Authorisation Cases

Please note that these authorisation cases have been summarised with the aim of detailing the major facts of each case and where relevant, the major points of law that have been developed. The cases appear here according to date.

Strickland v Native Title Registrar [1999] FCA 1530

In *Strickland* the Full Court held that the power given by s 190A to the registrar by the NTA to make decisions in respect of the registration of an application made to the court is the exercise of an administrative power: [63]. The legislation does not specify the nature or the extent of the court's review under s 190D(3) or impose any limitation upon the material that may be taken into account. Jurisdiction is conferred by s 190D(2) and (3) in the broadest of terms: [64]. A review under s 190D is not restricted to considerations and determination of a question of law and extends to determinations of issues of fact. This is based on the view that determinations of fact in the relevant controversy have been settled by the Registrar's administrative decision and that the only matter restricted to a determination of the court is any controversy on questions of law. In reaching his decision, Justice French noted that authorisation:

> is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications: [57].

Moran v Minister for Land and Water Conservation (NSW) [1999] FCA 1637

This case involved the question of whether proceedings were properly authorised focusing on the specific question of whether two particular people were entitled to represent the claimant group. The two people are Kim Edna Eileen Moran, the person who originated the proceedings, and her second cousin, William Allen, also known as Wilay Bijarr. Section 62(1)(a)(iv) of the NTA requires a claimant application to be accompanied by an affidavit that states 'that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it'. Justice Wilcox found that Ms Moran did not fulfil any of the elements of s. 251. Ms Moran made reference to a meeting of Elders from which she had received the authorisation of the claim group. However, Wilcox J could not accept that at any point, the attendees of the meeting had purported to act as a decision making body nor had the Council of Elders exercised traditional law or custom in order to bind the claimant group as a whole. Justice Wilcox noted that O 20 of the Federal Court rules provides a number of circumstances in which the proceedings may be stayed or dismissed, but emphasised that these rules should be approached with caution. Justice Wilcox concluded that the cases of both applicants were so faulty as to fall within this definition and invoked O 20 of the Rules. Justice Wilcox noted that did authorisation did not require every member of the claim group to authorise the named applicants, but that they employ a decision making exercised within traditional laws and customs. His Honour believed this was not an unreasonable threshold for meritorious cases, which would need to establish the existence of such systems as a part of the claim process.

Western Australia v Strickland [2000] FCA 652

In *Western Australia v Strickland* the Full Court held that the power given by s. 190A to the Registrar by the NTA to make decisions in respect of the registration of an

application made to the Court is the exercise of an administrative power. The legislation does not specify the nature or the extent of the Court's review under s 190D(3) or impose any limitation upon the material that may be taken into account. Jurisdiction is conferred by s. 190D(2) and (3) in the broadest of terms. A review under s. 190D is not restricted to considerations and determination of a question of law. Section 190D(4) makes it plain that the review extends to determinations of issues of fact. The Court also affirmed *Strickland v Native Title Registrar* (1999) 168 ALR 242 at 259-260 and noted that the requirement for authorisation acknowledges 'the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications':[52].

Johnson, in the matter of Lawson and Lawson [2001] FCA 894

The process for removing an applicant should be substantially the same as the process adopted to confer authorisation in the first instance (as per s. 61(1)). In *Martin v Native Title Registrar* [2001] FCA 16 registration of the application had not been accepted as the registrar was not satisfied about a number of the conditions specified in ss. 190B and 190C. This an application to review that decision. Two conditions arose from s. 190C(2) concerning the affidavit required by s 62(1)(a)(iv) to accompany the application, and by s. 62(1)(a)(v) that the affidavit state the basis for the authorisation. The registrar had simply addressed the content of the affidavit to determine if those conditions were satisfied. As to s. 62(1)(a)(v), Justice French said (at [12]):

> the other element of the delegate's reasoning was directed to the claimed source of authorisation, descendants of the native title claim group, rather than members of the group themselves. In my opinion, this was more than just a slip of the pen. It indicates the deponent failed to direct her mind to the matter she must establish,

namely the basis of authorisation.

In reaching his decision, French J found that the requirements of s.190C(2) do not suggest that the registrar must consider whether as a fact, the applicant in that case was properly authorised by all the relevant members of the native title claim group.

Duren v Kiama Council [2001] FCA 1363

By notice of motion filed on 5 October 2001, Gwendoline Laura Brown asked the court for an order under s. 66B of the NTA to remove the current applicant, Ernest William Duren, and replace him herself as the person authorised by the Elouera Aboriginal People to make the application. The court granted leave for a number of Mrs Brown's affidavits, which were outside the time for doing so, to be considered in the matter. The court made reference to the matter of authorisation as it is characterised in s 251B of the NTA. The court held that it was clear that the affidavits in question did not satisfactorily address the questions posed by s 251 B, that is they do not establish who the members of the native title claim group are and therefore it is not possible to know whether any particular individual is or is not within that group. Further, the affidavits did not address the question whether there is, or is not, a decision-making process under the traditional laws and customs of the Elouera Aboriginal People. For these reasons it the motion was dismissed.

