

## Power to the People: Decision Making and Empowering the Claim Group

“But so long as the people remain an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed”.<sup>1</sup>

### Introduction

1. Traditional laws and customs of Traditional Owners<sup>2</sup> are an essential part of the social and cultural fabric of a native title group. With the influx of final and favourable native title determinations and the consequential determination of Prescribed Bodies Corporate (PBCs), an ongoing challenge for PBCs and Traditional Owners is to make sound, informed and sensible decisions so as to restrict and manage risks of decision being challenged. Native title claims may never get finalised and PBC business and other opportunities may be lost if the door is left open to challenge a claim group’s authority to make decisions.
2. It is, of course, trite to say that each native title claim group has its own set of laws and customs and each group has its own cultural and political dynamic. Whether or not a court, tribunal or some other entity of competent jurisdiction will interfere with a decision made by a native title claim group will, of course, depend on the relevant factual circumstances in each case.
3. In my experience, claim groups that are united and follow a sensible and consistent decision making process, whether that process incorporates wholly or in part traditional laws and customs, to make informed decisions are the groups who have their claims

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<sup>1</sup> *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1, Brennan J at [61].

<sup>2</sup> In this paper I use the term “Traditional Owner”. Where the term “native title holder” is used it is used in accordance with s.224 NTA definition which defines “native title holder” as:

The expression **native title holder**, in relation to native title, means:

- (a) If a prescribed body corporate is registered on the National Native Title Register as holding native title rights and interests on trust – the prescribed body corporate; or
- (b) In any other case – the person or persons who hold the native title.

finalised and take advantage of the economic and other opportunities that may arise as a result of their native title claim.

4. Traditional Owners are required to make a range of decisions either through an Applicant who is authorised on behalf of a native title claim group or through a PBC which holds the determined native title either as a trustee or as an agent for the native title holders.
5. Traditional Owners, either through an Applicant or a PBC, will be required to make native title related decisions about many and varied matters. Some examples are:
  - a. Authorising the making of a native title claim and authorising an Applicant to bring that claim;
  - b. Managing and protecting the environment, eco systems and country generally;
  - c. Protection of sacred and significant sites;
  - d. Financial and community benefit opportunities that may arise from time to time;
  - e. Entering into Indigenous Land Use Agreements (ILUAs);
  - f. Appointing legal, financial or other professional advisers; and
  - g. Who are the members of the native title holding group.
6. A unique aspect of decision making in native title claims is that some decisions made by an Applicant or a PBC will bind the entire group and in many cases, successively. For example, the authorisation of an ILUA can bind the current members of the claim group and all future members of the claim group.
7. It is, therefore, important for Traditional Owners, Applicants and PBCs to make well informed decisions when entering into native title related discussions and negotiations.

### **Some Cases**

#### *Waanyi*<sup>3</sup>

8. In this case the Court heard a separate question on whether a particular disputed person was a Waanyi ancestor and whether her descendants should be included in the native title claim group. The Waanyi People have their own rules about membership of the claim group. The Court found that, in this case, such a question was justiciable because of the requirements of the NTA relating to, *inter alia*, claim group membership and the pre-

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<sup>3</sup> *Aplin on behalf of the Waanyi People v Qld* [2010] FCA 625.

sovereignty social existence and continuity of that group is a necessary element in any determination as to the existence of native title<sup>4</sup>.

9. After hearing argument and evidence, the Court found that the disputed ancestor was in fact a Waanyi person. However, as to whether those descendants are part of the claim group, the court made the following comments:<sup>5</sup>

“As a matter of fact I have held that Minnie identified as a Waanyi person (believing that she was descended from at least one Waanyi parent) and was accepted by Waanyi people at Burketown and at Lawn Hill as being Waanyi. However the case really addresses the entitlement of Minnie’s descendants to Waanyi identity. That question depends upon group acceptance of each of them as being of Waanyi descent which question, in turn, depends primarily upon whether the present Waanyi people accept that Minnie was a Waanyi person. As the applicant asserts, the claim group must determine that question. To date they have refused so to recognize her. I cannot make that decision for them. Nor can I find that during her lifetime, the Waanyi people, as a whole, accepted her as being Waanyi. My findings as to such acceptance are limited to the position as it was at Lawn Hill and at Burketown. It is for the claim group to determine whether that is a sufficient basis for accepting that she was a Waanyi woman ... .”

10. The important point to make about this case is that the composition of the claim group is essentially a matter to be determined by its members in accordance with laws and customs.

### *Juru*<sup>6</sup>

11. In this case several Indigenous persons were respondent parties to the Juru claim asserting that they were part of the native title claim group. The NTRB engaged an independent anthropologist to review the initial claim group description findings.<sup>7</sup> The outcome of the independent anthropological findings required the NTRB Lawyer to seek further instructions from the claim group about whether a proposed apical ancestor should be included in the claim group description. The Applicant, with guidance of the

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<sup>4</sup> At [17]-[18].

