



Native Title Authorisation Meetings

National Native Title Conference
Coffs Harbour – June 2014

Who are we?

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Disclaimer

The matters discussed during the course of this paper do not comprise legal advice and no liability is accepted for any reliance placed on, or actions taken by any person, body or group as a consequence of, matters discussed.

Another disclaimer / warning

What works for one group, or in one region, may not work for, or within, another.

Always:

- KNOW YOUR MOB
- KNOW WHAT YOU'RE TRYING TO ACHIEVE
- PREDICT WHAT LINES OF ATTACK RESPONDENTS (or maybe the Court) MIGHT ADOPT (if any?)

and plan, prepare and design your meeting processes accordingly

KLC experience

Roe v State of Western Australia (No 2) [2011] FCA 102

Since having our authorisation processes so carefully and thoroughly scrutinised by the Court, we have gone on to successfully hold many authorisation meetings, including:

- Discontinuance authorisations
- Claim boundary amendments
- Claim group description amendments
- Consent Determination / ILUA authorisations
- Commencement of new native title claims

Most of these have required interlocutory applications to be made to the Court to give affect to the decisions made at the meetings and our authorisation processes are never questioned.

Recommended reading

- Between *Roe* and the judgment of Collier J in the matter of *Anderson on behalf of the Wullli Wullli People v State of Queensland* [2011] FCA 1158 (which contains a really useful summary of past cases which specifically discuss the matter of authorisation within the Native Title context), you should get a good handle on what's involved and what's required to allow the Court to infer that:
"the decisions made at the meeting were the legitimate binding expression of the view of the ... claim group as a whole." (per Siopis J in *Coyne v Western Australia* [2009] FCA 533 at [51])

Why authorisation meetings?

s61 Native Title Act

Who may make a native title or compensation application?

“A person or persons **authorised** by all the persons (the native title [or compensation] claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title [or compensation] claimed...”

Why the need for authorisation by right people?

Need for the claim to be authorised by the people who properly form that native title claim group – see:

- *Western Australia v Ward* [2000] FCA 191 per Beaumont and von Doussa JJ at [181]
- Cited with approval by O’Loughlin J in *Risk v NNTT* [2000] FCA 1589 at [29] and [30]

The meeting should pass a resolution to confirm membership of the NTCG

What does it mean to be “authorised”?

s251B *Native Title Act*

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) Traditional decision-making process...
- (b) No traditional decision-making process...

Note s251A re authorising the making of ILUAs...

ALRC queries...

The ALRC is seeking views on whether the authorisation provisions in the NTA are effective in ensuring that claims are made by applicants who have the approval of the claim group.

Are the current provisions creating barriers to access to justice for claimants, potential claimants and respondents?

The ALRC is also seeking views on whether claim groups should be able to adopt decision-making processes of their choice.

Why is proper authorisation important?

s62A Native Title Act

“... the Applicant may deal with ***all matters*** arising under this Act in relation to the application.”

Note: s61(2): “... The person [authorised to make the application] is the applicant, and ***none of the other members of the ... claim group is the applicant.***” (my emphasis)

Hence, authorisation meetings really do matter!

Justice French (as he then was) described authorisation as “*a matter of considerable importance and fundamental to the legitimacy of native title determination applications.*”

Strickland v Native Title Registrar (1999) 168 ALR 242, [57]

Once authorised, what power do you have?

- See:

Ankamuthi People v State of Queensland [2002] FCA 897 per Drummond J

Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 at [33] per Rares J

It also includes future acts and section 31 agreements but excludes ILUAs see *Dimer/Askins/WA* [2006] NNTTA 70 (8 June 2006); *Moore/Mungeranie/SA* [2005] NNTTA 53 (28 July 2005)

ALRC query

The ALRC has identified many of the questions that have been identified by (but not necessarily satisfactorily answered by) the common law. Eg:

- Can a claim group authorise an applicant to make decisions by majority?
- Can the applicant act by majority when, for example, one member of the applicant doesn't come to meetings? Is the only option: s66B? Costly, delay, inconvenience...
- Can a claim group authorise an applicant to act subject to restrictions or conditions?

ALRC is asking:

Should the Native Title Act be amended to clarify whether:

(a) the claim group can define the scope of the authority of the applicant?

(b) the applicant can act by majority?