Daniel and Others v Western Australia and Others [2002] FCA 1147

The case involved the removal of an applicant who refused to execute an agreement which would hand over native title rights and interests to the State government in the Burrup Peninsula and the Maitland Estates. The applicant, David Walker, had refused to sign the agreement saying that he wanted to obtain separate advice over the agreement. The other applicants claimed that he was not present at previous negotiations. Justice French discussed the law surrounding ss. 251 and 66B(1). He

noted that cessation of authority under s. 66B(1) is dependant on 'decision making on the part of the native title claimant group unless it can be said that the authority originally conferred was limited in such a way that it ceased upon the happening of some event without any separate decision being required': [15]. Justice French also noted that the criterion of excess of authority under s. 66B was less onerous than the criterion of cessation of authority. However he said that the claimant group was still bound by the provisions of s. 66B which require:

- there be a claimant application; and
- that each applicant for an order under s 66B is a member of the native title group; and
- the person to be replaced is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it; or
- alternatively, the person to be replaced has exceeded the authority given to him or her by the claim group and the persons making the application under s 66B are authorised by the claim group to make the application and to deal with matters arising under it: [17].

There was an issue as to whether the resolution to remove David Walker, who was from the Yindjibarndi group, was validly made, considering that there were predominantly Ngarluma people at the meetings. There was anthropological evidence presented of the membership of the group based on descent, and that decisions were made with both groups present at meetings. Justice French criticised the process for removing the applicant after considering the circumstances of the meeting (especially the number and composition of the attendees). However he considered the totality of the circumstance especially the time period in which the claimants had been involved in native title and concluded that David Walker was no longer authorised by the claim group.

Holborow v State of Western Australia [2002] FCA 1428

Holborow involved an application under s. 66B of the NTA for the removal of one of the named claimants. The applicant had refused to sign a proposed agreement on

behalf of the group with the Western Australian Government in relation to proposed Future Acts in the Pilbara region. It concerned what Justice French at [50] called a 'hybrid group claim' in respect of which there was no process of decision making that, under the traditional laws and customs of the persons in the native title claim groups, must be complied with. His Honour said at [5]:

> This, however, is a native title determination application which covers both groups. That is not an uncommon phenomenon. It is not surprising in such cases that there would not be traditional decision-making processes embracing all elements of the hybrid claim group.

Ward v Northern Territory of Australia [2002] FCA 1477

This decision related to a similar application which was dismissed by Justice O'Loughlin on the basis that it did not establish that the applicant was properly authorised by the native title claim group. In that case the applicants had argued that the Northern Land Council (NLC) was not the proper representative of the application group. Another application was sought by the NLC on 27 May 2002 to replace 17 named applicants with 15 people. It was supported by affidavits from anthropologist, Kim Barber who was present at the meeting. In reaching his decision, Mansfield Jnoted that s 251B also applies to the revocation of authority: [10]. The s 66B application was opposed by counsel representing 12 applicants who claimed that the affidavits of Mr Barber were wrong in 'fact and in traditional law'. In reaching his decision, Justice Mansfield referred to the decision of *Alderson v Northern Land Council* (1983) 67 FLR 353 at [8] where it was stated that 'it is a delicate and complex area as is the task of finally determining who are traditional Aboriginal owners'. It may be a long process especially in the face of competing claims or conflicting anthropological advice, but it is a task the law vests in the land council, being…an Aboriginal body with access to expert advice and recognized by the Act as the only determinative body'. His Honour followed the principles set down in *Daniel v State of Western Australia* [2002] FCA 1147 and was satisfied that the affidavits provided by Mr Barber were accurate. Justice Mansfield noted that 'the native title claim group

is organised on the basis that responsibility for and control of the land the subject of native title determination application is exercised by various estate groups or clans...Such responsibilities also include secular matters such as authorisation of persons to make and maintain the native title determination application and to make decisions concerning it including instructing solicitors to conduct it': [31]. His Honour was satisfied that the meeting held on 9 May 2002 was attended by representatives of the relevant Dawawang or traditional owners of the claim group or the Dawawang whose country was within the claim area and that it was decided that the current applicants be replaced by the proposed applicants and that the NLC represent the applicants.

Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517

This case involved a challenge to a decision making process which was used to remove two applicants. The two applicants had been prevoiusly authorised under traditional laws and customs of the claim group involving elders who were the heads of individual extended families. However, the two applicants were later removed by an alternative decision making process which they now contend is contrary to s 251B. Section 251B only allows for an alternative decision making process where a traditional one does not exist. In reaching his decision, Justice Stone confirmed the decision of Justice Mansfield in *Ward v Northern Territory of Australia* [2002] FCA 1477, [10] where he noted that the revocation of authority under s. 66B follows the same decision making process under s. 251B for authorisation: [14]. However Stone J found that 'it is that the traditional decision making process has broken down and it unable to cope with the decisions required in respect of a native title application...experience since the claimant application was first made shows that the traditional decision making process has been ‘unable to sustain’ the Claim Group which therefore has had resort to the more direct approach of having the members of

the Claim group directly vote on the issues relevant to this application': [20]. Justice Stone concluded that given the history of the case and the failed mediation attempts to resolve issues within the claim group, he was 'satisfied that there is no relevant traditional decision making process capable of dealing with the decisions that need to be made to progress this claim and resolve the problem of how is to represent the claim group':[21]-[22]. In reaching his conclusion, Stone J discussed what a non traditional decision making process involves in order to constitute a valid decision. He found that the NTA does not require decisions of native title claim groups to be scrutinised in an 'overly technical or pedantic way. Unless a practical approach is adopted to such questions, the ability of indigenous groups to pursue their entitlements under the Act will be severely compromised': [28]. According to Stone J, it is 'sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process':[25].

