



Federal Court of Australia

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Butchulla People v State of Queensland (with Corrigendum dated 18 August 2006) [2006] FCA 1063 (23 August 2006)

Last Updated: 23 August 2006

FEDERAL COURT OF AUSTRALIA

Butchulla People v State of Queensland [2006] FCA 1063

CORRIGENDUM

BUTCHULLA PEOPLE v STATE OF QUEENSLAND & ORS
QUD 6140 OF 1998

KIEFEL J
18 AUGUST 2006
BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

QUD 6140 OF 1998

BETWEEN: **BUTCHULLA PEOPLE**
 Applicant

AND: **STATE OF QUEENSLAND**
 First Respondent

HERVEY BAY CITY COUNCIL
Second Respondent

MARYBOROUGH CITY COUNCIL
Third Respondent

TIARO SHIRE COUNCIL
Fourth Respondent

WOOCOO SHIRE COUNCIL
Fifth Respondent

TELSTRA CORPORATION LIMITED
Sixth Respondent

WIDE BAY WATER CORPORATION
Seventh Respondent

JOHN ARMITAGE
Eighth Respondent

KEVIN GREENHALGH
Ninth Respondent

LAURENCE GUSE
Tenth Respondent

GARRY WHITTAKER
Eleventh Respondent

QUEENSLAND LAPIDARY AND ALLIED CRAFT CLUBS
ASSOCIATION
Twelfth Respondent

THE FRASER ISLAND ASSOCIATION INC
Thirteenth Respondent

MARY RIVER RIPARIAN LANDHOLDERS GROUP (LOWER CATCHMENT)
Fourteenth Respondent

KINGFISHER BAY RESORT VILLAGE PTY LTD
Fifteenth Respondent

MAINCLOUD PTY LTD (TRADING AS THE FRASER ISLAND COMPANY)
Sixteenth Respondent

(DECEASED PERSON)
Seventeenth Respondent

JUDGE: KIEFEL J
DATE OF ORDER: 18 AUGUST 2006
WHERE MADE: BRISBANE

CORRIGENDUM

1. In the Reasons for Judgment of the Honourable Justice Kiefel given on 18 August 2006 at page 12, paragraph 30 and page 13, paragraph 32 replace the word 'Owen' with the word 'Owens'.

I certify that the preceding one (1) paragraph is a true copy of the Corrigendum to the Reasons for Judgment of her Honour Justice Kiefel.

Associate
18 August 2006

FEDERAL COURT OF AUSTRALIA

Butchulla People v State of Queensland [2006] FCA 1063

NATIVE TITLE - whether authorisation for the current applicant's removal and replacement was given in accordance with s 251B - whether all members of the claim group need to be present at the meeting - necessity to establish that the removal and replacement is authorised by all persons in the native title

claim group - whether claim group obliged to use a customary process of decision-making of a sub-group in a larger native title group or could adopt a contemporary process - whether the inability of one applicant to continue affects the authorisation of the other applicants

[Native Title Act 1993](#) (Cth), [ss 61](#), [64\(5\)](#), [66B\(1\)](#), [190\(4\)\(b\)](#), [251B](#), [253](#)

Bolton on behalf of the Southern Noongar Families v State of Western Australia [\[2004\] FCA 760](#)

Distinguished

Combined Gunggandji Claim v State of Queensland [\[2005\] FCA 575](#) Cited

Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCAFC 1517 Cited

Moran v Minister of Land and Water Conservation for New South Wales [\[1999\] FCA 1637](#) Cited

Project Blue Sky Inc v Australian Broadcasting Authority (1998) [194 CLR 355](#) Cited

Ward v Northern Territory of Australia [\[2002\] FCA 1477](#) Cited

BUTCHULLA PEOPLE v STATE OF QUEENSLAND & ORS
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IN THE FEDERAL COURT OF AUSTRALIA
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COMPANY)
Sixteenth Respondent