P, P, P, P, P

- Plan
- Predict
- Prepare
- Prepare
- Prepare

And when it's all over...

- Make sure you've recorded all of the outcomes – keep safe!
- Act on the outcomes promptly
- Prepare all of the required evidence effectively and efficiently (delay is risky)
- Act in accordance with the instructions you have received from the Applicant.

Back to the first P... Planning

Identify what it is you're trying to achieve

- Is it the authorisation of a new claim?
- Is it an amendment to a claim group description or a claim boundary?
- s66B – replacing the applicant?
- Maybe you're authorising the terms of a Consent Determination?? 😊

Planning... (cont)

No matter what you're trying to achieve, the starting point is always the same:

Who do you need at an authorisation meeting?

IDENTIFY YOUR CLAIM GROUP

Identifying your claim group

Before a claim can be authorised, the claim group must be identified.

This in itself can be difficult, as it is often inconsistent with the interrelated nature of some Aboriginal and Torres Strait Islander societies and also fails to consider the impact of colonisation (forcible exclusion from land, confinement on reserves, discouragement of language and culture, etc).

ALRC query

The ALRC's Issues Paper recognises the difficulties in having to have the claim group identified before a claim is filed, especially in circumstances where a claim is being filed in response to future act pressure.

There is recognition that getting the claim group wrong at the start is likely to result in litigation and disputes later.

ALRC queries: What, if any, changes could be made to assist Aboriginal and Torres Strait Islander groups as they identify their claim group membership and the boundaries of the land claimed?

Claim Group List

- Identifying your claim group is ordinarily the task of the anthropology unit. This is done through historical and current information held by your organisation, as well as confirming and consulting with the TOs on the ground.
- Genealogies are then prepared showing how the current claimant group is linked to apical ancestors of a claim area.
- These materials will form the foundation of your **claim group list** (“**Contact List**”) – which is most likely to be an ever-evolving document and is a **key document** in any native title matter.

DO IT RIGHT AND KEEP THE LIST ALIVE!

Planning... (cont)

Once you know what you're trying to achieve, and you know who your target audience is, start having internal planning meetings to:

- Discuss and confirm logistics (where, when, for how long, how will everyone get there, what accommodation needs to be provided, meals, portaloos!!!!)
- Allocate tasks to different members of the team (drafting meeting notice, placing ads in papers and around town(s), identifying how many field staff will be needed and allocate tasks accordingly, etc etc)

Planning... (cont)

If there is an existing claim, and therefore an Applicant already exists, get them involved in the process!

(Perhaps especially true if they're facing a s66B... You want them at the meeting, if at all possible!)

Planning... Consider the costs of the process

Be aware of the cost of convening an authorisation meeting.

Costs must be factored into your planning.

For NTRB/NTSPs, costs of authorisation processes may prohibit the progress of claims from one year to the next. The Court and Respondents don't "get" this... (But it's the world we live in!)

ALRC is considering the costs of the process

ALRC is asking:

“Compliance with the authorisation provisions of the NTA requires considerable resources to be invested in claim group meetings. Are these costs proportionate to the aim of ensuring the effective participation of native title claimants in the decisions that affect them?”

Notification of the meeting

Err on the side of caution

INVITE EVERYONE!

Let the mob decide who should or shouldn't be in the meeting. Better to over-invite than under-invite...

Notification of the meeting

Your Contact List is your starting point for notification of the meeting.

How to notify?

Letters or mail outs	Hand delivery to homes/workplaces
Emails	Faxes
Public noticeboards (identify the best places to put notices up)	Public notices in local (other?) newspapers
Announcements on local radio	Telephone calls to key people
Bush telegraph	Any other way that works!

Notification of the meeting

What's most important?

C.Y.B

Keep a record of who you've notified, when, and how.

Timing of Notification

At least 4 weeks before the meeting

Again, 2 weeks out

And again, 1 week out

You can't over-do this!

And, again, keep a record!

What needs to be on the meeting notice?

*If known

- Name of the claim group*
- Federal Court id. number (“WAD...”) *
- Venue, date and time of the meeting
- Who is invited (list the Apical Ancestors* in bold)
- The **purpose** of the meeting
- Contact details for contact person at your organisation

Make the print big, bold and easy to read

What needs to be on the meeting notice?

Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 per Rares J:

- 1) notices of meetings under s 251B of Native Title Act 1993 must give fair notice of the particular business to be considered at the meeting;*
- (2) notice must be clearly, simply and directly expressed so native title group member may judge for themselves whether to attend meeting and vote – notice of first meeting invalid and that invalidated both other meetings;*

The Purpose of the meeting

It is extremely important that the purpose of the meeting is well advertised prior to the meeting.

Eg of Notice of Meeting

An example:

KIMBERLEY LAND COUNCIL



NOTICE OF MEETING

A claimant meeting for the members of the native title claim group for the <Group name> Peoples' native title claim WAD..... in the Federal Court of Australia will be held as follows:

WHERE: [location]
WHEN: [day] [date]
START: 8:30am for registration

All members of the native title claim group being those persons who are the descendants of the following named apical ancestors: **<name the apical ancestors of the claim group>**.

The meeting is being called to consider:

(a) The replacement of the current Applicant on the <Group name> Peoples' native title claim WAD.... in the Federal Court of Australia ("<group name> native title claim").

(b) If the meeting resolves to replace the current Applicant:

(i) The authorisation of any member(s) of the native title claim group to deal with matters arising in relation to the <Group name> native title claim.

(ii) The bringing of a motion under section 66B of the *Native Title Act 1993* (Cth) by the member(s) of the native title claim group newly authorised to deal with matters arising in relation to the <group name> native title claim to replace the current Applicant.

Example Meeting Notice cont

An example cont.:

- (c) The future conduct of the <group name> native title claim, which may include consideration of the following options:
 - (i) To progress the <group name> native title claim as it is currently constituted.
 - (ii) To amend the <group name> native title claim including, but not limited to, the amendment of the description of the native title claim group of the <group name> native title claim so as to include all the descendants of known and agreed <group name> ancestors.
 - (iii) To discontinue the <group name> native title claim in favour of separate native title claims by the <group name> People (which has already been commenced) and, if requested the <group name> People, in respect of those land and waters that they claim to hold native title rights and interests in relation to.
- (d) If the meeting resolves to progress the <group name> native title claim in some form then the legal representation of the Applicant on the <group name> native title claim and the future conduct of that claim.

At the request of claim group members the Kimberley Land Council has agreed to provide assistance for this meeting. For fuel, transport and any other queries please call <NTSU Office> at the Broome KLC Office on 08 9191 8006.

Agenda

Prepare the agenda and circulate it to all invitees before the meeting.

Perhaps include the Agenda items on the Meeting Notice.

Attendance List

- An Attendance List should always be taken at all meetings and especially at authorisation meetings. The list should be updated throughout the day as claimants come and go.
- An Attendance List is also an opportunity for claimants to confirm change of contact details.
- If possible, ask claimants to sign against their name so that there are no disputes about their attendance at the authorisation meeting.
- Any apologies should be stated on the attendance list.

'All' of the people?

See:

- *Lawson on behalf of the 'Pooncan' Barkandji (Paakantyi) People v Minister for Land & Water Conservation for the State of New South Wales* [2002] FCA 1517 at [25]
- *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 at [1265], Lindgren J
- *Fesl v Native Title Registrar* [2008] FCA 1469 at [71], Logan J

Conduct at Authorisation Meeting

- It is important that claimants at authorisation meetings understand the purpose of the authorisation meeting and are given ample time to digest and discuss before decisions are made. It is also important that claimants have as much information available to them to make informed decisions.

Conduct at Authorisation Meeting

- Topics that should be presented to an authorisation meeting include:
 - Code of Conduct
 - Purpose of the Meeting
 - Instructions to Act
 - Purpose of Applicant
 - Representation of the Claim Group
 - Claim Area/Boundary
 - Decision-making process
 - Authority to commence the claim
 - Election of Applicant
 - Completion of Form 1
- It is advisable that affidavits and other relevant documents such as Instructions to act be signed by the Applicant before the meeting ends.

Minutes

It is essential that clear and legible meeting minutes are taken

Minutes should include the following information:

- Name of the Claim Group
- Venue and place of the authorisation meeting
- Date of authorisation meeting
- Time of authorisation meeting
- State it is "Minutes of the Authorisation Meeting"
- Start and Finish times
- Attendance List – Claimants, observers as well as Rep Body Staff (state position of Rep Body Staff)
- Apologies
- Topics for discussion
- Record the discussion
- Resolutions passed

Conclusion