Anderson v State of Western Australia [2002] FCA 1558

This case involved an attempt by the South West Aboriginal Land and Sea Council to alter the named applicants under s 64, to combine all of the applications into one application covering the bulk of the South West area. They raise, in each case, questions about whether the proposed changes have been authorised by the native title claim group defined in the application. In reaching its decision the Court noted that 64 specifically authorises the amendment of applications to reduce the area of land or waters covered by them. Such amendments, however, must not result in the inclusion of any area of land or waters not covered by the original application (s. 64(1)). This is subject to s. 64(2) which permits combination applications to provide for the inclusion in one application of an area of land or waters covered by another. Justice French noted at [45] that ‘for each of the applications there is a defined native title claim group which is set out earlier in these reasons. The connection between those who attended the various meetings referred to and the respective native title claim groups was not established either in respect of notification nor, more importantly, in respect

of attendance. The native title claim groups are defined in each case by reference to apical ancestors and biological descendants of those persons and persons adopted by them. The advertisements and notices did not refer to the relevant native title claim groups except by use of the generic title of the applications in question. The membership of the native title claim group by those who attended each meeting was not demonstrated. Rather it was reported as an asserted self-identification.'

Kulkalgal People (Aureed Island) v State of Queensland [2003] FCA 163

This case involved an application by a member of the Kulkalgal people, who was not a named applicant, to become a separate party to the matter under s. 84(5) because she was dissatisfied with the direction of negotiations by the named applicants in the claims process. Justice Drummond noted that there are facilities under the NTA for removing named applicants who are thought to no longer enjoy the authority of the claim group, or have exceeded their authority under s. 61, subject to satisfying the s. 66B conditions. His Honour also said that the NTA was clear and was not intended to allow an application of this kind to proceed under s. 84. The application was dismissed, as the applicant had not demonstrated that the named applicants had lost authorisation under s. 61 and s. 84 was not designed to support an application of this kind. See *Bidjara Peoples 2 v State of Queensland* [2003] FCA 324.

Landers v State of South Australia [2003] FCA 264

This case involved an application for a dismissal of an application on the basis that the claim does not comply with s. 61 of the NTA and that the application has not been authorised in accordance with s. 251B of the NTA. The authorisation under s .251B of the NTA relied upon by the Edward Landers group is said to have occurred at Broken Hill on 26-28 March 1999. It is also the meeting at which the agreement to separate the two native title claim groups, and to change the boundaries of the Edward

Landers' application so as to avoid any overlap with the claim of the Yandruwandha People, was made. However the authorisation of the Landers group was contested by the Dieri People. They indicated that, under the process available under the traditional laws and customs of the Dieri People, many of the persons who participated in the Broken Hill meeting and decision were not entitled to have participated; that some persons within the Dieri People who should have been involved in the decision did not participate; and in some instances those persons who should have been involved did not have the opportunity to do so. They further contended that a number of persons in the Edward Landers' group did not have the native title rights and interests which they claimed, that the group had not consulted with important tribal Dieri persons; and that it did not include sites significant to the Dieri People. Justice Mansfield accepted this submission and found that the Landers group is required either to name the persons making up the native title claim group or to describe them sufficiently clearly so that it can be ascertained whether any particular person is one of those persons. It was found that the Edward Landers group adopted a non traditional decision making process but did not do so in a way which properly complies with s. 61(4). It only describes a smaller group of people namely the Dieri People. The Edward Landers group acknowledged that they, or most of them, are part of the Dieri People. However, the smaller group is not the group of people who should exclusively enjoy the communal native title if it is granted. Justice Mansfield found that at [33] that s. 61(4) requires the application to be on behalf of the people who have authorised it – 'it does not permit the making of a claim by a native title determination application by a subgroup of the native title claim group, or the grant of native title to a subgroup of the real native title claim group': see *Ward v State of Western Australia* (1998) 159 ALR 483, [541]; *Risk v National Native Title Tribunal* [2000] FCA 1589, [60]; *Tilmouth v Northern Territory of Australia* (2001) 109 FCR 240.

Bidjara People 2 v State of Queensland [2003] FCA 324

In this case the court was asked to exercise its power under s. 84(5), which provides that the Federal Court may join a party to proceedings where it believes that party may be affected by a native title determination. Although this provision is often used to join a respondent or non-claimant to proceedings, here the court was required to consider whether an additional claimant party should be added. As there was already a claimant group, known as the Bidjara claim which had filed an affidavit demonstrating their authorisation under s. 61B, the court needed to establish whether the named applicants continued to enjoy authorisation under s. 62A.The applicant, Ms Jo-Ann Fraser adduced evidence that she is a direct descendent of the same peoples as the named applicants but claimed that the named applicants did not have the authority to bring and conduct proceedings on her behalf. His Honour held there is no facility under the NTA, namely s. 62, for proceedings to be constituted by applicants acting in different interests or claiming different authorisation to bring the proceedings (s. 61B). Justice Ryan referred to Drummond J's decision in *Kulkalgal People (Aureed Island) v State of Queensland* (2003) FCA 163, [5]-[8] and noted the procedure under s. 66B for replacement of authorisation where it was thought to be undermined or exceeded by authorised applicants. His Honour ordered that whilst this application was not an indication that the authorisation was unable to support a claim, he also held that the applicants should *represent* the whole of the claim group. His Honour found that the NTA does not intend for an authorised claimant to represent or act in the interest of a particular factor within a claim. Despite Drummond J's dismissal of a similar application, Ryan J held that in the interests of justice, however, Ms Fraser was made a separate party to the proceedings as her interests may well be affected by the claim under the meaning of s. 84(5) of the Act.