<sup>5</sup> At [267].

<sup>6</sup> *Smallwood v Queensland* [2014] FCA 331.

<sup>7</sup> In the matter of *Prior v Queensland* [2014] FCA 332 Rares J made orders removing a number of Indigenous parties pursuant to 84(8) NTA.

Elders, instructed the NTRB to hold an authorisation meeting to consider, *inter alia*, whether the proposed ancestor should be included in the claim group description. That meeting authorised, in accordance with a consistently used traditional decision making process<sup>8</sup>, the inclusion of the new ancestor. A consent determination was scheduled for July 2014 and a disgruntled member of the new Applicant who disagreed with the inclusion of the new Apical Ancestor, refused to sign a s.62 affidavit in support of a s.66B application.

12. In the reasons for decision, Rares J noted the following important point:<sup>9</sup>

“... meetings of elders of the Juru people and each of the members of the current and proposed replacement applicants occurred. ... The meetings of elders and members of the current and replacement applicants resolved that the s 66B application should proceed with only the eight nominees who had made s 62 affidavits in its support. The elders resolved that, in the time available to them before the hearing of the application to replace the applicant and the consent determination scheduled for 11 July 2014, it was not possible nor necessary to hold another full authorisation meeting. They resolved that, following consultation with their families and other Juru people, they had authority to decide, as Juru elders, what was best for the Juru people in those circumstances. They instructed their solicitor ... on behalf of the Juru people, to proceed with the application to replace the current applicant with the eight willing nominees”.

13. His Honour also went on to comment on the construction of a particular resolution to authorise the Applicant and stated as follows:<sup>10</sup>

“I am of opinion that the construction of a resolution at a meeting of a claim group must be approached on the same basis as the construction of any other resolution of a body, that is, in the way in which an ordinary, reasonable person who was present at the meeting of the claim group and understood its laws and customs would have understood the words used in the resolution to have been employed”.

14. The important point to note from this case is that the claim group made its decision in accordance with a traditional decision making process. A member of the Applicant

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<sup>8</sup> At [7].

<sup>9</sup> At [19].

<sup>10</sup> At [41]

disagreed with the decision of the claim group however, the authority of the Elders prevailed which was considered and accepted by the Judge.

### **Claim Group Decisions**

15. While traditional laws and customs may be an important part of the decision making process, it is also important for Traditional Owners and PBCs to follow governance and meeting procedures.
16. Decisions of Traditional Owners are made through an Applicant or a PBC. Decision making by Applicants or a PBC is, in part, regulated by the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations)* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)*.

### *Applicant*

17. The NTA requires that a claim group authorise an applicant to bring the claim on behalf of the relevant native title holders. A decision to authorise an applicant must be through a traditional process of decision making<sup>11</sup> or where there is no such process, according to a process agreed to and adopted by the members of the native title claim group.<sup>12</sup>
18. Applicants are authorised to deal with all matters arising under the NTA in relation to a claim. This, of course, does not mean that the Applicant can act in any way they like or act in their own interests. Implied in the authorisation of an Applicant is that they are obliged to act in the best interests of the group.
19. The Applicant has significant authority to deal with all matters arising under the NTA<sup>13</sup> in both processing and signing off on decisions, including being authorised to bind all the members of the native title claim group to Indigenous Land Use Agreements (ILUAs). Members of the claim group can however, apply to the Federal Court to replace Applicants where they have exceeded their authority.<sup>14</sup>

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<sup>11</sup> NTA: Section 251B(a).

<sup>12</sup> NTA: Section 251B(b).

<sup>13</sup> NTA: Section 62A.

<sup>14</sup> NTA: Section 66B(1)(iv).

*Prescribed Body Corporate*

20. PBCs hold native title rights and interests as the trustee or agent for the Traditional Owners<sup>15</sup> and PBCs are required to make decisions at two levels; corporate decisions and native title decisions.
21. PBCs are currently governed by a complex legislative and regulatory framework, which includes a series of functions and powers prescribed by the NTA, PBC Regulations and CATSI Act.
22. The PBC Regulations set out the functions<sup>16</sup> to be carried out by a PBC in managing and holding native title namely:
  - a. To manage the native title rights and interests of the Traditional Owners;
  - b. Hold money;
  - c. To invest money;
  - d. To consult with the Traditional Owners;
  - e. To perform any other function relating to the native title rights and interests as directed by the Traditional Owners.
23. PBCs make many and varied decisions. For example:
  - a. The CATSI Act requires PBCs to have a rule book which sets out how decisions are made on matters such as;
    - how the PBC is set up,
    - powers of the Board of Directors,
    - membership eligibility/requirements,
    - rules for holding meetings and financial administration.
  - b. PBCs also have legal obligations such as;
    - Consultation with and obtaining the consent of the Traditional Owners when making a native title decision;<sup>17</sup>
    - Consultation with and obtaining the consent of the Traditional Owners that relate to decisions about; entering into an ILUA,<sup>18</sup> allowing a non-

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<sup>15</sup> The PBC regulations use the term “common law holders” which is defined in the NTA as; “... the persons ... in the determination as the native title holders: see ss.253 and 56 NTA.