(DECEASED PERSON)
Seventeenth Respondent

JUDGE: KIEFEL J
DATE OF ORDER: 18 AUGUST 2006
WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. Sonia Gala, Wayne Tobane, William Rainbow (Snr), Kate Doolan, Shaun Doolan, Edward Doolan, Alfred Blackman, Sandra Page and Glenn Blake replace Susie Hansen, Eddie Doolan, Lynette Doolan, Bradley Doolan, Peter Blackman, Marie Wilkinson, Glenese Guilliver, Sandra Page, Frederick Thomas Blackman, Dorothy Morland, Jill Linda McBride, Frances Gala, Joynce Smith, Joyce Schultz, George Gala, Joyce Bonner and deceased person as the applicant in this native title determination application.
2. The title of the proceedings be amended to bear the name of the persons comprising the new applicant with the additional words 'on behalf of the Butchulla People'.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

QUD 6140 OF 1998

BETWEEN:

BUTCHULLA PEOPLE Applicant

AND:

STATE OF QUEENSLANDFirst RespondentHERVEY BAY CITY COUNCILSecond RespondentMARYBOROUGH CITY COUNCILThird RespondentTIARO SHIRE COUNCILFourth RespondentWOOCOO SHIRE COUNCILFifth RespondentTELSTRA CORPORATION LIMITEDSixth RespondentWIDE BAY WATER CORPORATIONSeventh RespondentJOHN ARMITAGEEighth RespondentKEVIN GREENHALGHNinth RespondentLAURENCE GUSETenth RespondentGARRY WHITTAKEREleventh RespondentQUEENSLAND LAPIDARY AND ALLIED CRAFT CLUBS ASSOCIATIONTwelfth RespondentTHE FRASER ISLAND ASSOCIATION INCThirteenth RespondentMARY RIVER RIPARIAN LANDHOLDERS GROUP (LOWER CATCHMENT)Fourteenth RespondentKINGFISHER BAY RESORT VILLAGE PTY LTDFifteenth RespondentMAINCLOUD PTY LTD (TRADING AS THE FRASER ISLAND COMPANY)Sixteenth Respondent (DECEASED PERSON)Seventeenth Respondent

JUDGE: KIEFEL J
DATE: 18 AUGUST 2006
PLACE: BRISBANE

REASONS FOR JUDGMENT

1 The applicants to this motion (Sonia Gala, Wayne Tobane, William Rainbow (Snr), Kate

Doolan, Shaun Doolan, Edward Doolan, Alfred Blackman, Sandra Page and Glenn Blake) seek an order that the persons currently authorised to be the applicant in this application for native title determination for the Butchulla People be removed and that they be inserted in their stead. I shall refer to the applicants to the motion as '*the applicants*'. The persons currently comprising the applicant in the proceedings, whom I shall refer to as '*the respondents*', are:

'Susie Hansen, Eddie Doolan, Lynette Doolan, Bradley Doolan, Peter Blackman, Marie Wilkinson, Glenese Gulliver, Sandra Page, Frederick Thomas Blackman, Dorothy Morland, Jill Linda McBride, Frances Gala, Joynce Smith, Joyce Schultz, George Gala, Joyce Bonner and deceased person.'

BACKGROUND AND AUTHORISATION MEETING

2 On 28 August 1998 a claim for native title determination was filed in this Court on behalf of the Butchulla People. The respondents were not named in the title to the proceedings. I understand a practice to have developed whereby the name of the group of persons seeking a native title determination is used for convenience or ready identification. The practice is not adopted in every case of this kind filed in the Court. In many the persons authorised by their native title claim group to bring the application are named in the title to the proceedings and are said to bring them '*on behalf of*' the people they represent. That would appear to be the better practice. I will return to this matter at the conclusion of these reasons.

3 Schedule R of the application, entitled '*certification or authorisation*', contained the following reference to authorisation:

*'The authorisation took place through the following process:
The native title claim group has adopted a contemporary process of authorising the application. This is a combination of: -*

- *Consent of senior members of the native title claim group;*
- *Seniority based on those members of the native title claim group who have established the longest connection with the area covered by the application;*
and
- *Consensus, through debate and dialogue through all members of the native title claim group.'*

The claim was later amended with respect to the area of the subject of the claim but in no other respect. In April 2004, at a directions hearing, the Gurang Land Council, on behalf of the applicant, produced a work plan which proposed that a connection report be completed and given to the State of Queensland by mid December of that year. Directions were made accordingly. In September and October 2004 meetings were held in relation to the connection report which had been produced by a consultant anthropologist. An issue arose between some of the respondents about the content of the report. Only some of the amendments sought by them were made. In January 2005, at a meeting with the consultant anthropologist, the Gurang Land Council was instructed that the connection report was not to be provided to the State of Queensland. The respondents who appear to be particularly concerned about the report are members of the Owens family.