Booth (Bunthamurra People #2) v State of Queensland [2003] FCA 418

In this case, Justice Tamberlin said that, where authorisation was purportedly given by majority vote there is a challenge to that authority, evidence should be provided as to

who and how many people were entitled to vote and ‘precisely what is meant by the expression ‘majority vote’’: [11].

Wharton on behalf of the Kooma People v State of Queensland [2003] FCA 790

This case involved a challenge to whether authorisation had been given in accordance with a process of decision making agreed to and adopted by the persons in the native title claim group. In reaching his decision, His Honour noted that s. 251B(b) does not require that all members of a relevant claim group must be involved in the decision: [34], referring to *Lawson v Minister for Land and Water Conservation NSW* [2002] FCA 1517, [25]. The original application was made as a result of resolutions passed by the Kooma Corporation, which was set up after a meeting of 34 people in 1994. There was evidence of a further meeting of the Kooma Corporation in 1999, attended by 40 people, where a resolution was passed that Mr Wharton was 'authorised by all people in attendance at the Kooma Native Title Meeting to deal with the Native Title Claim of Kooma and matters arising in relation to it'. There was also a resolution passed at that meeting stating that 'all Kooma people' agreed to use a consensus decision making process. Notice of the meeting was sent to 180 members of the Kooma Corporation and the meeting was advertised on both local and national indigenous radio stations: [19]-[29]. His Honour found that even though an inference could be drawn that those present at the meeting in 1994 were members of the native title claim group there was nothing in the minutes indicating that those present were agreeing to, and adopting, the procedures of the proposed Kooma Corporation as a means of decision-making on behalf of the native title claim group. There was also evidence that 40 people present at the meeting did not constitute the claim group.

Bodney v State of Western Australia [2003] FCA 890

The case involved a strike out application in relation to the Bodney application which overlapped with 'the Combined Metro Applications'. It was submitted that the Bodney applications failed to comply with s. 61 of the NTA. Some of the Bodney applications were filed before 30 September 1998 and two of them have been amended since that date making it necessary for Justice Wilcox to consider the position of the applicants both prior to and after the 1998 amendments. The 'new Act' applications were made on behalf of the biological descendants of Mr Bodney's parents, a subgroup of a larger group. Justice Wilcox considered the view taken by O'Loughlin J in *Tilomouth v Northern Territory* [2001] FCA 820 and Mansfield J in *Landers v South Australia* [2003] FCA 264 where it was found that a claim can not be made by a subgroup of the broader native title claim group. However he found that based on this view:

- It would be extremely difficult for a native title claim to succeed where the claim group is limited to the descendants of a couple who are removed only a generation or two from the present;
- That it gives a veto right to any significant body of members of the group that allegedly holds the relevant native title rights and interests and does not wish to support the claim of a particular putative applicant; and
- That it was not possible to reconcile this view with s 233 of the NTA to 'individual native title rights and interests'; [39]-[40].

Justice Wilcox found that it was unnecessary to 'express a concluded view on the question whether it is possible for a person to make a native title determination claim on behalf of himself or herself alone, or a small group, in respect of rights and interests that are held by a wider group of people'. However, 'one thing is certain; any claim must be authorised by the group on behalf of whom the claim is made':[41]. After a consideration of the facts, Wilcox J found that each of the Bodney applications did not satisfy the requirements of s. 61 under both the new and old

legislation and that the deficiencies of the case were found in the 'applications themselves':[46].

Northern Territory of Australia v Doepel [2003] F CA 1384

The court considered the role of the Registrar under s 190 and concluded at pp 116-117 that:

> Under s 190A(6), the Registrar is obliged to accept the claim for registration if it satisfies all of the conditions in s 190B (which deals mainly with the merits of the claim) and in s 190C (which deals with procedural and other matters). If it does not satisfy all those conditions, the Registrar must not accept the claim for registration…. Sections 190A, 190B and 190C were part of the extensive amendments to the NT Act introduced by the *Native Title Amendment Act 1998* (Cth). They effectively separate clearly the judicial decision-making processes under the NT Act from the administrative processes relating to registration. Registration is not a precondition to the application for the determination of native title proceeding to hearing, or to it being summarily dismissed.

Anderson v State of Western Australia [2003] FCA 1423

The South West Aboriginal Land and Sea Council (SWALSC) in an attempt to rationalise its claims with a view to negotiate on behalf of the Noongar people in the region as a whole, SWALSC sought to contract the boundaries of the Ballardong claim and replace sixteen applicants with four applicants for the reduced claim area which would be called the Nulla Nulla application. The state argued that the reduced claim area was not properly authorised according to s. 61 contending that two different processes were utilised at the two meetings which were inadequately notified, attended by a small number of unidentified people, resolutions were passed by bare majority and that the decision making processes used at the meeting were not those agreed to and adopted by members of the native title claim group but only some of the attendees of the meeting: [44]. Justice French reviewed evidence of the

meetings but was not 'satisfied on the evidence that the meetings were attended by persons representative of the whole of the native title claim group' nor was he 'satisfied that they were adequately notified with sufficient advance warning to provide a proper opportunity for members of the native title claim group to attend': [45]. In recognition of the ongoing disputes between the parties, French J made a springing order that the application be dismissed. However he noted that this did not preclude the parties from advancing evidence that the requirements of s. 66B had been met to authorise the applicants of the proposed Nulla Nulla claim.

