

IN THE FEDERAL COURT OF QUEENSLAND
QUEENSLAND DISTRICT REGISTRY

QG 6010 of 1998
QG 6024 of 1999

BETWEEN: QUANDAMOOKA PEOPLE

Applicant

AND: STATE OF QUEENSLAND & OTHERS

Respondent

**IN THE MATTER OF AN APPLICATION BY IAN DELANEY TO REPLACE DALE
ALFRED EUGENE RUSKA AS SOLE APPLICANT IN THE CLAIMANT APPLICATIONS**

Submissions on behalf of Dale Alfred Eugene Ruska

Introduction

1. On 6 December 2001 Ian Delaney filed a Notice of Motion in these proceedings seeking *inter alia*:

"That the current Applicant in proceedings no. QG6010 of 1998 and no. Q6024 of 1999 be replaced as Applicant by Ian Delaney alone."

2. Affidavits from three people, Ian Delaney, Darren John Burns and Virginia Lee Antony all sworn on 6 December 2001 have been filed in support of the application. At the directions hearing on 11 December 2001, counsel for Mr Delaney indicated that primary reliance for the application would be made on these affidavits.¹
3. Also at this directions hearing, Drummond J:
 - 3.1. set the hearing of Mr Delaney's application for 4-6 March 2002;
 - 3.2. made directions for the filing of materials;² and
 - 3.3. afforded each party liberty to apply on 24 hrs notice.

¹ Transcript 11 December 2001, Coram Drummond J p.16, l.9-17

His Honour: "... I am assuming that you won't have a lot of material to rely on in the first instance. Whether you want to put a lot more material in reply is a different question.

Mr Duggan: "I hesitate to say it, sir, but the bare bones of the material on behalf of Mr Delaney has already been filed and served. I.."

His Honour: "Well, you're content to stand on that in the first instance?"

Mr Duggan: "I am"

² Ruska's material and submissions by 1 February 2002
Delaney's further material by 20 February 2002

Mr Ruska's application pursuant to Order 20 Rule 2(1) of the *Federal Court Rules*

4. Mr Ruska herein seeks the following orders:
 - 4.1. that the Notice of Motion be dismissed on the grounds that the claim for relief discloses no reasonable cause of action, is frivolous and vexatious and/or amounts to an abuse of the process of the Court pursuant to Order 20 Rule 2(1) of the *Federal Court Rules*;
 - 4.2. that Mr Delaney pay Mr Ruska's costs of and incidental to responding to the Notice of Motion, including of bringing this Motion; and
 - 4.3. further directions which will assist the claim group to resolve the underlying conflict which is obstructing the claim proceeding (see further below).
5. Pursuant to Order 20 rule 2(2) and for the purposes of this application reliance is placed on the affidavit of Mr Ruska sworn and filed by leave on 11 December 2001 and the affidavit of Ms Paula Morreau affirmed and filed on 22 January 2002.

Brief relevant history

6. Messrs Ruska and Delaney are the two current applicants in both proceedings. The Quandamooka Lands Council was the original applicant in 1994. Mr Ruska was authorised to be the replacement applicant in the documents filed on behalf of the claimant community in 1998, after concerns that a corporate entity could not lawfully hold native title. Mr Delaney was joined as a co-applicant to these proceedings on or about 28 November 1999 following a meeting of the native title group on 13 November 1999.³
7. The claim is presently in the mediation phase with other parties including the State and Federal Governments and mining entities.
8. On 14 August 2001 Mr Delaney brought a similar Notice of Motion seeking the removal of Mr Ruska, however that proceeding was discontinued after agreement was reached at a mediation before the Registrar of the Court, as to holding a claim group meeting seeking to resolve the factional disagreement.
9. There remains a conflict between the parties as to the degree of compliance with the terms of the negotiated agreement between counsel engaged by the Queensland South Representative Board Aboriginal Corporation ("QSRBAC") who are acting as Mr Delaney's lawyers, and the solicitors acting on behalf of Mr Ruska. Both Mr Delaney and Mr Ruska were at the mediation. Mr Ruska's contentions as to the insufficiency of compliance by QSRBAC in that regard appear in his affidavit of 11 December 2001.
10. However, one should not be too distracted by the degree of compliance *per se* as the primary deficiency in Mr Delaney's material is that the purported basis to obtain authority did not comply with the traditional laws and customs of the claim group and that it does not even seek to establish what they are. That is to say, even if Mr Delaney's group had strictly complied with all aspects of the agreed process negotiated at the mediation he would still have to establish the requirements of sections 66B and 251B.

