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Abstract

Under section 66B of the NTA claim groups are entitled to replace or remove named applicants. Authorisation of the applicant can occur in accordance with decision making processes under either traditional law and customs that are binding on the group for decisions of that kind, or, where there is no such process, a process agreed to and adopted by the native title claim group in relation to authorising the application and things of that kind: s 251B. In this paper, Dr Lisa Strelein examines the decision in Bolton v WA [2004] FCA 760 (15 June 2004) *against a backdrop of similar cases involving removal of applicants and authorisation to determine current state of the law and the implications for practice.*

Dr Lisa Strelein is Research Fellow and Manager of the Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies

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Authorisation and replacement of applicants: Bolton v WA [2004] FCA 760 (15 June 2004)

Dr Lisa Strelein[1]

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Introduction

Over the past few years the South West Aboriginal Land and Sea Council have been working with Noongar native title applicants to rationalise claims in the South West, including an ambitious project to combine all existing claims into a single united Noongar claim. NTRBs are under a positive obligation to minimise the number of applications covering an area of land or waters under s 203BE(3) of the *Native Title Act 1993* (NTA). The proposed rationalisation has involved an enormous meeting schedule to meet with claimant groups and family groups within and across claims in the South West. Part of this rationalisation was to identify family groups and determine appropriate representation structures within the groups to form the basis for the applicant groups. As part of this process, the six main claimant groups applied to the Court to change a number of the named applicants in each existing claim (under s 66B) to mirror the new representative structure proposed for the single claim.

The applications were unsuccessful, with the Federal Court finding that the applicants were not properly authorised by the whole claim group to make the decisions to replace the applicants. The resulting decision in *Bolton v WA*[2] provides a comprehensive discussion of the requirements for the requirements of a successful applications under s 66B as well as the principles of authorisation that underlie it. This paper examines the decision in *Bolton* against the backdrop of similar cases involving removal of applicants and authorisation to determine current state of the law and the implications for practice.

Named applicants and Authorisation under the NTA

The individuals who are named on the application (referred to as the applicants or, sometimes, the named applicants) for a native title determination or compensation determination have certain powers and responsibilities in relation to the claim, including the power to deal with the all matters arising under the NTA in relation to the application. A person may only make an application (under s 61(1)) if they are authorised by the native title claim group. The applicants therefore act on behalf of 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'.[3]

While the applicants are specifically named in the application, the claim group need not be. The group is only required to be described with sufficient clarity so that it can be ascertained whether a particular person is part of the claim group.[4] Authorisation can occur in accordance with decision making processes under traditional law and custom that are appropriate to such a purpose, or a process agreed to and adopted by the native title claim group in relation to authorising the application and dealing with the matters arising from it, or one adopted in relation to doing things of that kind.[5]

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[2] *Bolton v WA* [2004] FCA 760 (15 June 2004) (*Bolton*)
[3] *Native Title Act 1993* (Cth) (NTA) s 61(1)
[4] NTA s 61(4)
[5] NTA s 251B

Replacing applicants

Section 66B provides that the claim group are entitled to replace or remove named applicants. Indeed, the provision also confirms that one or more members of the group can apply to the court for this to occur, so long as they satisfy the Court that the applicant to be removed is no longer authorised by the whole group to deal with matters arising in relation to the application, or that the applicant has exceeded their authority, and that the new applicant is so authorised.[6] In *Daniel v Western Australia* (2002), the conditions for replacement of applicants were outlined in similar terms to those in the Act and were not added to in any material way.[7]

A court may also remove applicants under their general powers under the Federal Court Rules to amend or strike out claims.[8] But those powers should be exercised in the context of ss 64 and 66B.[9]

Replacement of applicants does not necessarily have to be based on *male fides* (bad faith) on the part of the applicant to be removed (although a ground also exists for removal and the basis of an applicant exceeding their authority s 66B(1)(a)(ii)) and could conceivably be simply a matter of convenience, or reflect a change in the representation or decision making structures of personnel within the group.[10] However, the power to make orders under s 66B remains at the discretion of the Court,[11] and the Courts have indicated that there should be a positive discretionary reason to grant such orders.[12] The Courts appear to more readily exercise that discretion where there is a pressing or apparent reason to do so, such as repeated or protracted recalcitrance;[13] rather than as a way resolving internal conflict within the group.[14]

Importantly, removal as a named applicant does not mean that the removed applicant is no longer part of the claim group. It merely means that they will no longer formally act on behalf of the group in relation to the native title application.