Wiradjuri Wellington v NSW Minister for Land & Water Conservation [2004] FCA 1127

This case involved an application to replace a member of a claim group as a current applicant in the proceedings where the claim group was associated with an Aboriginal corporation. This matter involved consideration of a request from four named applicants to remove the fifth applicant (Mrs Denise Kelly) under one of the circumstances provided in s. 66B. The five named applicants were all Governing Board member of Wiradjuri. The applicants negotiated a lengthy agreement providing for the future use and control of the Wellington Town Common, land the subject of the native title application. The majority of applicants sought to register the agreement as an ILUA with the NNTT. Mrs Kelly, among others, objected to the way in which the other members sought to give effect to the ILUA. Mrs Chown called an extraordinary meeting of the corporation and advertised widely as to the agenda for the meeting, including the removal of an applicant and Mrs Kelly was aware that she was the applicant named on the agenda. As per the voting rules of the corporation, Mrs Kelly was removed from the Governing Board of the corporation. Justice Madgwick found that the Court, had a discretionary power to amend which applicants were authorised to speak for the application but that discretion did not extend to discerning which members were acting in accordance with traditional custom. His Honour found that, except in the case of unlawful decision making

structures, it was not the role of the court to interfere with the decisions of the corporation:

> The claim group have chosen to regulate their affairs in relation to this application by their membership of the corporation and by proceeding according to the rules of the corporation. Where, as appears to be the case here, those rules have been apparently obeyed and validly acted on, respect should ordinarily be given by a court to the decisions arrived at.

There was no discussion as whether either the rules were valid or those whom exercised their powers under the corporation rules were acting in the best interests of the claim group as a whole. Mrs Kelly was removed from the list of applicants.

Bolton v Western Australia [2004] FCA 760

Ahead of the Noongar application the South West Aboriginal Land and Sea Council (SWALSC) worked together with the native title applicants to rationalise claims in the South West of Western Australia culminating in the 'Single Noongar' claim. 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 provides a comprehensive discussion of the requirements for the requirements of a successful applicant under s. 66B as well as principles of authorisation that underlie it. Prior to making these applications, SWALSC held a series of meetings for each affected application at which resolutions were passed to, among other things, bring the s. 66B(1) applications and seek orders for combination, both of which involved questions of authorisation under s. 251B of the NTA. The meetings were advertised in various newspapers, with the advertisements specifying

the general nature of the proposed resolutions. All the members of the SWALSC who identified as part of the relevant claim group as generally described (e.g. Wagyl Kaip, Yued, South West Boojarah) were sent an agenda that included the proposed resolutions, as were members of various working parties and certain Aboriginal organisations in the region. The court noted that the number of people who attended the meetings was often much lower than the number of SWALSC members who identified as part of a particular claim group and had been personally notified. The court was critical of the process adopted to obtain authorisation for a number of reasons. Justice French listed these and then cited a number of authorities which indicate 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.

Evans v Native Title Registrar [2004] FCA 1070

This case involved an application under s. 190D(2) seeking a review under s. 190A of a decision not to register the Koara people for registration. The application involved six applications which were accepted in 1999 but later set aside (see *Western Australia v Native Title Register* [1999] FCA 1594). There were issues raised as to whether the applicants had satisfied the requirements of the registration test and whether sufficient evidence had been provided in relation to whether the application has been properly advertised. There was an issue in relation to the evidence has been tendered. In particular, four varied claims had been tendered to the Registrar, two of which referred to traditional processes where as the other referred to 'standard protocols and procedures' although there was not evidence of what they may have been and whether they conflicted with traditional decision making processes. The delegate had requested further information on the matter and ultimately concluded that even though the application was made accordingly it did not comply with s. 251B. Justice Nicholson found that s. 251B provides an alternative method of authorisation where it is not possible to follow traditional law and custom. However

it was not possible to conflate the two decision making processes which had occurred in this instance. In particular he found that the delegates request for further information was based on the need for clarification due to the contradictory information that had been received. Further he rejected the argument that the delegate had misconstrued his role by raising issues that we not the subject of any adverse submission. However, Nicholson J noted that the delegate has no discretion and must consider all elements as a part of the Registrar's administrative function. Further he noted that the delegate had no obligation to accept material especially where it was contradictory or inconsistent.