4 On 21 February 2005 the Chief Executive Officer of the Gurang Land Council wrote to

the persons listed on the Council's database, as the known members of the claim group, requesting instructions regarding the future progress of their claim. The letter advised that the Land Council might have to consider withdrawing from the claim and that there appeared to be three alternative courses of action:

- 1. The majority of applicants instructs us to forward the Report to the State;*
- 2. An authorisation meeting authorises a new set of applicants who undertakes to consider submitting the Report to the State;*
- 3. Acceptance of the applicants decision to lose all future rights to native title (sic) and cultural heritage on Fraser Island and the adjoining main land of Australia'.*

It said that if the second course was requested by a sufficient number of Butchulla claimants then the Land Council would consider funding the necessary meeting and providing an independent chairperson for that purpose.

5 The Gurang Land Council received a number of requests to appoint a new applicant following the sending of the letter. On 19th March 2005 a public notice was placed in *The Courier Mail* and *The Fraser Coast Chronicle*. In it the Gurang Land Council invited all persons on the Butchulla People native title claim to:

'to attend an authorisation meeting for the purpose of removing and replacing the current applicant, to progress the current claim'.

Notice was given at the same time of a separate meeting on the same day involving the Butchulla Land and Sea Native Title claim. The date of the meetings was to be 9th April 2005. The same notification was provided in the *Koori Mail* publication on 21st March 2005.

6 A letter dated 21st March 2005 was sent to the persons listed on the database of the Gurang Land Council as Butchulla People. It advised of the two authorisation meetings to be held:

'for the purposes of removing the current applicants from the claim and replacing the applicants with new applicants. As you will be aware, the reason for the meetings is to gain instructions to progress the claim'.

7 Persons coming to the meeting received an agenda which was placed on each of the seats in the meeting room and their attention was directed to the agenda during the introductory talk. The discussion points were said to be:

- 1. The Process of removing and replacing the Applicant; and*
- 2. The Butchulla Decision Making Process'.*

and the meeting was said to be concerned with the *'Removal and Replacement of Applicant'*.

8 Before the meeting commenced Ms Fiona Campbell, a legal officer with the Gurang Land Council, was given four letters from members of the Owens family group or their supporters which expressed the view that the Owens Elders, amongst the respondents,

should not be removed as part of the applicant.

9 Mr Kym Elston, a legal practitioner employed by the North Queensland Land Council Native Title Representative Body Aboriginal Corporation acted as Chairperson of the meeting. He advised the persons present of the situations provided for under the [Native Title Act 1993](#) (Cth) ('the NTA'), where an applicant can be replaced and removed, and that they needed to make a decision about whether the current applicant was no longer authorised or has exceeded their authority and that if this was so they could authorise a new set of people to be the joint applicants. He explained the provisions of [s 251B](#) of the NTA and said there were two ways in which the applicant may be authorised:

1. Where there is a traditional decision-making process based on traditional laws and customs, this process must be used;
2. If there is no such process, because of loss of traditional law, then the group may adopt or agree to a process. He provided the example of making decisions on the basis of the majority rules.

10 Mr Peter Blackwood, a consultant anthropologist, spoke to the meeting about the decision-making process. He had been made aware of the authorisation section in the native title determination application and of the minutes of the Butchulla People Land and Sea Claim authorisation meeting which had been held on 23rd October 2004. That document summarised the responses of the Butchulla People who attended that meeting to a series of questions about their decision-making practices for the purpose of native title decisions. Drawing upon those documents he wrote the following points on the whiteboard as a summary of what he took to be the key principles of that decision-making process:

- *Only people with Butchulla blood speak for country;*
- *Elders in the family make the final decision after consultation with family members;*
- *Respect for all Butchulla elders;*
- *Decisions are made for the betterment of the group; and*
- *Decisions are made by mutual agreement within families and between families.'*

