

AUTHORISATION LAW

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Overview

Authorisation is the process by which a group gives representative authority to an individual or group of individuals to make decisions on its behalf. Authorisation is inextricably linked to a number of potential rights. Since the [1998 amendments](#) to the [Native Title Act 1993 \(Cth\)](#) (NTA), in order to make a native title or compensation application, claimants need to demonstrate that they are authorised to make the application by all the members of the native title claim group.

Authorisation is a fundamental element of the NTA.¹ The key provisions are summarised as follows (click on the hyperlinks for the relevant sections of the NTA):²

1. A person can only make a native title application³ if they are authorised by all the members of the native title claim group ([s 61\(1\)](#)) that is, those persons who 'according to the traditional laws and custom, hold the common or group rights and interests comprising the particular native title claimed'.
2. The native title claim group is defined under [s 253](#).
3. Authorisation of the applicant must be either the outcome of a traditional process of decision making ([s 251B\(a\)](#)) or 'where there is no such process', according to a process agreed to by all the members of the native title claim group ([s 251B\(b\)](#)).
4. The applicant has a significant power to deal with all matters arising under the NTA ([s 62A](#)) in both processing and signing off on decisions, including binding all the members of the native title claim group to Indigenous Land Use Agreements (ILUAs).
5. Members of the claim group can apply to the Federal Court to replace applicants where they have exceeded their authority ([s 66B\(1\)](#)).

¹ *Strickland v Native Title Registrar* [1999] FCA 1530, [57].

² S, Phillips 'The Authorisation Trail' (2000) 4(28) *Indigenous Law Bulletin* 13; L, Strelein 2004, *Mediation, Determinations and the Facilitation of Decision Making under the Native Title Act 1993*, unpublished paper, Native Title Research Unit, AIATSIS, Canberra.

³ Applications refer to the initiation of processes under the NTA including an application for the determination of native title (s 13(1)); non-claimant applications for a determination of native title (s 13(1)); applications to revoke or vary a determination of native title (s 13(5)); and applications in relations to Future Acts (s 32(3)). Note that for compensation applications under s 50(2), the claim groups is defined differently.

6. Authorisation affects whether parties will pass the registration test under [s 190A](#), [190B](#) and [190C](#). The registration test involves applying a set of conditions to the native title application by the Native Title Registrar. Once registered, the applicants gain certain rights such as having a say about proposed developments on the claim area.
7. Authorisation also impacts on the functions of NTRBs under the NTA (ss [203A](#), [203AA](#), [203AB](#), [203AC](#), [203AD](#), [203AE](#)). These functions include certification, notification, dispute resolution and agreement making which are interrelated with the authorisation process. In particular, applications for registration of an area ILUA must have been certified by all representative bodies for an area in performing their certification functions under paragraph 203BE(1)(b) or be accompanied with authorisation statements under s. 24CG(3)(b).
8. Parties can apply to have an application dismissed under [s 84C](#) where the application has not been properly authorised.

2007 legislative reforms

As a part of the [Attorney General's Native Title Reform](#) process announced in 2005 the Federal Government has implemented a number of legislative changes in response to the [Claims Resolution Review](#) finalised in 2006. Authorisation and registration was identified as factors delaying the resolution of claims and a number of changes were enacted under the [Native Title Amendment \(Technical Amendments\) Act 2007](#) (Cth) – some of which are yet to come into force. The reforms have affected a number of aspects of authorisation including:

- *Removing deceased applicants.* There was a need to address the removal of a deceased applicant which was specifically proposed in recommendation 12 of the [Claims Resolution Review](#). Prior to the amendments, under s 66B the removal of applicants was expressed in generalised terms based on the applicant no longer being authorised or having exceeded their power. Under the 2007 provisions, one or more members of the claim group may apply to the Court for an order that the member, or the members jointly, replace the current applicant on the grounds that a person who is (alone or jointly with one or more other persons) the current applicant either:
 - consents to his or her replacement
 - consents to his or her removal
 - had died or become incapacitated
 - is no longer authorised by the claim group to make the application and to deal
 - with matters arising in relation to it, or
 - 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. ⁴

⁴ [Native Title Amendment \(Technical Amendments\) Bill 2007 Explanatory Memorandum](#), at para. 1.263; *Native Title (Technical Amendment) Act 2007*, s 84D.

- *Continuing proceedings where there is a defect in authorisation.* Where there has been a defect in authorisation the Federal Court will have the flexibility to hear and determine an application despite a defect in authorisation. This will depend on the circumstances of the case and the nature of the defect, whether the applicant is now authorised to deal with the matters in relation to the application and the progress of the case such as whether or not it is in trial or mediation.⁵ This has the potential to enable a number of cases to proceed where authorisation is contested by the respondent party. This may avoid situation where processes adopted to obtain authorisation are defective. For example, in *Bolton v WA*⁶ French J noted that, while the court has a general power to amend applications under O 13 4. 2 of the Federal Court Rules, that power is subject to the constraints imposed by ss. 64 and 66B of the NTA. Even though the amendments do not remove these 'constraints' there is further flexibility to ensure that a case can proceed to more substantive matters.
- *Clarifying circumstances where the registration test will be reapplied.* The technical amendments seek to clarify the interaction between s 64 and s 66B. Section 64 relates to all amendments in a native title claim and requires that the registrar reapply the registration test whereas s 66B relates only to amendments relating to applicants. S 64(5) has been repealed meaning that the all applications to replace an applicant will be made under s 66B and the Registrar would not be required to reapply the registration test to replace the applicant.⁷
- *Strike out provisions for registration test decisions.* The amendments proposed empowers the Court to dismiss claims that do not pass the merit provisions of the registration test administered by the NNTT. However these changes have been criticised on the basis that the provisions will create further appeals and are manifestly redundant given the powers of the Court to strike out manifestly deficient claims under [s 84C](#) of the NTA and [s 31A](#) of the [Federal Court Act 1976 \(Cth\)](#).
- *The provision of information to the court.* The 2007 amendments also require further information from applicants. In particular, under s 62(1)(a)(v) applicants were formerly required to 'state the basis on which the applicant is authorised'. However the 2007 changes require details of the decision making process. This has a number of potential practical implications such as creating a further burden on applicants to provide anthropological material evidencing a decision making process that can be 'artificial' or brought about by the legal requirements of the claim itself. This is a contentious amendment which, as argued by the National Native

⁵ [Native Title Amendment \(Technical Amendments\) Bill 2007 Explanatory Memorandum](#), at para. 1.285.

⁶ [2004] FCA 760.

⁷ [Native Title Amendment \(Technical Amendments\) Bill 2007 Explanatory Memorandum](#), at para. 1.249.

Title Council (NNTC)⁸, can be open to abuse given that parties are not required to show cause to rely on the provision.

Relevant readings

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⁸ National Native Title Council, 2007 [submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment \(Technical Amendments\) Bill 2007](#).