(4).

Continuing authorisation could be implied in any case

In addition to the reasons noted above, his Honour was prepared to find that the application to remove the deceased persons was competent because:

> [I]n the absence of any evidence to suggest to the contrary, ... authorisation is to be understood in the context of the native title claim group recognising the circumstances of one or other of the authorised persons may change, and that one change may involve the death of one or more of them. Although it is not express, I consider that the authorisation in its terms is one for them, or so many of them, as continue to be living and able to discharge their representative function to do so—at [34].

On this reasoning, in applying to have the deceased 'authorised members' removed 'as parties to the application', the surviving authorised persons were 'acting in accordance with their authorisation' to deal with matters arising in relation to the application pursuant to s. 62A or, 'alternatively', O 6 r 9 of the FCR 'may be used to support the application'—at [35].

However, as noted earlier, it is not clear why this inference of implied authority could not have been used to make an order under s. 66B(2).

Decision
Mansfield J decided that, where one or more of a number of persons authorised under s. 251B to make a claimant application dies, 'generally the remaining persons so authorised may continue to deal with all matters arising' under the NTA in relation to the application and they continue to be 'the applicant' for that purpose. 'Consequently, on their application the court may remove the name of the deceased person as a party'—at [1].

In the reasons for judgment at [37], the order proposed is that 'the names of the parties to the proceeding as applicant be amended by deleting the names of two deceased persons'. However, the order actually made is that the application be amended to delete the names of those persons.

Comment – each authorised person is a separate party
As noted earlier, Mansfield J took the view that:

- the NTA does not 'constitute the applicant as having an independent legal existence';
- a claimant application 'must be instituted in the names of the authorised persons as *the parties*';
- '*the parties* making the application are the authorised persons'—at [5] (emphasis added)—at [5] (emphasis added).

His Honour must be of the view that each authorised person is a party in his or her own right, which is reinforced by the fact that O 6 r 9 only applies to a person who is 'a party' to a proceeding. It seems his Honour agrees with what Carr J said in *Central West Goldfields People v Western Australia* (2003) 129 FCR 107 at [10], i.e. that a person authorised as one of the group comprising the applicant 'is also a party within' the meaning of O 6 because that person 'is named as one of the ... joint applicants who seek the relief (albeit in a representative capacity)'.

However, Carr J's use of the term 'joint applicants' seems to beg the question, i.e. where more than one person is authorised, why does s. 61(2)(d) emphatically state that those persons are jointly 'the applicant'? Further, why does s. 253 go to the trouble of stating that '***applicant*** has a meaning affected by subsection 61(2)' (emphasis in original)? What is to be made of s. 84(2), which provides that: 'The applicant is *a party* to the proceeding'? (Emphasis added.) These questions illustrate that the construction adopted may be too strained. It may tear at the fabric of scheme adopted in 1998 as amended in 2007, particularly since it seems the discretion under s. 66B(2) is available based on an inference as to continuity of authority in an appropriate case.

As to s. 62A, Mansfield J takes the view that some of those parties (the authorised persons) who are 'the applicant' can apply to change the constitution of 'the applicant' by removing the some or all of the other parties who are also 'the applicant' because this is a 'matter arising under' the NTA 'in relation to the application'. With respect, this is a circular argument that may also be too strained a construction. It is also sits uneasily with the findings in *Roe v KLC* at [35], [37] and

[42] that s. 62A effectively grants standing exclusively to 'the applicant' and that one only of two people who jointly constituted the applicant had no standing to bring proceedings on behalf of the claim group. See also *Tigan v Western Australia* [2010] FCA 993.

Comment – take steps to avoid the issue

It should not be assumed that the process enshrined in s. 66B is of itself inefficient. This case highlights two matters:

- legal representatives for claimant applications should identify foreseeable contingencies (e.g. death, incapacity) in native title proceedings and take instructions to address them, thereby avoiding the need for further authorisation meetings should they materialise;
- before every claim group meeting, those calling it should consider whether there are any issues as to the constitution of the applicant that could be dealt with at that meeting.

Adopting these practices would ensure the claim group retains ultimate control of the proceedings with the minimum of delay, cost and inconvenience to that group and its representative, along with the other parties and the court.

Further, using s. 66B to replace the applicant, rather than using the FCR to amend the application, means that the registration test is not applied and the Register of Native Title Claims is amended to reflect the change. It also means time and resources are not drawn away from the progress of the claim in the court and into the registration process.

The orders made in *Chapman* should be also noted in this context. The court relied on O 6 r 9 of the FCR to make orders that three of the people who constituted the applicant (two of whom were alive) 'cease to be parties to the proceedings' and that the RNTC 'be amended to reflect removal of the names of those persons as applicant'. No meeting of the claim group had been held to authorise their removal.

While this approach may have initial appeal, these orders raise a number of issues. First, even if it is assumed *Sambo* is wrong and O 6 r 9 supports the making of such orders, the court noted at [17] that there may have to be a declaration 'reflecting the foundation for the consequential order under O 6 r 9' (i.e. the order that the RNTC be amended) and, in 'contentious' cases, a hearing and a declaration as to 'the right of persons to continue to be an applicant'. Therefore, in those cases, this approach would not provide the 'ready and economical means' for change sought by Mansfield J.

Second, the order directing the amendment of the RNTC was effectively made against the Registrar, who was not a party to the proceedings. The Registrar is a statutory office holder with independent duties in relation to the management of the RNTC pursuant to Pt 5 and Pt 7 of the NTA. (Of course, the Registrar complied with the order because, as was recently noted in *Siminton v Australian Prudential Regulation Authority* (2006) 152 FCR 129; [2006] FCAFC 118 at [28], an order 'made by a superior

court of record stands and is bound to be observed'.) Kiefel J's comment as to the need in some cases for a declaratory foundation for such an order appears to be a nod in the direction of this issue.

Finally, many of the issues noted above arise here also, e.g. the first order implies each of the three people affected is a party to the proceedings. Further, the order that the RNTC be amended to 'reflect removal of the names of those persons *as applicant*' (emphasis added) is awkwardly worded and seems to simply skirt the issue, given the three people removed were not 'the applicant' but merely a part thereof.