The Noongar applications

In relation to three of the six claims before the Court in *Bolton*, no new applicants were added but a number of applicants were sought to be removed from each of the six claims resulting in a much smaller number of named applicants in relation to each claim.

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[6] NTA s 66B(1).

[7] *Daniel v WA* [2002] FCA 1147 (13 September 2002, French J) (2003) 194 ALR 278 (*Daniel*),at [17].

[8] *Button v Chapman on behalf of the Wakka Wakka people* [2003] FCA 861 (20 August 2003, Kiefel J) (*Button)*

[9] *Andersen v WA* [2003] FCA 1423 (4 December 2003, French J) (*Andersen*)

[10] NTA s 66B(1)(a)(i).

[11] see *Ward v Northern Territory* [2002] FCA 171 at [16] (*Ward*)

[12] see *Wiradjuri Wellington v NSW Minister for Land & Water Conservation* [2004] FCA 1127 per Madgwick J at [17] (*Wiradjuri Wellington*).

[13] see *Daniel, Wiradjuri Wellington*

[14] for example, *Ward*; and *Moran v Minister for Land and Water Conservation (NSW)* [1999] FCA 1637 (25 November 1999, Wilcox J) (*Moran*)

In two claims the named applicants were made the same, ostensibly because the claim group descriptions (that is, the ancestors from whom the group is descended) were almost identical.

The Court notes that authority for the proposed changes in the named applicants was said to be authorised by meetings held in relation to each of the six claims in February 2004. The NTRB directly contacted registered members of the Land Council who identified with the relevant claim group, and posted advertisements regarding the February meetings in local and statewide newspapers.

Members of the Land Council and the working party for the relevant application received information about the meeting, agenda and proposed resolutions. Information was also sent to various Indigenous organisations in the relevant area. The general advertisement contained information about the technical questions to be considered by the claimant groups, the relationship to previous meetings held in relation to the single claim and the addresses and dates of meetings (which were all held mid-week) in relation to each of the six claims concerned. The advertisement encouraged any person who was a member of one of the claims and wished to be involved in the decision making process to attend the relevant meeting and stay until the voting on resolution was finished and that they would have to do so at their own cost.

The resolutions passed at the meetings note, in adopting a decision making process for the authorisation process, each native title claimant attending the claim group meeting has a right to vote. In addition, in relation to the Southern Noongar claim, for example, a number of applicants gave evidence directly and by affidavit that membership of the claim group was discussed prior to any decisions being made, as was practice prior to a claim group meeting. The attendance at the community meetings varied from between 17 and 64 voting attendees. This amounted to between 13 and 31% of the known claimants (as a function of their membership of the land council and declared claim group status).

In relation to five of the six applications there appeared to be no significant dissent either at the meetings or in the proceedings before the Court. In relation to the Wagyl Kaip claim, there was dissent expressed by two of the named applicants who were proposed to be removed. The attempt to treat two claims (Wagyl Kaip and Southern Noongar) similarly, based on the similarities in the claim groups' descriptions, by authorising corresponding named applicants, was not supported by the two dissenting named applicants in the Wagyl Kaip claim in the proceedings before the Court. They expressed further dissent in relation to the united Single Noongar Claim proposal and in relation to representation by the SWALSC. One of the dissenting applicants also disputed the authority of the 29 people at the Albany meeting to make decisions for the Wagyl Kaip application.
It should be noted that where evidence can be adduced as to the assent of the applicants proposed to be removed, such evidence may be sufficient to satisfy s 66B. French J in *Anderson* remarked: '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.[15]

Previous cases

In *Quandamooka v Qld* [2002],[16] Drummond J noted that all of the cases dealing with s 66B 'advert to the importance of there being evidence identifying the nature of the decision making process followed by the native title claim group' to confirm authority on the applicants. Lindgren J described this as 'the formalities touching the due convening and decision-making at the meeting'.[17] The cases have tended to conduct three related inquiries:

1. who authorises the application;
2. how they make that decision; and
3. the context in which the decision is made.