11 He wrote the following questions about the decision-making process on the whiteboard as 'prompts' for discussion by the group:

- *Should elders have the last say?*
- *Do some families have the final say for particular areas?*
- *Can each family have its own decision-making process?'*

12 He then discussed the points he had placed on the whiteboard and was asked to make some amendments. The discussions resulted in the following points being placed on the whiteboard:

- *Only people with Butchulla blood speak for country;*
- *Elders in the family provide advice;*
- *Family consultation - communication - elders provide advice;*

- *Respect for all Butchulla elders; and*
- *Come to mutual agreement:*
 - (1) *within families; and*

(2) *between families.*

13 The minutes record discussion taking place about ‘*mutual agreement*’. The consultant anthropologist said that ‘*consensus*’ and ‘*mutual agreement*’ do not mean that everyone has the same idea. People may not agree with the decision, but they agree to go along with it. He said that the land council was not suggesting that everybody agree, but that there needed to be sufficient agreement amongst the groups. ‘*Within families*’ referred to consensus; ‘*between families*’ referred to mutual agreement - a decision from all the groups as the court required. At a later point the meeting was again reminded that the families could have their own arrangements for decisions but that the NTA recognised only the claim group as authorising or removing applicants.

14 The names of the persons attending the meeting were recorded. There were some persons at the meeting who were not part of the native title claim group in the Butchulla People’s claim. They fell into two categories, according to the witnesses. There were some persons involved in the Butchulla People Land and Sea claim who were not part of the claim under discussion and were there for the second meeting and there were some persons from the Kubi Kubi group present. The meeting was asked whether there was any objection to the Kubi Kubi People remaining and there was none made. The minutes record that the Kubi Kubi People left the room before the motions were put. Before reading the resolutions to the Butchulla People claimants the Chairperson said words to the effect that only those claimants included on the Fraser Island claim (the Butchulla People’s claim) could participate in the decision-making process for that claim. Ms Campbell says that from her observation of what followed only persons connected with the Butchulla People’s claim was involved in the decision-making. The minutes also recorded the names of persons who signed the attendance sheet beside the words ‘*Butchulla People claimant*’. The Chairperson asked the meeting whether a motion was to be moved. A resolution was read out and also written on the whiteboard:

‘Resolution One:

The members of the Butchulla People (QUD 6140 of 1998) resolved to no longer authorise the current applicant and resolved to remove the applicant.’

(The names of the respondents were then listed).

15 This resolution was moved and seconded. Persons in attendance were asked to indicate, by way of show of hands, if they were in agreement with the motion in making the decision ‘*in accordance with traditional law and custom which the group has chosen*’. The witnesses saw a majority of Butchulla People put their hands in the air. The Chairperson then asked, with respect to the motion, if there was anyone not in favour of it and two people raised their hand. The Chairperson then advised that the group needed to consider who was to represent them. A break was taken in the meeting to permit discussion.

16 When the meeting re-convened the names of the apical ancestors for the Butchulla People’s claim were listed on the whiteboard. Each family put forward the names of

some of its members whom they wished the group to authorise. The names were listed against their apical ancestors. Pauline Wondunna and Gemma Cronin were nominated by Frances Gala, for the Owens family.

17 The second resolution was then read out and was written on the whiteboard:

'Resolution Two:

The members of the Butchulla People native title claim group resolved to authorise the following persons to be the applicant on the Butchulla People native title claim (QUD 6140 of 1998).'

(The names of the applicants were then listed).

18 Each of the nominated applicants was present at the meeting and they were asked whether they accepted their position as applicant and they responded in the affirmative. The Chairperson asked the meeting whether there were any objections to the applicants nominated and none were voiced. He then read out the third resolution which was also written on the whiteboard:

'Resolution Three:

The members of the Butchulla People native title claim group resolve, approve and instruct the applicant to bring an application in the Federal Court to replace the current applicant with the people named in resolution two.'

After the motion was moved and seconded the Chairperson asked the meeting if there was anyone who opposed the motion and no-one did.

