Replacing the applicant under s. 66B — Ballardong

Anderson v Western Australia [2003] FCA 1423

French J, 4 December 2003

Issues
This decision primarily addresses an application made pursuant to s. 66B of the *Native Title Act 1993* (Cwlth) (NTA) to replace the existing sixteen people named as the applicant with four people. The court refused to make the orders sought.

Background
The motion was brought against the background of the lodgement of a single Noongar native title determination application representing a combination of most of the active applications in the south-west region of Western Australia.

The amendment application sought to reduce the area of the Ballardong application to the extent of any overlap with the Single Noongar claim (the contracted claim to be referred to as the Nulla Nulla application), together with related amendments. An order was also sought to replace the existing sixteen named applicants (two of whom are now deceased) with four applicants who would be the authorised applicants for the Nulla Nulla application.

Justice French had before him evidence of two meetings relating to the Ballardong application convened by the South West Aboriginal Land and Sea Council (SWALSC) (the meetings). The purpose of the first meeting was to give native title claimants in the area an opportunity to discuss and make decisions in relation to the lodgement of the single Noongar claim, consider its impacts on the Ballardong application and authorise a number of individuals to bring the single Noongar claim. The purpose of the second meeting was to give native title claimants for the Ballardong application an opportunity to discuss and consider the proposed amendments to that claim and authorise the proposed people to be named as 'the applicant' for the Nulla Nulla claim. On 'the applicant', see s. 61(2) of the NTA.

The evidence comprised affidavits from two persons employed by SWALSC and affidavits from nine of the 14 living persons named as the applicant acknowledging that they were no longer authorised to make the Ballardong application. The three other persons included in the applicant group for the Ballardong application who were to remain as the applicant in the Nulla Nulla application, together with a new person to be included in the group named as the applicant, swore a joint affidavit. There remained two people included in the applicant group for the Ballardong application from whom the court did not have evidence of their consent to the amendment or their removal (the dissenting applicants)—at [11] to [28].

Various resolutions were passed at each meeting. The same resolution as to the

adoption of a decision-making process by way of majority vote was passed at both meetings. There was no evidence before the Federal Court that addressed the question of whether there was any applicable traditional decision-making method.

Application to amend to replace applicant—authorisation

French J noted that an amendment of an application for a determination of native title may be made pursuant to the general powers of the court under Order 13 r. 2 of the Federal Court Rules, subject to the constraints imposed by ss. 64 and 66B of the NTA—at [36].

His Honour stated that there was no procedural requirement for any particular form of decision-making process by members of a native title claim group to authorise amendments to a claim outside the kind of amendment covered by s. 66B—at [37].

Subsection 64(5) deals with the case in which an application is amended to replace the applicant with a new applicant and requires that the amended application must be accompanied by an affidavit sworn by the new applicant that the new applicant is authorised by the native title claim group and stating the basis on which the new applicant is authorised. His Honour considered such affidavit to be 'simply a procedural requirement incidental to the filing of an amended application' and noted that it does not deal with the manner in which authority for the replacement of an applicant may arise—at [38].

Section 66B authorises members of a native title claim group to seek an order from the court that an applicant be replaced on the grounds of want, or excess, of authority by the claim group. In making an order under s. 66B, the court must be satisfied amongst other things, that the persons making the application under s. 66B are authorised by the claim group to make the application and to deal with matters arising under it—at [39].

French J considered that the amendment application, insofar as it sought to reduce the number of applicants, must satisfy the criteria set out in s. 66B.

His Honour, referring to his decision in *Daniel v Western Australia* [2002] FCA 1147 (summarised in *Native Title Hot Spots* Issue 2), noted that:

- the definition of 'authorise' in s.251B defines the decision-making process by which authorisation may be withdrawn for the purposes of s. 66B; and
- in order to prove the relevant decision-making processes, it is not necessary to prove the making of individual decisions by all or most members of the group;
- it is sufficient if there be a decision by a representative or other collective body exercising authority on behalf of the group under customary law—at [40] to [41].