Who authorises the decision

In *Daniel*, French J pointed out that 'section 66B recognises that a claim group which can confer authority on applicants to deal with matters arising in relation to a native title determination, can also withdraw that authority'.[18] Thus, when considering the requirements of a s 66B application, the anterior question of 'who is the claim group' determines much of the inquiry. In particular, it has been held that the process of removing authorisation from an applicant should be substantially the same as the process adopted to confer authorisation in the first instance.[19] That is, where authorisation under s 61 (1) requires a decision of the claim group, so too, the decision to remove authority must also be shown to be a decision of the group. To this end, the courts have paid significant attention to who participated in the decision.

In *Moran* [1999], Wilcox J applied what is perhaps the most rigorous requirements on the applicant group and their representative body. In that case, Wilcox J found that neither the person applying to replace the applicant nor the original applicant had sufficient authorisation. His Honour held that in order to demonstrate authority under either s 66B or 251B applicants must either:

a) identify *all* the members of the claim group by name and have express authority from at least the majority of individuals; or
b) identify a collective body or representative group who confer authority, supported by evidence that the body or group exists under traditional law and custom and whose nature and extent of authority under traditional law and custom extend to speaking on behalf of the whole group.[20]

While the second alternative proposed in *Moran* has been cited with approval in numerous cases, the first extraordinarily onerous requirement of identifying every member of the group prior to the authorisation of an application has not

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[15] *Bolton*, at [42].
[16] *Quandamooka v Queensland* [2002] FCA 259 (6 March 2002, Drummond J), (*Quandamooka)*at [65].
[17] *Duren v Kiama Council* [2001] FCA 1363 (Lindgren J), at [6].
[18] *Daniel*, at [18].
[19] *Johnson, Lawson* [2001], per Stone J.
[20] *Moran*, at [49]

been supported in other decisions. While it is possible to satisfy many requirements of the Act with such a list, it is not required.

In *Daniel*, Justice French took a much less stringent approach than that adopted in *Moran*. The Judge in that case did not suggest any need to identify all members of the Ngarluma and Yindjibarndi claim group members and there was no question raised as to the capacity of the group assembled for the community meetings at which the s 66B motions were considered. French J reinforced *Moran's* second proposition with approval, stating that: 'it would be enough if there was a decision by a representative or other collective body, that exercises authority on behalf of the group under customary law'.[21] That is, the group may be have authority to make the decision where it is sufficiently representative and there are no significant groups or individuals excluded from the decision-making, or where a smaller group or particular individuals hold decision making authority under traditional law and custom or by virtue of a process agreed by the whole claim group.

The source of the two alternative proposals in *Moran* can be traced to the requirement that the applicants are *authorised* by all the persons in the claim group. Reciprocally, it has been held that the role of applicants is to *represent* the whole of the claim group and that there is no provision for persons to represent or act in the interests of a particular faction or group within the claim.[22]

As a corollary, this has translated into a scepticism in cases such as *Quandamooka* of meetings that may be held in the absence of particular (especially opposing) groups. That is, persons authorised by a meeting that does not include dissident groups, where decisions are made affecting their interests, can be indicative of inadequate processes.