STATUTORY PROVISIONS

19 The table which follows [s 61](#)(1) of the NTA provides that persons who may make an application for native title determination are:

*'(1) A person or persons authorised by all the persons (the **native title claim** group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group...'*

A note to that provision states that the person or persons will be '*the applicant*' and refers to subsection (2), which is in these terms:

'In the case of:

(a) a native title determination application made by a person or persons authorised to make the application by a native title claim group; or

(b) a compensation application made by a person or persons authorised to make the application by a compensation claim group;

the following apply:

(c) *the person is, or the persons are jointly, the **applicant**; and*

(d) *none of the other members of the native title claim group or compensation claim group is the **applicant**.*'

The word 'applicant' is defined by [s 253](#) by reference to [s 61\(2\)](#).

20 Section 61(3) requires that the application state the names and address for service of the person who is the persons who are the applicant. [Section 61\(4\)](#) requires:

'A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must:

(a) *name the persons; or*

(b) *otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.*'

21 Section 251B provides for the authorisation of the making of an application:

*'For the purposes of [this Act](#), all the persons in a native title claim group or compensation claim group **authorise** a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:*

(a) *where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind - the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or*

(b) *where there is no such process - the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.*'

22 By inference the section also applies to the revocation of authority : *Ward v Northern Territory of Australia* [2002] FCA 1477 at [10]; *Lawson on behalf of the 'Pooncarie', Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCAFC 1517 at [14] ('*Lawson v Minister*'). [Section 62\(1\)](#)

(a) requires a claimant application to be accompanied by an affidavit sworn by '*the applicant*', containing references as to the applicant, to belief of certain matters and to the fact that '*the applicant*' is authorised by all the persons in the claim group to make the application and to deal with matters arising in relation to it (see subsection (1)(a)(iv)). The registration process requires the National Native Title Registrar to be satisfied that '*the applicant*' is a member of the claim group and is authorised to make the application: [s 190C\(4\)\(b\)](#).

23 Section 66B(1) of the NTA provides:

'Application to replace applicant in claimant application

*(1) One or more members of the native title claim group (the **claim group**) in relation to a claimant application, or of the compensation claim group (also the **claim group**) in relation to a compensation application, may apply to the Federal Court for an order that the member, or the members jointly, replace the current applicant for the application on the grounds that :*

(a) either:

- (i) the current applicant is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it; or*
- (ii) the current applicant has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it; and*

(b) the member or members are authorised by the claim group to make the application and to deal with matters arising in relation to it.'

The Court may make the order if it is satisfied that the grounds are established: see subs (2).

24 Section 64(5) provides, with respect to the amendment of an application to replace an applicant, that:

'(5) If a claimant application, or a compensation application whose making was authorised by a compensation claim group, is amended so as to replace the applicant with a new applicant, the amended application must be accompanied by an affidavit sworn by the new applicant:

- (a) that the new applicant is authorised by the other persons included in the native title claim group, or the compensation claim group, to deal with matters arising in relation to the application; and*
- (b) stating the basis on which the new applicant is authorised as mentioned in paragraph (a).'*

25 It remains to mention that an application must be filed in the Federal Court and comply with the rules of the court about:

- (a) the form of the application; or*
- (b) information to be contained in the application; or*
- (c) documents that must accompany the application; or*
- (d) any other matter relating to the application.'*

(see [s 70\(1\)](#)). The Federal Court Rules provide that *'a party claiming relief shall be called an applicant'*: see Order 4 Rule 2(1).

THE APPLICATION

26 It is not suggested that the respondents have exceeded their authority. The case for their

replacement under [s 66B](#) is put upon the basis that they are no longer authorised following the resolution of the meeting. The respondents deny that there has been proper authorisation for their removal and replacement under [s 251B](#). They raise a number of matters relevant to the issue which include: the identification of persons notified and attending the meeting as members of the claim group; the failure to follow a traditional process of decision-making or a failure to warn that a different, non-traditional, method might be used by the group; the meeting being unduly influenced by the letter from the Gurang Land Council dated 21 February 2005; and no proper vote being taken. The respondents also point to the fact that since the meeting Gemma Cronin and Pauline Wondunna have changed their mind and no longer wish to form part of the applicant. The result, it is contended, is that there must be a fresh authorisation meeting. The respondents submit that if the applicants otherwise satisfy the Court that the requirements of authorisation have been met, the Court should nevertheless adjourn the matter to enable them to attempt an agreed outcome. A case management conference to that end is suggested.

