AUTHORISATION MEETINGS

Since the 1998 amendments to the *Native Title Act 1993* (Cth), in order to make a native title or compensation application, section 62 requires the person/s to demonstrate that they are authorised to make the application by all the members of the native title claim group.

The courts have taken a close interest in the way that decisions have been made at authorisation meetings in other regions, to the effect that there are now some base requirements for the way that these meetings are convened. As such, claimants and NTRBs need to comply with the legal requirements for these meetings in order to facilitate sustainable outcomes.

While a number of Federal Court decisions related to authorisation meetings focus on the removal and replacement of native title applicants, some cases have taken a wider view, and the collection of these decisions provide direction on the nature of authorisation meetings, whether they address new native title applications, the nature of the claim group, removal of applicants, or amendments to claims.

1. How are the meetings organised?

It is clear that authorisation meetings need to be organised so as not to disadvantage certain members of the claim group (*Quandamooka*). The first point of reference on this question is the content of the notice of the meeting. Justice French in *Bolton* said that:

- Advertisements and notices of a meeting must include claim group descriptions, with identified apical ancestors; and
- Notices of meetings must identify the claim group description in such a way that individuals can verify whether they are members of the claim or not, with greater burden on the 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.

Justice French in *Daniel* 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 the registering of attendance. Personal contact was also made with claimants who lived in and around the area. French J accepted that sufficient notification had been given to the members of the native title group.

2. Who authorises the decisions?

The courts have paid significant attention to who participates in the decision-making process at authorisation meetings. Justice French in *Bolton* explained that the meeting needs to demonstrate that:

- the descent of the people at the meeting from the relevant ancestors;
- those attending the meeting are members of the native title claim group (and this cannot be established through self-identification); and
- those attending are ‘representative’ of the various elements of the native title group.

The courts have examined how many people attended a meeting in an effort to decide whether a specific meeting was a meeting of the 'group', while only one example can be found of a judge suggesting that the every member of the claim group needs to be in attendance, there have been other instances that imply that an unspecified percentage of the group needed to attend the meeting in order for it to be 'representative'.

In analysing the relevant cases, it can be concluded that an authorisation decision need not be a decision of every member of the claim group; rather, it may be accepted to be a decision of the group if it can be shown that:

- the people involved in making the decision represents a reasonable cross section of the claim group;
- the smaller group (either a working party, group of elders or people at a meeting) is authorised by the wider claim group to make decisions of the kind in question; and
- opposing groups are given an opportunity to be involved in the decision-making process.

On the notion of representation, the decision in *Moran* showed that, in order to demonstrate authority, applicants may identify a collective body or representative group who are able to confer authority, supported by evidence that this body or group exists under traditional law and custom and whose nature and extent of authority under traditional law and custom extends to speaking on behalf of the whole group.

Reliance on 'representative authority' was discussed in *Daniel*, where the judge outlined that the group (those attending an authorisation meeting) may have authority to make the decision where it is sufficiently representative (of the whole claim group) and there are no significant groups or individuals excluded from the decision-making process.

In addition, a smaller group or particular individuals (a working party, group of elders or people at a meeting) may hold decision-making authority under traditional law and custom or by virtue of a process agreed by the whole claim group (*Daniel*). 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 (*Bolton*).

On the need to be inclusive, problems have arisen where meetings have been convened in the absence of a specific group, particularly opposing groups. Specifically, as detailed in the *Quandamooka* judgement, persons authorised by a meeting that does not include dissident groups can be indicative of inadequate processes.

On the issue of evidence, there is a burden on the organisers of an authorisation meeting, normally the native title representative body or native title service, to formally document not merely the attendance at meetings but the connection of attendees to the claim group. Justice French in *Daniel* accepted as evidence the affidavits in which native title claimants and NTRB staff attested to the fact that the attendees matched the attendance list and that those in attendance were of the relevant native title group. This evidence was supported by the observations of an anthropologist who had a long association with the native title group.

Similarly, evidence in the form of affidavits from an anthropologist, Aboriginal project officer or similar person with a knowledge of the claim group that those attending a meeting can be linked to the claim group description should also be sufficient to satisfy the court (*Simpson*).

3. How are the decisions made?

A distinction has been made by the courts between a decision-making process accepted by the native title claim group as a whole and a decision-making process adopted by people at a meeting. For example, there must be a correlation between the original decision-making

process adopted for the authorisation of applicants and the decision-making process used to remove them. So, where there is no evidence of such a correlation, the information provided to demonstrate the legitimacy of the new process will need to be more stringent.

Moreover, Justice French in *Bolton* stated that a native title claim group must have a pre-existing process for decision-making (such as the process used at first instance of authorisation, or even more preferably, a decision-making process used for decisions relating to the claim consistently over a period of time) rather than a decision-making process adopted at the start of a particular meeting. Further, the process must be traceable to a decision of the claim group. And again, the legitimacy of the decision-making process is therefore dependent on whether it can be established that those who were in attendance at a specific meeting and adopted a decision-making process had the authority of the wider claim group to do so (*Andersen*).

Similarly, cases have referred to the importance of evidence (including affidavits) that identifies the nature and legitimacy of the decision-making process followed by the meeting to confirm authority on the applicants; that is, the formalities or rules used to convene the meeting and to reach decisions at the meeting (*Quandamooka*; *Duren*).

More positively, the courts have accepted that the adopted decision-making processes of 'community meetings', where a majority decision by the participants can be shown by decree or show of hands, are a demonstration of a legitimate method by the group. Indeed, Justice French in *Daniel* accepted that this approach was the decision-making process adopted over time by that group, and by inference, the approach had been agreed by the group for all decisions related to their application.

For a more expansive explanation, see Lisa Strelein, 'Authorisation and replacement of applicants: *Bolton v W.A.* [2004] FCA 760 (15 June 2004)', *Land, Rights, Laws: Issues of Native Title*, vol. 3, 1, March 2005.

Cases

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

Bidjara People 2 v Queensland [2003] FCA 324 (7 April 2003, Ryan J)

Bolton v WA [2004] FCA 760 (15 June 2004, French J)

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

Daniel v WA [2002] FCA 1147 (13 September 2002, French J)

Duren v Kiama Council [2001] FCA 1363 (Lindgren J)

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

Quandamooka v Queensland [2002] FCA 259 (6 March 2002, Drummond J)

Simpson on behalf of the Wajarri Elders v WA [2004] FCA 1752

Other Resources on Authorisation

Bartlett, R. 2004 ‘Making a Claim Under the Native Title Act 1993, *Native Title in Australia* (2nd ed, LexisNexis Butterworths, Brisbane) [11.4].

Hiley, G. 2005, ‘How important is authorisation?’ *Native Title News* 7(5), pp. 83-87.

Hiley, G. 2004, ‘Amendment and authorisation of Old Act applications’ *Native Title News* 6(11), pp. 203-206.

Phillips, S. 2000, ‘The Authorisation Trail’ *Indigenous Law Bulletin* 4(28), pp. 13-15.