Authorisation of claimant application by narrower claim group

Walker v Minister for Land & Water Conservation (NSW) [2003] FCA 947

Hely J, 10 September 2003

Issue
This decision deals with objections to an application to amend a claimant application lodged prior to the 1998 amendments to the *Native Title Act 1993* (Cwlth) (NTA), i.e. under the old Act. The issue was whether authorisation of amendments by a potentially narrower native title claim group was fatal to the formal validity of the amendment application.

Background
On 27 November 1996, a claimant application was lodged with the National Native Title Tribunal by Della Walker and Joyce Clague (nee Mercy) on behalf of the Yaegl, Bundjalung and Gumbaynggirr people, in which native title was said to be held by all members of the Yaegl, Bundjalung and Gumbanyggirr peoples.

As this application was made prior to the 1998 amendments, there was no requirement that the applicant have the authority of a native title claim group before making an application on behalf of that group. The NSW Farmers Association and the Minister for Land and Water Conservation (NSW) objected to three of the proposed nine amendments. The objections related to amendments to:

- clarify on whose behalf the application was brought;
- clarify the manner in which the 'applicant's' were authorised to make the claim; and
- add 'five further applicants'.

The basis for the objections was that the proposed amendments changed the description of the native title claim group by eliminating references to the Bundjalung and Gumbaynggirr People without that change being authorised by all those on whose behalf the original application was made. It was argued that authorisation by those who would form the new and more restricted native title claim group was insufficient. Schedule R of the amendment application provided that:

- those named as the applicant were members of the native title claim group and were authorised to make the application and to deal with matters arising in relation to it, by all other persons in the native title claim group;
- an advertised meeting held on 21 and 22 June 2003 had been open to all members of the native title claim group and was attended by all members of the native title claim group, including elders;

- the applicants were authorised by the traditional decision making process of the Yaegl people to amend the application in the manner set out in Schedule S of the proposed amended application.

On whose behalf is the application brought and did they properly authorise persons to make the amended application?
The amended application was brought on behalf of the Yaegl people. There was no reference in the proposed amended application to the Bundjalung or Gumbaynggirr people, on whose behalf the original application was also made.

While Justice Hely accepted the possibility that the claim group had, in fact, not changed, absent any evidence to the contrary, the court assumed for the purposes of this matter that the claim group described in the proposed amended application was made up of a different group of people from those on whose behalf the original application was made—at [14].

Hely J decided that the fact (assuming it to be a fact) that the proposed amended application was not brought on behalf of, or with the authority of, the same people on whose behalf the original application was brought was not fatal to its formal validity—at [15].

The respondents' contention that it was essential to the validity of the amended application that it should be authorised by the native title group referred to in the original application was rejected. The respondents' submission that, if this was not so, then the application would no longer be authorised by, and made on behalf of, the native title claim group referred to in s. 61(1) was similarly rejected. Hely J considered that this submission overlooked the fact that communal authorisation was not required for the original application—at [13].

His Honour held that:
- the applicant for the purpose of the application for leave was constituted by the two persons who lodged the original application with the Tribunal;
- the purpose of the application for leave to amend was to bring the application into conformity with the requirements of the new Act;
- one of the things that needed to be done to achieve that result was the identification of a native title claim group and the authorisation of particular persons to bring the application, which was not a requirement of the old Act;
- in this case, the group was identified in the proposed amendment application as the Yaegl people and seven people were proposed as the applicant—at [16].

Five further 'applicants'
The affidavit evidence given in support of the application to add five people to the group named as the applicant asserted that:
- each was a member of the native title claim group;
- each was authorised by all the persons in the native title claim group to make the application and to deal with all matters arising in relation to it; and

- the basis on which they and others were authorised to make the amended application was set out in Schedule R, and included via a meeting on 21 and 22 June 2003.

Hely J held that s. 64(5), which provides that, if a claimant application is amended so as to replace the applicant with a new applicant, then the application must be amended to reflect the change and an affidavit going to authorisation of the new applicant must be filed, did not apply in the circumstances of this case. An original applicant is not replaced by a new applicant. The original applicants remain but others are added. (On this point, see the comment below.) Nor was there any application to replace the applicant under s. 66B on foot—at [17].

Decision
The amendments were allowed.

Comment
With respect, his Honour's finding that s. 64(5) did not apply may not be correct. Subsection 61(2) provides that, where more than one person is authorised to make a claimant application, they are jointly 'the applicant' i.e. a single legal entity. Therefore, it would seem that adding people to that group alters the constitution of that entity and, in this sense, makes a 'new' applicant. Under the NTA, this would be an amendment to the application and s. 64(5) would apply.

Given the repeated statements by the court that proper authorisation of the applicant is of central importance to the conduct of claimant applications and to the importance of maintaining the 'continuing' authority of the native title claim group by ensuring 'the applicant' is properly authorised (e.g. *Daniel v Western Australia* [2002] FCA 1147, summarised in *Native Title Hot Spots* Issue 2, at [11], [16] and [17] per French J), it is not surprising that there is a requirement under the NTA that a newly constituted applicant must be shown to retain authority of the claimant group. Were this not so, the change in the applicant brought about by removing one of its members could be done without the claim group's authority.

It is not difficult to envision circumstances where the claim group authorised a group as 'the applicant' only so long as it was constituted in a particular way (e.g. to include one representative from each of the subgroups or families that make up the claim group). The removal of a particular person (even because they are deceased) could mean that those remaining are no longer authorised.

The Explanatory Memorandum to the Native Title Amendment Bill 1997 [No. 2] supports this view:

> When a claimant application...is amended to replace the applicant with a new applicant, that new applicant must provide an affidavit showing authority ... [referring to what became s 64(5)]. *A new applicant may be required*, for example, *if ... one of the group of persons* that *together make up the applicant*, becomes *incapacitated or dies*—at [25.42], emphasis added.