- 27 The solicitor for the respondents submitted that it has not been demonstrated that the notification was given to all Butchulla People having an interest in this claim. In the absence of anthropological evidence, or some other method of identifying those persons listed in the database and those attending the meeting as related to relevant ancestors and therefore members of the claim group, the Court could not be satisfied that the authorisations were made by the remaining persons and the application should fail. The respondents rely upon the decision of French J in *Bolton on Behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 at [45] as authority for such a requirement. In that case however the only public notification bore the generic title of the claim and did not otherwise identify who might be members of the claim group. The connection of those attending the meeting with the native title claim group was not demonstrated in anyway and the process undertaken was effectively self-identification. In the present case the apical ancestors are known and there has been a connection report. There has been a previous authorisation meeting between members of the claim group. So far as concerns the Gurang Land Council it may be inferred that the database it keeps reflects the names of those persons, who have previously attended meetings and persons recognised as part of the families having a line of descent from the apical ancestors. The respondents, who have seen the list, do not suggest to the contrary. Their evidence suggests a deal of knowledge about the make-up of the claim group and they could be expected to identify anyone on the list in attending the meeting as not being a Butchulla person.
- 28 In some of the affidavit material filed on behalf of the respondents, allegations were made about some people attending the meeting not being Butchulla People. In the case of one of them the Gurang Land Council sought anthropological evidence to rebut the allegation, which it did. I did not understand these claims to be persisted in at the hearing. They are in any event mere assertions without any factual basis. The legal representative for the respondents in his submissions focussed upon whether the applicants could prove that all persons at the meeting were part of the claim group.
- 29 There is evidence as to the steps taken at the meeting to ensure that only the members of this group took part in the decision-making process. I am satisfied that that was the likely result. The Kubi Kubi People were observed to withdraw from the meeting. Those persons interested in the Butchulla Land and Sea Native Title claim were warned not to participate and Ms Campbell, whom I take to have some knowledge of the

persons associated with the various claims, was confident that only those involved in this claim in fact took part in the decision-making process. Moreover I find it difficult to believe that those of the respondents at the meeting would not have spoken out if they had observed persons outside the group taking part. Again, apart from mere assertions no attempt is made to identify those present and taking part who were not part of the claim group.

- 30 The respondents' principal argument about the process required by [s 251B](#) is that par (a) applies and that the meeting was obliged to use a customary process of decision-making. The custom of which they speak however is one adopted by the Owen family, not the wider group. In the Owen family the Elders determine matters such as authorisation and who may speak for the family. [Section 251B\(a\)](#) does not refer to the custom of a sub-group in a larger native title group. Its only concern is with the laws or customs of the whole group. Where the group as a whole has no law or custom which must apply, as is here the case, par (b) of subs (1) applies: *Combined Gunggandji Claim v State of Queensland* [2005] FCA 575 at [2].
- 31 The application for native title determination filed in this matter referred to the claim group adopting a contemporary process of decision-making, one which had regard to the Elders' viewpoint and attempts at consensus. The group had agreed to and adopted such a course for the purpose of the prior authorisation meeting. It did not however thereby become an immutable law or custom and could be changed by the process of agreement again.
- 32 The discussion at the meeting included the topic of the weight to be given to the views of the Elders in the claim group and it appears that it was decided that their role in the decision-making process should be more limited to advice rather than approval and ultimate outcome, as had previously occurred. The respondents contended that the native title group has always followed the decision of the Elders of the Owens family. In the way it was put, the claim group had previously given what amounted to a right of veto to those persons. This may provide the reason why some of the Owen family failed to attend the meeting, which is the next point raised by them. It does not however prevent a change in the method of decision-making. The respondents say that they did not appreciate that a different method might be employed and that no notification was given of this possibility. It is difficult to understand how the respondents thought the proposal to remove the existing applicant could occur if the process they speak of was not changed. They proceeded upon a wrong assumption about the ability of the claim group to agree on different procedure. There is no requirement that such a proposal be notified.
- 33 The decision-making process discussed at the meeting can be seen to have been agreed upon by a majority of those attending. This agreed process limited the Elders' roles. Neither of the terms '*consensus*' or '*mutual agreement*' were said to require unanimity. Whatever '*consensus*' was understood by the meeting to mean, it was relegated to the arrangement which might be made within a family. The decision of the whole group was to be by mutual agreement. There had been similar mention of a majority view prevailing. This is consistent with what was later discussed. In what followed at the meeting it may be inferred that it was agreed that a resolution may be passed by a majority. This case does not raise further questions as to the extent of the majority. So far as concerns the respondents' suggestion that there must be something approaching a