While finding that, in the present case, there were those named as members of the applicant group whose attitude to the amendment application was not known, French J noted as follows in relation to the want of authority condition in s. 66B(1)(a)(i):

> To the extent that an applicant is unwilling to continue as such it could be taken that the want of authority condition under s. 66B(1)(1) is satisfied. In my opinion, authorisation, of

> its very nature, is only able to be conferred upon a willing party. A party unwilling to continue as an applicant may therefore be replaced on the basis of an implied lack of authority. When a person who is an authorised applicant consents to being removed and replaced as an applicant that consent may be evidence that he or she, as a member of the native title claim group, recognises that authority has been withdrawn. That recognition may be probative of the fact of the withdrawal and may be sufficient, according to the circumstances of the case, to establish the condition under s. 66B for the making of an order—at [42].

French J substantially accepted the submissions of the State of Western Australia, that the decision-making processes supporting the amendment were inadequate or inadequately evidenced before the court—at [44].

His Honour was not satisfied that:

- the meetings were attended by persons representative of the whole of the native title claim group;
- the meetings were adequately notified with sufficient advance warning to provide a proper opportunity for members of the native title claim group to attend; and
- the resolutions passed at the meetings did not address the condition under s. 66B that the named applicants lacked authorisation or had exceeded their authority—at [45].

French J did not allow the application on the basis that the conditions for replacement of the applicant under s. 66B had not been made out—at [47].

As to the process of decision-making, his Honour observed:

> The adoption by a native title claim group of a decision-making process by way of majority vote will be justifiable if there is no traditional decision-making method applicable to the processes of authorisation associated with the making and conduct of a native title determination application. And it may well be the case, in connection with the procedural aspects of native title litigation, that there is no relevantly applicable traditional decision-making method. Native title litigation is not exactly a traditional activity. However, the evidence, beyond reporting the fact of the resolutions about the decision-making process, did not address that anterior question—at [46].

Should the court allow an amendment without the agreement of all those named as 'the applicant'?

French J dismissed the application for the other amendments sought on the basis that, on the evidence before him, two of those constituting the applicant did not support the proposed amendments, the application to replace the existing applicant should not be allowed and the other amendments were major amendments.

In so finding, his Honour noted that:

- the effect of s. 62A is that the amendment of an application, other than the replacement of the applicant, may be dealt with by those named as the applicant;
- whether such an amendment should be allowed is always a discretionary issue;
- where a division arises between those who constitute the applicant, such that one or more of them is not prepared to support an amendment, it may be debatable

whether the court has authority to allow the amendment (it was not necessary for his Honour to decide that question in this case); and

- where it is a major amendment that is proposed, the dissent of some of those names as the applicant to the proposed amendment is a powerful discretionary factor against allowing it—at [48].

In relation to the last point noted above, his Honour stated:

> In such a case whether the bar be legal or discretionary the proper remedy for the majority applicants is to go back to the native title claim group and obtain a decision that the group of applicants, in so far as it includes the dissentients, is no longer authorised by the claim group to deal with matters arising in relation to the application, and an authority for members of the native title claim group to apply to the Court under s. 66B. Alternatively, it may be that the authority conferred upon the applicants is conferred in terms that enable it to be exercised according to a majority vote. That would, however, depend upon the terms of the authority. I express no concluded view on the efficacy of such a procedure—at [48].

Stalemate—springing order

French J noted that, unless there was a resolution of this matter between the majority to those named as the applicant and the dissenters or satisfaction of the conditions for an application under s. 66B, the Ballardong application was likely to be 'stalemated'. On this basis, his Honour made a springing order that the application will stand dismissed unless, by 31 March 2004, a motion for its amendment or for further programming directions, agreed to by all those named as the applicant, had been filed in the court—at [50] to [51].

His Honour noted that such order would not preclude:

- the filing of a further motion to replace the applicants on proper evidence that the conditions under s. 66B have been complied with;
- (if it be the case that the application is dismissed pursuant to the springing order) a fresh application being filed covering the area which would have been covered by the proposed Nulla Nulla application;
- any continued mediation of the differences between the applicants, at least until the springing order comes into effect—at [51].

After noting the absence of a specific rule of court which covers the making of a springing order in a case such as this, French J said that the general power conferred upon the court by s. 23 of the *Federal Court of Australia Act 1976* (Cwlth) was sufficient to authorise the springing order—at [52].

Decision

The notice of motion was dismissed and the court made a springing order that the Ballardong application will stand dismissed unless, by 31 March 2004 a motion for its amendment or for further programming directions, agreed to by all named applicants, has been filed.