<sup>16</sup> At regulation 6.

<sup>17</sup> The PBC Regulations define a *native title decision* as a decision to;

(a) ... surrender native title rights and interests in relation to land or waters; or

(b) ... do, or agree to, any other act that would affect native title rights or interests of the common law holders.

<sup>18</sup> PBC Regulations: (8)(1)(b).

Traditional Owner to become a member of the PBC<sup>19</sup> and setting out a consultation processes in the constitution of the PBC;<sup>20</sup> and

- Ensuring that the Traditional Owners understand the purpose and nature of a proposed native title decision.<sup>21</sup>

24. PBCs also make decisions about high or major impact activities which prevent the exercise and enjoyment of native title which **must** be made by the Traditional Owners. For example, the negotiation of an ILUA for open cut mining or major infrastructure works on undisturbed land where native title is determined to exist or the subject of a claim, are examples of high impact activities.

### **Tips to Manage Risk in Decision Making**

25. In the native title jurisdiction, situations will inevitably arise where the decision of an Applicant or PBC will be open to challenge. The NTA sets out a prescribed regime for native title claims such as defining the composition of a native title claim group,<sup>22</sup> registration of a native title claim<sup>23</sup> and the determination and registration of PBCs.<sup>24</sup> Not all decisions of a claim group will be justiciable<sup>25</sup>, however, Applicant's and PBCs should manage decision making risks and consider the consequences of incorrect decision making.
26. It is a matter for the Traditional Owners to consider the appropriate decision making processes and to ensure that they work in practice and that it is consistently applied.
27. There has been much judicial interpretation and discussion on the authorisation process<sup>26</sup> and NTRBs have vast experience in arranging and facilitating authorisation meetings and I do not wish to revisit authorisation processes or practices here.
28. With the continued determination of claims and the large number of PBCs being determined and registered, it is an appropriate time to discuss PBC decision making.

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<sup>19</sup> PBC Regulations: (8)(1)(c).

<sup>20</sup> PBC Regulations: (8)(1)(d).

<sup>21</sup> The PBC Regulations require PBCs to consult and consider the views of an NTRB for the area and, if appropriate, give notice of NTRB views (if any) to the common law holders: PBC Regulations (8)(2)(a)-(b).

<sup>22</sup> See NTA section 61(1).

<sup>23</sup> See NTA sections 190B and 190C.

<sup>24</sup> See NTA sections 55-60AA.

<sup>25</sup> See comments of Dowsett J in *Aplin v Queensland* [2010] FCA 625 at [9]-[12].

<sup>26</sup> See for example PowerPoint presentation of Tim Wishart and Jackie Cole at the June 2013 and June 2014 National Native Title Conference: <http://www.aiatsis.gov.au>

## PBC Regulations

29. The PBC Regulations require PBCs, in certain circumstances, to undertake the following tasks:
- a. consult with the Traditional Owners about surrendering or doing acts that will affect their native title;<sup>27</sup>
  - b. make sure the Traditional Owners understand the purpose and nature of the proposed decision;<sup>28</sup> and
  - c. Provide evidence of consultation and consent.<sup>29</sup>
30. PBCs can develop and include alternative consultation processes in the rule book and that process must be followed to obtain the consent of the Traditional Owners.<sup>30</sup> However, the alternative consultation process cannot be used when making decisions about; entering into ILUAs, whether a non-Traditional Owner should be a member of the PBC and a decision to make consultation processes.<sup>31</sup>
31. The PBC Regulations also sets out the requirements for evidence of consultation and consent<sup>32</sup> and PBCs may wish to consider a checklist of steps to follow before making a native title decision or a decision which will affect the continued exercise and enjoyment of native title rights and interests.
- a. *Determine the type of activity that requires a decision* – Decisions about major impact activities which prevent the exercise and enjoyment of native title **must** be made by the Traditional Owners. Low impact activities such as maintaining and making safe existing infrastructure is most likely an activity that will not affect the continued enjoyment and exercise of native title rights and interests.
  - b. *Major high impact activities and native title decisions* – For high impact activities and native title decisions the PBC is required to consult with and obtain the consent of the Traditional Owners. PBC Regulations are silent on how PBCs should consult with the Traditional Owners and it is a matter for the PBC to determine its consultation process. The items discussed below may be used a consultation guide.