³ See paragraph 6 of the affidavit of Gregory Scott McDougall dated 25 November 1999 and filed in proceedings Q6024 of 1999.

These matters are addressed more fully below.

11. It is relevant to note that QSRBAC, aside from acting as Mr Delaney's lawyers, is also the statutorily recognised Aboriginal/Torres Strait Islander representative body responsible for the entire claim on behalf of the Quandamooka peoples, a position it assumed in or about June 2001.⁴ Prior to that, for nearly a decade, the administrative bodies conducting the claim have been the Quandamooka Lands Council and F.A.I.R.A. This is not the forum for there to be lengthy discussion of the reasons behind and merits of these changes but awareness of these changes provide some insight into the underlying difficulties currently being experienced within the claim group. Another complication arises as Mr Delaney is a member of the board of QSRBAC. This board has continued to deny Mr Ruska any funding to engage legal representatives to respond to either Notice of Motion or indeed to fund those who might not agree with Mr Delaney and his group. The distinctions between the statutory responsibilities of a representative body and that of lawyers acting for 'one side' have been pointed out to them but to no apparent avail.⁵
12. Following notices said by Ms Antony to have been sent by QSRBAC on or about 10 October 2001,⁶ a meeting was held of about 70 people at Dunwich on 20 October 2001. It was chaired by National Native Title Tribunal Member, Graham Fletcher. Mr Ruska attended. Mr Delaney did not. The following motions were recorded as having been

⁴ The relevant statutory responsibilities of a representative body include the following:

203B Functions and powers of representative bodies

- (4) *"a representative body ... must from time to time determine the priorities it will give to performing its functions...and may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently; but must give priority to the protection of the interests of native title holders"*

Section 203BA How functions of representative bodies are to be performed

- (1) *"in a timely manner"*
- (2)(a) *"in a manner that maintains organisational structures and administrative processes that promote the satisfactory representation by the body of native title holders";*
- (2)(b) *"... maintains organisational structures ... that promote effective consultation with Aboriginal peoples and Torres Strait Islanders living in the area";*
- (2)(c) *"... ensures that the structures and processes operate in a fair manner having particular regard to the matters set out in paragraphs 203AI(2)(a)-(f)", namely*
 - (a) *"the opportunities for the Aboriginal peoples or Torres Strait Islanders for whom it might act to participate in its process"*
 - (b) *"the level of consultation with them ..."*
 - (c) *"its procedures for making decisions and for reviewing its decisions"*
 - (d) *"its rules or requirements relating to conduct of its officers"*
 - (e) *"the nature of its executive management structures and management processes"*
 - (f) *"its procedures for reporting back to persons who hold or may hold native title in the area"*

203BB Facilitation and assistance functions

- (1)(b) *"to assist ... native title holders ... (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings ..."*
- (2) exercisable on request

203BC How facilitation and assistance functions are to be performed

- (1)(a) *"consult with, and have regard to the interests of ... any native title holder"*
- (1)(b) *"if the matter involves the representative body representing such ... native title holders – be satisfied they understand and consent to any general course of action that the representative body takes on their behalf..."*

203BF Dispute resolution functions

- (1)(a) *"to assist in promoting agreement between its constituents about the making of native title applications or the conduct ..."*
- (1)(b) *"to mediate between its constituents about the making of native title applications or the conduct ..."*

203BJ Other functions

- (b) *"identify persons who may hold native title in the area for which the body is the representative body"*
- (c) *"promote understanding, among Aboriginal peoples and Torres Strait Islanders living in the area, about matters relevant to the operation of this Act"*

⁵ See correspondence exhibited to the affidavit of Ms Paula Morreau affirmed and filed on 22 January 2002.