While in some cases this has justified rejecting the application under s 66B, that has not stopped the court from taking action to remove recalcitrant applicants in other circumstances.[23] In normal circumstances an applicant who is no longer authorised will remain as a member of the claim group. Where the applicant no longer wishes to take part in the original application it has been suggested, to ensure their voices are not denied in the proceedings, the appropriate resolution may be for dissident groups to join as a party to the proceedings.[24]

From these decisions it may be concluded that the decision need not be a decision of every member of the group. Rather, it may be accepted to be a decision of the group if it can be shown that:

1. the group participating in the decision represents a reasonable cross section of the claim group; and/or
2. the smaller group is authorised by the wider claim group to make decisions of the kind in question; and

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[21] *Daniel*, at [18].
[22] *Bidjara People 2 v Queensland* [2003] FCA 324 (7 April 2003, Ryan J), at [4].
[23] As in *Daniel.*
[24] see *Button.*

3. opposing groups are given an opportunity to be involved in the decision making.

How the decision is made

Lindgren J, in *Duren*, suggested that the starting point for determining whether a s 66B application is authorised must be to identify whether or not there is a process of decision making under traditional law and custom of the group. *Moran* would suggest that where no such process exists a majority of all of the members would be required either in the first instance, to determine a decision making process for native title matters or authorisation in particular, or for each authorisation decision.

In practice, the acceptability to all the claim group of adopted decision making processes has been inferred from recent practices of the group without evidence of adoption by individual members. In *Daniel*, the adopted decision-making process was described as 'community meetings' in which a majority decision by attendees, determined by decree or show of hands, was adopted. As one might expect this is a common practice for the management of native title claims by many claim groups represented by an NTRB.

The Court in *Daniel* accepted that in that instance, this was the decision making process adopted over time, and by inference agreed to, by the group for all decisions related to their application. It had been used in decision relating to the claim since its lodgement in 1996 and similar processes had been used in relation to development issues prior to the advent of native title.

His Honour accepted that this was not a process under traditional law and custom (although the resolution stated that it was consistent with traditional laws and customs.[25]) and that this was not required by the Act. Indeed, he suggested that on the balance of probabilities traditional law and custom would not have a decision making process appropriate to the technicalities of the native title process.[26]

In *Andersen* French J distinguished between a decision making process adopted by the native title claim group, and a decision making process adopted by the people at the meeting. In the absence of evidence supporting an inference of the kind raised in *Daniel*, (see above) in order to establish that such a decision making process was accepted *by the wider claim group* it would first be necessary to establish that the group adopting that decision making process was itself authorised to make such decisions. The legitimacy of the decision making process in a particular instance is therefore dependent on the successful outcome of the first inquiry – whether it can be established that those who were in attendance and adopted the decision making process had the authority of the wider claim group to do so.

[25] see *Daniel* at [34].
[26] *Daniel* at [51].

Construing the decision making process in this way, the authorities again highlight the correlation between the original decision making process adopted for authorisation of applicants and the decision making process used to remove them. Thus, where there is no evidence of such a correlation, evidence as to the legitimacy of the new process may need to be more stringent.

The context in which the decision is made

In *Daniel*, *Andersen* and now *Bolton*, Justice French has paid particular attention to the conduct of the meetings to approve an application under s 66B. In *Quandamooka*, Drummond J noted concerns as to the extent and methods of notice and voting employed that may have disadvantaged certain members of the group. In French J's decisions, however, these matters received much greater attention.

In *Daniel*, French allowed a s 66B application to remove an applicant who continued to hold out against the Ngarluma Yindjibarndi native title group signing an agreement to extinguish native title in relation to the Burrup Peninsula Agreement. As in *Bolton*, French J examined the meeting notification and procedures in detail, including the content of the notices, who they were sent to, the number of people present at the meeting, and registering of attendance. The notices were sent to 94 households the meeting was attended by 80 people. It also appears that personal contact was made with claimants who lived in and around the Roeburn town area. Travel allowance was available to attendees though the evidence suggested that decisions were usually made by claimants from the Roeburn area, where meetings are generally held and where the majority of the claim group live, and that this was generally accepted by the group.

His Honour accepted that sufficient notification had been given to the members of the native title group and accepted affidavits in which claimants, and NTRB staff attested to the fact that the attendees matched the attendance list and that those in attendance were Ngarluma or Yindjibarndi (based for example on the observations of the anthropologist who had a long association with the group) and that decisions were made using a decision making processes used in the past.