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<sup>27</sup> Regulation 4A.

<sup>28</sup> Regulation 8(2).

<sup>29</sup> Regulation 8(1)(a).

<sup>30</sup> Regulation 8A.

<sup>31</sup> Regulation 8(1).

<sup>32</sup> Regulation 9.



- c. *Details of the activity* – Ensure sufficient information has been provided to the PBC such as maps, the location of the activity, the length of time to complete the activity and precise details of work that will be undertaken.
- d. *Identify the Traditional Owners* – The PBC will know who the members of the group are. Consultation and consent is required from Traditional Owners and not just the members of the PBC. If a PBC is unsure of the makeup of the native title group and their contact details, they should seek assistance from the NTRB who may have a record of those persons.
- e. *Set up a database of contact details* - Set up and maintain a database of the names, addresses and contact details of the Traditional Owners.
- f. *Notices* – notices should be sent to as many Traditional Owners as possible. When preparing a meeting notice keep in mind the comments made by Rares J namely,<sup>33</sup>

“the notice must be sufficient to enable the persons to whom it is addressed, namely members or potential members of the native title claim group, to judge for themselves whether to attend the meeting and vote for or against a proposal or whether to leave the matter to be determined by the majority who do attend and vote at the meeting”.

- The notice must give fair notice of the particular business to be discussed at the meeting.
- The notice must be clearly, simply and directly expressed so the Traditional Owners may judge for themselves whether to attend the meeting and vote.
- Notices can be sent by; mail, email, facebook, local/community radio/TV, newspaper advertisement, telephone calls, word of mouth.
- Keep copies of all notices and keep a record of how they were sent or how they were publically notified (ie person advised by phone on a particular date, advertisement on TV/radio etc). Keep these records in a safe and secure place as they may have to be produced as evidence in support of providing reasonable notice of the meeting.
- Consider the timing of the notices ie two/three weeks before the meeting is held. Follow up after the notices are sent, advertised etc by making

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<sup>33</sup> *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 225 at [40].

phone calls and keep a record of people who register to attend the meeting.

- g. *Agenda* – Where possible the agenda should be sent to the Traditional Owners before the meeting. Include an agenda item, “purpose of the meeting”.
- h. *Planning* - Have several meetings to discuss things such as the agenda and order of business, update on confirmation of attendance and venue (make sure the venue is comfortable and has facilities for Elders etc).
- i. *Attendance List* – keeps a record of who people who attended the meeting and ask participants to update their contact details.
- j. *Conduct of the Meeting* – Have an appropriate person officially open the meeting (ie Elder or PBC Chair). Discuss the agenda items and the purpose of the meeting. Consider if the Traditional Owners present are sufficiently representative of the group to make decisions. Set a rule of standards to be followed during the meeting ie no swearing, each person having the right to speak and be heard, respect for each other etc.
- k. *Keep a record of the meeting*<sup>34</sup> - Keep a detailed record of the meeting. The minutes should be checked and signed by the relevant persons (ie PBC Chairman) and filed in the Minute Book.
- l. *Prepare motions/draft resolutions* – Prepare motions/draft resolutions relevant to the topics to be discussed and decisions to be made. Follow a formal procedure such as:
  - motions/draft resolutions moved;
  - seconded;
  - Mover has first right to speak in favour;
  - Chair allows a Traditional Owner who does not support the motion to speak against it;
  - Allow debate between for and against speakers;
  - Decision passed according to decision making process ie law and custom, voting method etc.

When preparing motions/draft resolutions consider the following:

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<sup>34</sup> See also ORAC website at <http://www.orac.gov.au/run-corporation/corporation-meetings>

- They should be expressed in a positive/affirmative form. For example, a motion expressed in the negative which results in a “yes” decision may create confusion.
- Be complete and use plain English. If a motion is long winded break it up into several motions or express it in parts.
- Wording should be clear and precise so as to identify the intention of the motion. Avoid uncertain wording.
- Express motions in a way so that it can be decided for or against.
- Motions which are passed (resolutions) which have an important legal consequence (eg a resolution to enter into ILUA) should be run past or done in conjunction with legal advisors prior to or at the meeting. Such motions should also be included in the notice of the meeting.

### **Conclusion**

32. I would strongly urge PBCs and Applicants to discuss with Traditional Owners and to plan in some detail the consultation process and the appropriate decision making process. This may require some assistance from legal and anthropological advisors. It is also important for a native title group to fully understand a decision-making process and checklists and diagrams detailing the consultation and decision making steps can be a useful aid to understanding the processes. It is also important for PBCs to workshop and gain a clear understanding of its vision statement, goals, governance processes and meeting procedures.
33. Finally, while this paper provides suggestions for PBCs in making decisions, the challenge ahead is the capacity of PBCs to prepare and implement consultation and decision making processes.

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7 August 2014