Replacing the applicant under s. 66B

Dingaal Tribe v Queensland [2003] FCA 999

Cooper J, 17 September 2003

Issue
This case concerned an application under s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) to replace the applicant in a claimant application. The court made an order to replace the current applicant.

Background
The application on behalf of the Dingaal tribe was originally made under the old Act and was unamended when this matter was heard. Gordon and Jonathon Charlie were named as the applicants. The people named as the registered native title claimants for the purposes of the old Act were the same people who brought the s. 66B application (the s. 66B applicants).

Justice Cooper took the view that item 25 of schedule 5 to the *Native Title Amendment Act 1998 (*Cwlth) (the transitional provisions) applied so as to make Gordon and Johnathon Charlie 'applicants authorised' for the purposes of the new Act i.e. people authorised 'to maintain the claim and make decisions in relation to the issues relating to it on behalf of the native title claim group'—at [9] to [10], referring to s. 62A.

With respect, item 25 deals only with ensuring that those who were registered native title claimants under the old Act retain that status in relation to future act matters unless and until the application is amended and an applicant is authorised as required under the new Act. If the amended application is accepted for registration, then those named on the Register of Native Title Claims as the applicant in the amended application are then, by definition, also the registered native title claimant—see s. 253. Item 25 does not have any effect on who is the applicant for the purposes of either the old or the new Act.

The s. 66B application
The s. 66B applicants sought an order that they replace Gordon and Jonathon Charlie on the grounds that they were no longer authorised by the claim group to make the application and to deal with the matters arising in relation to it. Gordon Charlie opposed the application and presented affidavit evidence to the effect that:

- under the traditional law and customs of the Dingaal people, he was the only person entitled, and thereby authorised, to make the claim for native title on behalf of the claim group;
- no meeting, however constituted, could remove that authority or make any decision authorising any other person if he did not attend the meeting and did not consent to being replaced;

- the interests of the Charlie subgroup were not sufficiently represented at the meeting or in the resolutions passed to replace Gordon and Jonathon Charlie—at [18].

On the evidence, the court was satisfied that no traditional law or custom of the group existed that would prevent the termination of the authority of Mr Charlie and authorise others to act in his stead or bring an application under s. 66B—at [17] and [30].

His Honour was satisfied that those who were to constitute the new applicant satisfied the requirements of s. 66B and addressed the relevant criteria considered by Justice O'Loughlin in *Ward v Northern Territory* [2002] FCA 171 (*Ward*):
- notice of the meeting concerning the authorisation of those bringing the s. 66B application, with a full agenda, was given to all existing members of the claim group or potential members;
- a sufficient period of notice was provided;
- adequate transport arrangements were made for all persons to attend;
- reasonable offers of travel and accommodation were made to Gordon Charlie and his associates—at [19], [20], [24] and [32].

Cooper J was satisfied that:
- the minutes of the meeting were a full and correct record of the proceedings and gave him no cause for concern that the final resolutions were other than 'the considered decisions of those attending the meeting, after a process of discussion and consultation';
- that the Charlie clan was represented among the new applicant;
- those attending the meeting understood that Gordon and Jonathon Charlie remained as members of the claim group and could participate in future conduct of the claim as members of that group—at [21], [22], [26] and [28] to [29].

The authorisation issue
His Honour ultimately relied upon s. 251B(b) (on the basis that no process of decision-making based on traditional laws and customs existed) and applied the criteria set out by O'Loughlin J in *Ward*. However, although not relying upon it, Cooper J was prepared to accept the expert opinion of an anthropologist that 'the meeting was conducted in accordance with contemporary Aboriginal law and custom which is based on traditional ways and evolving contemporary practices'—at [31].

Decision
The court made an order that Gordon and Jonathon Charlie be replaced as the applicant by those who made the s. 66B application.