- unanimous resolution, the meeting did not require it. Such a requirement is contrary to the right of veto which it had rejected. And the NTA does not require that all members of the claim group be present (*Lawson v Minister* at [25]) or that all persons present agree (*Moran v Minister of Land and Water Conservation for New South Wales* [1999] [FCA 1637](#) at [48]).
- 34 So far as concerns the resolutions for revocation of the respondents' authorisation and the authorisation of the others to be the new applicant, all but two persons present were in favour of the first and there was no opposition to the second. There was no need for evidence of the number of votes, contrary to the respondents' submission. There is uncontradicted evidence about the vote on each occasion.
- 35 Although they had consented at the meeting to be one of the persons making up the 'applicant' to the proceedings, Ms Cronin and Ms Wondunna do not now wish to act in that capacity. The respondents submit that another authorisation meeting must be convened. They submit that the 'applicant' authorised for the purpose of native title claim proceedings has something of a corporate character and cannot be viewed as made up of individual applicants. This can be seen from the requirement of [s 61\(2\)\(c\)](#) that the persons authorised are jointly the 'applicant', it is submitted. It is that entity, here composed of 11 persons, which has been authorised and not a smaller one.
- 36 The applicants submit that the word 'applicant' may be seen to have more than one meaning in the NTA. It refers to all the persons who together make up 'the applicant' for the purpose of the application. It also refers to each person who has been authorised to be the applicant, in conjunction with others. It is submitted that the term should not be confined for all purposes to the meaning given by [s 61\(2\)\(c\)](#) NTA. If that were so the 'applicant' in native title claim proceedings would cease to exist if it transpired that just one of the persons making up 'the applicant' was not a member of the native title claim group, ceased to be a member of that group, ceased to be authorised, or died.
- 37 The meaning, or meanings, given to the word 'applicant' must be considered in its statutory context and by reference to the NTA as a whole. Regard must be had to the evident purpose and policy of the provisions and an attempt should be made to construe them so as to give effect to that purpose and achieve unity of all the statutory provisions: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) [194 CLR 355](#) at 381 - 382.
- 38 The evident purposes of [s 61](#) are to provide for representation of the claim group, to limit the number of persons who may act as 'the applicant' in the proceedings and, when more than one person is authorised, to require them to act in concert with each other. It may be assumed that since the persons authorised have a common interest in the subject matter of the claim acting jointly should not present a difficulty. Regrettably this is not always the case. In any event the section seeks a workable and efficient method of prosecuting claims for native title determination, one which limits the potential for dispute which might stifle the progress of claims.
- 39 Whilst [s 61\(2\)\(c\)](#) permits representative proceedings it does not create a legal entity which is itself capable of suing. And, whilst it obliges those authorised as representatives to co-operate with each other, it does not say that they are bound together in the way in which the respondents contend. The requirement that they act together does not imply that their ability to continue to act is dependent upon each other person authorised also continuing in the role. If that were the case it must arise from the terms upon which persons are authorised by the claim group.
- 40 Section 61 requires the persons who together are the applicant to be a member of the