The judge's decision in *Bolton*

In *Bolton*, French J reaffirmed that so long as the decision to replace applicants is made by a representative or other collective body exercising authority on behalf of the claim group, that will suffice.[27] However, he said, the decision making process used to determine the authority to bring the claim on behalf of the native title claim group must be traced to a decision of the claim group. This establishes a clear link between the original authorisation process and subsequent applications to change or remove applicants.

In *Andersen*, French J forewarned that the authorisation process used by the Noongar claimants in an earlier s 66B application under the Ballardong claim showed serious inadequacies in failing to demonstrate the connection between

[27] *Bolton*, at [42].

the attendees at the meeting and the class of persons identified in the claim group description.[28]

Justice French found that in *Bolton* 'the evidence and the processes adopted were not adequate to meet the conditions necessary for an order under s.66B'.[29] His honour suggested the following defects:

- The claim group descriptions, including the identified apical ancestors, were not included in the advertisements and notices;
- the connection between those attending the meeting and the claim group and their biological or other descent from the relevant apical ancestors was not established;
- membership of the native title claim group by those who attended was not demonstrated because it was based on self-identification; and
- it was not established that, even if all those in attendance were members of the relevant claim group that they were in any way 'representative' of the various components of the native title claim group concerned.

His Honour concluded that the available evidence suggested a 'constructed "decision-making" process which cannot be demonstrated, to reflect in any legitimate sense, the informed consent of the members of the native title claim group'.[30] This may appear to be based on the fact that the decision making process was adopted at the start of the meeting and was not a pre-existing agreed process for removal and replacement. However, this is not the requirement set out in s 251B. The processes for authorisation may be one agreed to and adopted by the persons in the native title claim group for the particular purpose of authorisation or one adopted for things of that kind. There is no requirement that the process needs to have been used before. But, in that case, the evidence must reveal that the decision making process is accepted and/or the group is authorised by the wider claim group.

French J suggests that the process must be traceable to a decision of the group. This would suggest that the heart of the problem is not the adoption of the particular process but that the meetings were not considered or proved to be meetings of 'the group'. In the final result, despite the criticisms of the procedural and evidentiary matters, the judge suggested that blame lay, not with the SWALSC but with the 'apathy, lack of interest or divided opinions within the claim groups'. This severe criticism appears to underscore a concern of the judge that in the absence of adequate proof that those present were 'representative' according to traditional law and custom or other basis agreed by the wider claim group, the numbers present at the meetings were insufficient to provide proper authorisation under the s 66B or 251B.

The question remains open as to whether, in hindsight, the claimants could have adduced the evidence required to establish that the decision making process and the number and nature of the attendance at meetings were accepted by the groups as sufficient to make decisions of this kind, whether by reference

[28] *Andersen,* at [21].
[29] *Bolton,* at [45].
[30] *Bolton,* at [48].

to traditional decision making processes or practice of long standing or practice in relation to native title application processes.

In *Daniel*, the same judge was prepared to infer a number of things from the evidence provided: that the decision making process adopted for the purpose of determining authorisation were accepted by the whole group by virtue of recent regular practice; that those who attend the meetings and make decisions in relation to authorisation, though only a proportion of the group are sufficient (by weight of numbers?) to constitute the whole group for the purposes of the requirements of the Act. These are necessary inferences in relation to the realities of native title claim groups.

- It may not be possible and is not required to identify exhaustively all the members of the claim group, especially in order to make an application;
- It may never be possible or practicable or culturally appropriate to receive instructions from each individual member; and
- It is unreasonable to expect every member of the claim group to actively participate in the claim management or the prosecution of their native title interests.

Impact on the Single Noongar Claim

The decision deals only briefly with the proposed combination of claims in the South West. The applications sought, in addition to the variations under s 66B, to then follow on to combine all of the applications covering the bulk of the original area under s 64. The combination failed in this instance because of the views the judge expressed in relation to the attempts to vary the named applicants in the six underlying claims. It remains open for the original applicants to bring a motion to combine.