McKenzie v State Government of South Australia & Ors [2005] FCA 22

This case involved an application by the Aboriginal Legal Rights Movement (ALRM) to strike out the Kuyani claim under s 84C of the NTA. There had been six amendments to the Kuyani claim under which the respondent, Mark McKenzie has been given authorisation to proceed with the claim. The Kuyani claim is made by a body corporate called the Kuyuni Association Incorporated and overlapped the entirety of the Adnyamuthna claim. The ALRM argued that (1) Mr McKenzie's evidence did not properly identify the native title claim group and (2) the authorisation claimed by Mr McKenzie was not that of the claim group. Justice Finn agreed with this argument; he was unconvinced that the evidence provided by the respondent had met the requirements of ss. 61 and 62 of the NTA. In particular, his Honour found that Mr McKenzie had relied on disparate sources. It was asserted that on 5 march 1999 he was authorised by a delegation of 29 watis (or senior law men), December 2000, a process of decision making under traditional laws and customs under affidavit and 2001, a decision at the annual general meeting of the Kuyuni Association. However, Finn J found that the rules of the corporate body did not reflect traditional decision making structures, nor was it evident that an alternative decision making structure was adopted by the claim group. Further, members of the pre-2000 claim group did not have to be a member of the association. Mr McKenzie also relied

on a memorandum of understanding on the interests of the claim group with the Adnyamuthana. However Finn J also found that the MOU did not define the new native title claim group or provide an agreed proceed of authorisation. Accordingly, Finn J ordered that the Kuyani application be struck out.

Davidson v Fesl [2005] FCAFC 183

The case involved an appeal against the decision in *Fesl v State of Queensland* [2005] FCA 120 where Justice Spender has granted a leave to discontinue the application because no one had approved of Dr Eve Fesl to make the application and as a consequence the application was not a claimant application as required under s 253. In considering whether or not to grant leave the court considered whether in all the circumstances, the decision of Spender J warranted a reconsideration and whether a substantial injustice would result if leave was given. On the first issue, the court framed the question in terms of whether a claimant application 'deficient in initial authorisation be permitted to continue without any possibility of rectification?':[22]. As to the second question, the court commented on the differences in opinion on the correct claim group and how the definition was applied restrictively despite its importance in determining authorisation. The Court also expressed doubts that the proper notification period had been applied. Ultimately it concluded that:

> [T]here is no substantial injustice arising from the discontinuance of the native title determination application. In fact there are considerable benefits to be gained in the opportunity that is now provided for a more thorough consideration of the scope of the native title claim group and the steps necessary to ensure the proper authorisation by that group is secured form named applicants at [27] (French, Finn and Hely JJ).

Accordingly, the application for leave was dismissed and Dr Fesl was not removed as an applicant.

Noble v Mundraby [2005] FCAFC 212

This case involves an appeal against a successful application removing Mr Federick Noble as a named applicant of the combined Gunggandji, Yidinji and Mandingalbay claim . It was argued that the primary judge had failed to apply s 251B correctly and that he was biased in reaching his decision. Justices North, Weinberg and Greenwood considered the primary Judge's conclusion that being a combined claim all members of the native title claim group were required to be involved in the decision making process, not only the specific members of the clan group that had originally appointed Mr Noble as their named applicant. That is, the decision making process followed must be that of the members of the claim group and not just a subgroup of the members of the claim. Mr Noble rejected this conclusion and in the current appeal argued that it was 'entirely possible that a native title claim group may agree to adopt a procedure of decision making under which each constituent tradition clan group separately makes its own decisions'. He noted that 'the primary jusge should have received evidence of the authorisation process and made findings of fact as to whether the process of consideration by a community meeting was one which had been agreed to and adopted by the native title claim group'. The court rejected this argument and found that it was open to the primary judge to decide that there was a decision making process agreed to and adopted in voting against Mr Noble. In particular, the court noted that 'section 251B does not require proof of a system of decision making beyond proof of the process used to arrive at the particular decision in question. The section accommodates a situation where a native title claim group agrees to follow a particular procedure for a particular decision even if other procedures are normally used for other decisions. Nor does s 251B require a formal agreement to the process adopted for the making of a particular decisions'.

Kemp v Native Title Registrar [2006] FCA 939

This case involved a judicial review of decision of Native Title Registrar to register an Indigenous Land Use Agreement (ILUA). The applicant, a member of the Pirripaayai people had opposed the original native title claim lodged by the Kattang people on the basis that a 'determination in favour of the applicant could give formal recognition to a version of history that does not recognise the Pirripaayai people: *Davis-Hurst v Minister for Land and Water Conservation (NSW)* (2003) 198 ALR 315, [14]-[15]. Justice Branson, considered the requirements for registration under s. 24CG(3)(b) of the NTA focusing on the meaning of 'all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement'. The issue was whether a non registered native title claimant who is not a party to the agreement is required to give authorisation for the making of the ILUA. In reaching his decision, Branson J said that 'it is plain that s. 251A is concerned with how a single community or other group, the members of which together hold or may hold the common or group rights comprising the native title in the area covered by an indigenous land use agreement, may authorise the making of an indigenous land use agreement': [41]. His Honour noted that 'it is hard to imagine any such process of decision making where the respective claims of two groups to hold the native title are in conflict; it would require traditional laws and customs in relation to jointly authorising things binding on the members of both groups':[41]. Justice Branson then proceeded to consider the meaning of the words in s 24CG(3)(b)(i). His Honour found said that the Explanatory Memorandum of the NTA states that 'the appropriate response of potential native title holders unhappy about the registration of such an agreement is to make a native title claim': para. 22.23. He also found that all persons holding native title in relation to any of the land or waters in the area who are not already parties to the agreement were bound by it. Accordingly, the authorisation of the applicant was required, even though he was opposing the native title claim and the Registrar erred in registering the ILUA.