- claim group and to be authorised by that group. [Section 251B](#) seeks to ensure that a proper process of authorisation is followed, one by which the Court can be satisfied that the wider group has authorised the persons to be their *'applicant'*. It recognises that in some cases proper authorisation may require the use of traditional customs or laws. Beyond these matters the NTA does not contain any express requirements as to how or upon what terms persons are to be authorised. It does however proceed upon the basis that each member of the claim group, including those authorised, has the same interest in the claim.
- 41 The respondents have not advanced a reason why, where more than one person is authorised to act as a representative, the persons authorised should be taken to be some kind of coalition. It might more readily be inferred, where the persons authorised represented distinct and different interests, that they must be replaced if they were unable to continue in that role. In that sense the ability of the rest of the group of representatives to continue would be affected. It may well be that the respondents view the matter in this way. The claim group has permitted each family to nominate a person to be authorised by the wider group. From the respondents' perspective the composition of the *'applicant'* reflects the various family interests. Such an approach is not however consistent with the nature of claims for native title determination nor the interests of the members of the claim group in it. The interest of each member is identical. The NTA does not recognise any sub-groups within the wider group having a different interest, as cases concerning the issue of authorisation consistently point out. It follows that, so far as the NTA is concerned, each person authorised is a representative of the entire claim group.
- 42 It follows, in my view, that the authorisation referred to in the NTA is not of the persons authorised collectively making up the *'applicant'*, but of each of them personally. There being no express term concerning the authorisation as to the authority to the contrary, statutory or otherwise, the presumptions usually applied to personal appointments would operate. That is to say, their authorisation will continue until revoked and whilst they are willing and able to act in their representative capacity. The requirement of the NTA, that persons authorised act together, is not a term or condition of appointment. It is a statutory requirement having as its purpose the efficient prosecution of claims.
- 43 Once the authority given by the claim group is seen to be directed to each of the persons authorised and subject to those terms it follows that the inability of one to continue does not affect the authorisation of the others. It is not an approach which cuts across any statutory provision or purpose. Unlike the respondents' approach it is consistent with the nature of the rights associated with claims to native title determination. The authorisation given by the claim group must be seen in this light. This view of authorisation does not however prevent revocation if it were considered to be necessary.
- 44 It is of some importance that the preferred approach also allows the Court's rules to have effect in proceedings of this kind. Order 6 rule 9 of the Federal Court Rules contemplates that there may be a need in some cases to remove a person as a party to the proceedings. A *'party'* in the context of a native title claim the *'applicant'*, would be all persons who together make up the applicant, since the *'applicant'* referred to in the NTA is not an entity itself capable of suing. There seems to me to be good reason why the Court should be in a position to exercise the power given by O6 r9 in native title claim proceedings as it does in any other litigation. I do not think it could be suggested that the need to do so would not arise.
- 45 In my view [s 251B](#) should be understood to refer to the authorisation of each person who is to represent the claim group and act with others as the *'applicant'*. The

authorisation is personal to them and continues until revoked or whilst they are willing or able to act. [Sections 66B\(1\)](#) and [64\(5\)](#), dealing with replacement and appointment respectively, should be read in a way consistent with this approach. The reference to the '*current applicant*' being no longer authorised would be taken to refer only to those persons whose authority has in fact been revoked. This may not be all persons comprising '*the applicant*'. The '*new applicant*' referred to in [s 64\(5\)](#) is each person who is authorised to make up the applicant when a change is made to one or more of them. The evidence that the subsection requires about their authorisation would be satisfied by those persons not newly appointed referring to their prior authorisation and the fact that it has not been revoked. For administrative convenience and clarity, their authorisation might also be ratified at the same meeting which authorises the new appointment or appointments, but this is not necessary

46 There will be orders in terms of the motion. The two persons authorised who do not now wish to act with the others as applicant in the proceedings will not be included in the replacement order. I have mentioned at the outset of these reasons my concern that the title of the proceedings may not be correct. It does not in my view reflect the requirements of the rules that the persons claiming relief be named. The names of the persons authorised to act as applicant should be set out. I accept that there is good reason to identify the native title claim group whom they represent. There will be orders accordingly.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate:

Dated: 18 August 2006

Counsel for the Applicant: Mr G Hiley QC

Solicitor for the Applicant: Gurang Land Council

Solicitor for the Respondent: Just Us Lawyers

Date of Hearing: 21 JULY 2006

Date of Judgment: 18 AUGUST 2006