Conclusion

The decision, in relation to s 66B has ramification for the management of native title claims across the country. The decision raises the burden on applicant groups who wish to vary the named applicants and reorganise their claim structure. *Bolton* does not diverge from the accepted authority of *Daniel* and other s 66B cases, including *Moran,* that a decision need not be made by all members of a claim group in order to be authorised. However the authority of that smaller group to make the decision must be properly established. *Bolton* raises the standard of evidence required to be adduced in these types of applications. Direct evidence should be led to establish the membership of the claim group for all those:

1) being notified of a meeting
2) attending a meeting
3) participating in the decision making process.

Where no traditional decision making process exists, it also requires evidence to be led as to how this decision making process was adopted. If it is different to the decision making process used to authorise the applicants originally this may need to be explained further.

Bolton deals specifically with notices of meetings of claim groups. In general terms, the decision requires that an NTRB identify the claim group description

in such a way that individuals can verify whether they are members of the claim or not. This is consistent with s 61(4) of the NTA. However *Bolton* raises the burden on representative bodies in relation to the extent and complexity of notices to claim group members, potentially requiring details of the basis for the claim group to be included in notices, including genealogical information. NTRBs who adopt practices of notification through newspapers or other public media may need to consider the implications of such public disclosure. It may be argued that notices sent to already identified claimants (eg, from a NTRB database) would not require this kind of information, however evidence will need to be adduced that those people are in fact members of the claim group. From a practical point of view, a regularly updated database is essential for taking informed instructions and for notifying claimants in relation to such important matters.

The decision in *Bolton* requires that NTRBs adduce clear evidence of the decision making processes adopted and applied in the particular case, and the basis for the authorisation of those making the decision. It also requires that NTRBs use due diligence to identify who are the members of the claim groups they represent and to keep up to date records of claim membership.

Bolton also highlights the positive obligation on NTRBs and active claimants or applicants to identify the members of the claim group and solicit their involvement in the decisions that affect them.[31] However, it should be acknowledged that NTRBs and active claimants cannot force the participation of potential native title holders in the management of the claim.

The apparent requirement for claim group meetings to formally document not merely the attendance at meetings but the connection of attendees to the claim group as evidence for establishing authorisation increases the burden of evidence that must be adduced in applications of this kind. However, most NTRBs or claim groups will have collected some primary genealogical or other information as to the membership of the particular claim group to satisfy s 61(4) and s 203BE. Evidence in the form of an affidavit from an anthropologist, Aboriginal Liaison/Project Officer or similar, that those attending a meeting can be linked to the claim group description should also be sufficient to satisfy this requirement.[32]

The decision in *Bolton* raises particular challenges for large and disparate claim groups. As NTRBs continue to work toward the rationalisation of claims the practicalities of large claim group meetings and the engagement of claimants must be managed in a manner consistent with the requirements of authorisation. For example, where decisions in relation to claim management are made by working parties or other intermediary groups, the source and extent of authority of the smaller group must be clearly established by evidence.

[31] See for example, ss 203BA,203BB, 203BC, 203BE, 203BF and 203BH.
[32] See *Simpson on Behalf of the Wajarri Elders v WA* [2004] FCA 1752 (*Simpson*)

Since *Bolton*, French J has granted an application to the Wajarri Elders claimants to remove one of their applicants under s66B.[33] The claim area is very large – over 83000 sq kilometres, and the authorising claim meetings were relatively small in comparison to the overall membership of the claim group. Evidence was led and accepted as to the authority of those attending to make a decision on behalf of the wider claim group. French J accepted that the group in attendance was 'fairly representative' of the claim group and had authority under Wajarri law and custom to make decisions on behalf of the wider claim group.

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Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
Lawson Cres, Acton Peninsula ACT
GPO Box 553 Canberra ACT 2601
Telephone 02 6246 1161 Facsimile 02 6249 7714
Email ntru@aiatsis.gov.au, website www.aiatsis.gov.au

[33] *Simpson*