Butchulla People v State of Queensland [2006] FCA 1063

This case considers whether authorisation for the current applicant's removal and replacement was given in accordance with s. 251B of Native Title Act 1993 (Cth). According to the certificate of authorisation, authorisation took place following a contemporary process that consisted of a combination of consent of the senior members of the native title claim group, whose seniority was based on members who had the longest connection with the area covered under the application. The consensus was reached though a process of debate and dialogue between all members of the native title claim group. There was significant disagreement between groups as to whether the content of a connection was correct and whether or not it should be forwarded to the Queensland State Government. The Land Council proposed three options one of which was to hold an authorisation meeting to replace the current applicants. The meeting was chaired by Kym Elston who explained the provisions of s. 251B and the decision making process that could be adopted. A consultant anthropologist Peter Blackwood spoke about decision making processes and made a summary of the key principles that came from the meeting. It was argued that the respondents in the case were no longer authorised pursuant to the meeting. However the respondents contend that there has been no proper authorisation for their removal. The case raises a number of issues including: the identification of persons notified and attending the meeting as members of the claim group; whether there was a failure to follow a traditional process of decision making or failure to warn that a different non traditional method might be used and whether the meeting was unduly influenced by a letter from the Gurang land council and whether a proper vote had been taken. The court found that the people present at the meeting were the claim group since they were identified through anthropological study for previous authorisation meetings. More importantly, Justice Kiefel rejected the argument that the applicants had a corporate character and had to reach the same conclusion on decisions. His Honour found that 'the evident purposes of s. 61 are to provide for representation of the claim group, to limit the number of persons who may act as 'the applicant...and whilst this obliges those authorised as representatives to cooperate with each other it does...not

imply that their ability to continue to act is dependent upon each other person authorised'.

This case also involved the issue of whether a family clan group decision making process was valid for the authorisation of family representatives. It referred to the decision of the Full Court of CA in *Noble v Mundraby* [2005] FCAFC 212 (30 September 2005) . The case discussed the issue of what constitutes a decision making process (see below).

Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31

On 5 February 2007, Justice Lindgren dismissed the native title claim of the Wongatha People. The determination involved eight overlapping claims – the Cosmo Newberry, Mantjintjarra Ngalia, Koara, Wutha, Maduwongga and Ngalia Kutjungkatja No 1 and No 2 claims – with Wongatha as the lead application. In reaching his conclusion, Lindgren J dealt with a number of preliminary issues including authorisation. The respondents argued that authorisation was not carried out according to the requirements of the NTA. Justice Lindgren agreed with this and found that the authorisation process did not follow the proper procedures. In reaching his conclusion, Lindgren J noted that 'native title claim group' is 'commonly and understandably used to refer to the group on whose behalf a native title determination application – claimant application is made'. However he notes that:

> there is no escaping the fact that the 'native title claim group'…is a group constituted by all the **actual** holders, according to their traditional laws and customs, of the common or group rights or interests comprising the particular native title claimed: [72].

Doolan v Native Title Registrar [2007] FCA 192

Application for the review of the decision of the NNTT Registry to not accept a native title determination application - known as the Butchulla Land and Sea Claim. Issue whether 'the applicant' means all of the persons authorised by the native title claim group and no fewer or whether it means all of the persons authorised by the native title claim group, who, at any particular time, are willing and able to act [6]. This has consequences for the validity of a claim where someone is unwilling to act or dies. On the latter interpretation the authorisation process will be considered to be 'incompetent' [7]. (Note that the circumstances that arise in this case have now been superseded by the amendments to the NTA). In this case two of the authorised applicants had withdrawn claiming that their traditional decision making processes had not been respected and sought to submit a new claim. The Butchulla Land and Sea claim was rejected by the NNTT under s 190C(4) in that even though all 216 persons has been authorised at an initial meeting as well as two people who subsequently withdrew, meant that the 16 persons were no longer authorised since they has declined to be included as applicants after the meeting but before the application was lodged. However the court found that the 'authorisation of a group of people to act has to be understood as meaning the authorisation of so many of them as continue to be willing and able to discharge their representative function': [59]. See also *Butchulla People v State of Queensland* [2006] FCA 1063.

Chapman on behalf of the Wakka Wakka People 2 v State of Queensland [2007] FCA 597

This case considered the removal of an applicant under O6R9 of FCR as opposed to s66B. Two named applicants, of the Wakka Wakka people's claim, Mr Regie Little and Mr Sam Joe Murray had had failed to attend any meetings of the applicant group and eventually supported an unsuccessful application to strike out the claim. They also failed to participate in any negotiation for indigenous land use agreements. Their

actions led the court to conclude that that 'they are neither a proper nor necessary party' to the claim. Accordingly there was no meeting revoking the authority of the applicants against whom the motion was brought against, nor was there a meeting authoring an application under s 66B to remove them. In reaching this conclusion the court considered the meaning of 'applicant' and found that the 'current applicant' referred to in s 66B was indivisible. Subsequently, the persons who are authorised are jointly the applicant and any approach that views them as individuals would be inconsistent with the NTA. However Kiefel J reiterated the view expressed in *Butchulla People v State of Queensland* [2006] FCA 1063, that the requirement that persons consisting of the applicant work together does not mean that their ability to continue to act is dependant on each other but rather the terms of the authorisation. The fact that applicants could be viewed individually means that there is no reason why O 6 r 9 should not have operation. That is, even though individuals comprise the applicant jointly, the terms of the authorisation apply to each individual who are also a party to the proceedings within the within the meaning of O 6 r 3.

Justice Kiefel also noted that the power of the Registrar to amend the Register to reflect an order made under s 66B(4) extended to the power to amend the provisions after an order was made under O 9 r 9.

Accordingly, Justice Kiefel found that the applicants were authorised on the 'basis that they were able, and wished to act in the capacity as a representative of the claim group for the purpose of advancing the application towards a determination of native title rights and interests claimed' and that Mr Regie Little and Mr Sam Joe Murray were unwilling to act under these terms.

Beattie on behalf of Western Wakka Wakka peoples v Queensland [2007] FCA 596

The court considered an application contesting an authorisation process that relied on a decision making process of the broader Western Wakka Wakka people even though the claim group were descendents of one family member or subgroup of the Wakka

Wakka people. However the court found that s 61(1) of the NTA does not prevent more than one claim group of traditional owners in an area provided that the claim is to different rights and interests: [15]. In reaching his decision Justice Kiefel approved of *Harrington Smith* where Justice Lindgren 'acknowledged the possibility of coexisting but different native title rights in the same area. In such a situation it would not be necessary for one group to authorise the application of another [15].

Van Hemmen on behalf of The Kabi Kabi People No 3 v State of Queensland [2007] FCA 1185

This case involved the review of a decision by the Native Title Registrar to not accept the application of the Kabi Kabi #3 applicants. The Kabi Kabi #2 applicants, the Gurang Land Council and Queensland South Native Title Services supported the registrars decision that the Kabi Kabi #3 applicants were not properly authorised and claimed that Kabi Kabi #3 should be dismissed pursuant to s 84C. The Court accepted this argument noting that the claim overlaped with another claim and that eleven of the twelve named apical ancestors were named in both the Kabi Kabi #2 and #3 claims. It also considered whether a majority vote is a method of decision making in accordance with traditional laws and customs of the Kabi Kabi people and whether all relevant Kabi Kabi people consulted. Collier J found that a majority decision was reached during the meeting in accordance with 'Australian meeting rules and conventions'. His Honour conceded that this conforms with traditional Kabi Kabi values in appropriate circumstances but found that it was not the case in this instance: [27]. Further he found that even though there was no conformity with traditional decision making processes there was no evidence of an alternative decision making process agreed to and adopted by the claim group: [28].

PC (on behalf of the Njamal People of Western Australia) [2007] FCA 1054

An application to amend the claim group description to reflect the community and replace persons under s. 66B of the NTA. Justice Bennet noted that there is no precise process or cultural precedent under the traditional laws and customs of the Njamal people that must be followed for decisions of the kind contemplated by s. 66B of the NTA or otherwise for authorising claim group members to represent the group as applicant. That is, decisions as to the authorisation or removal of applicants are not part of Njamal traditional law and culture. Instead, the Njamal people have agreed to and adopted a process of making decisions (under s. 251B(b)). Pursuant to that process, decisions are made by resolution or consensus at community meetings organised by the Pilbara Native Title Services ('PNTS'). His Honour said that it was not for the Court to consider merits of the claim group's decision.

Reid v State of South Australia [2007] FCA 1479

This case involved a motion by the South Australian Government to have a claim struck out under s 84C of the *Native Title Act 1993* (Cth) or dimissed under s 31A of the *Federal Court Act 1976* (Cth). The claim was filed by Richard Reid which overlapped with eight other claims including the Kokatha native title claim. The motion was supported by the Aboriginal Legal Rights Movement which represented the other claim groups. The South Australian Government opposed the motion was based on the fact that (1) the native title claim group description was unclear (2) the claims were made impersmissibly on behalf of a sub group (3) the basis of authorisation did not meet the requirements of the NTA and (4) the application failed to comply with the requirements of s 61A and s 62 of the NTA. Mr Reid claimed hat his authorisation was provided in three instances: (1) by the Kokatha Peoples Community Inc. (2) self authoristaon and (3) authorisation by the elders of surround Western Desert tribes. Justice Finn found that there was no evidence to suggest that all members of the KPC were present and that the description of the claim group was

only a part of the group. He also found that there was uncertainity in relation to the description of the members. Justice Finn was doubtful that there was evidnce of a right of self authorisation under traditional laws and customs and found that reliance on the Elders approval did not assit in the application because authorisation must be by 'all persons…who..hold common or group rights'.

Turrbal People v State of Queensland [2008] FCA 316

Notice of motion seeking to replace an applicant in proceedings. The original applicant, Connie Isaacs sought to replace herself with Maroochy Barambah. This motion was opposed on the basis that she did not have the authority of the claim group to make this decision. The court considered whether the issue of whether a native title determination application has been properly authorised can be considered during a strike out application under s 84C of the Act. Justice Splender noted that the relevant issue was if an application were to succeed on its own terms, the court needed to consider whether the applicants would not have been authorised by all those persons the Court would determine to be the members of the claim group. However he found that the factual inquiry of whether the claimants actually constitute the persons who actually hold the common or group rights and interests cannot be properly the subject of a strike out application.

It was argued by the applicant that if the Court was not satisfied there was a traditional decision making process in place, there was an alternative decision making process that was agreed to and adopted by the claim group. His Honour found this argument inconsistent but followed the previous decision of *Williams v Grant* which held that Connie Isaacs was authorised. Following this decision, if she had the authority to make the original application, she had the authority to decide on an altered position of the applicant.