⁶ Mr Ruska deposes in his affidavit of 11 December 2001 that he only received the notice on 15 October 2001.

passed by those present at that meeting:⁷

- 12.1. *"The decision-making process for all important issues is to remain as at present, namely that decisions will be by a majority vote of members present at a general meeting of Quandamooka People"* [passed 48-26];
 - 12.2. *"The structure of the claim group remains unchanged, being eleven family groups"* [passed unanimously];
 - 12.3. *"Ian Delaney be the sole applicant for the claim"* [passed 39-26]; and
 - 12.4. *"QSRB be the legal representative for the Quandamooka applicants"* [passed 39-28].
13. A motion put at the meeting but not passed was: *"We are not here to remove any applicant but to increase the number according to the number of NTA family groups (that is, eleven families)"*. It was lost 30-36.⁸

Observations on Mr Delaney's evidence

14. In essence Mr Delaney's contentions are:
- 14.1. he is a traditional owner and an authorised applicant for native title;
 - 14.2. he is aware of a meeting of people having been held on 20 October 2001 at Dunwich, Stradbroke Island;
 - 14.3. he is informed that a motion was passed at that meeting by a majority *"that the sole applicant for the claim be Ian Delaney"*; and
 - 14.4. that this motion is sufficient to justify an order from the Court for the removal of Mr Ruska.
15. Virginia Lee Antony deposes that:
- 15.1. she is a researcher employed by QSRBAC;
 - 15.2. she was given a list *"of people who are members of the claim group in these proceedings."*⁹
 - 15.3. she caused for notices of a meeting to names on this list; and
 - 15.4. she is not aware of any member of the claimant group not being notified of the meeting.
16. The affidavit of Darren John Burns annexes *inter alia* a list of persons said to have been at the meeting and expresses the following view:

"I have attended numerous meetings of the Quandamooka claim group since 1990. I have also attended numerous meetings of Quandamooka people held for the purposes of the Quandamooka Land Council since 1995. Save that the meeting of 20 October 2001 was chaired by a member of the Native Title Tribunal, it was typical of the manner and format of Quandamooka claim group meetings and group meetings of Quandamooka people generally. In my experience, Quandamooka group decision-making is commonly done at meetings such as that of 20 October 2001. At such meetings decisions are decided by simple majority vote among those present.

⁷ They are contained in Mr Fletcher's report, which appears as Exhibit DR-12 to Mr Ruska's 11 December 2001 affidavit.

⁸ It is clear that there are some tabulation errors in the minutes as to the votes taken. Exhibit DJB-2 to the affidavit of Darren Burns suggests that 70 people attended yet one motion set out in the same exhibit suggests that 74 people voted. There are other intrinsic anomalies.

⁹ There is no information as to who gave her that list. Strictly speaking this means that the assertion made is inadmissible as hearsay.

I consider that the meeting of 20 October 2001 and the decisions taken at that meeting were in accordance with the normal decision making processes of the Quandamooka claim group."

17. Mr Delaney's material does not include any evidence of:
 - 17.1. from whom the list relied upon by Ms Antony was obtained, who certified that it was a correct list, how she contends it is a correct and complete and in fact a proper record of the entire Quandamooka claim group;
 - 17.2. how that list was brought into existence in the first place; or
 - 17.3. who is on that list.

18. It is not clear from his material whether Mr Delaney's contention is that the decision-making process purporting to authorise the removal of Mr Ruska has been undertaken in accordance with customary law or whether an alternative model has been agreed to and adopted by the claim group. In either event, there is no attempt to provide evidence of what these customs and laws or agreed processes of decision-making are, and to what extent these customs and laws or processes were complied with. It does however seem unlikely that Mr Delaney would contend that there no longer exists traditional laws and customs in the claim group having regard to the basis of the claim as set out in paragraph 30 below.

19. It is also not possible on the present material to determine whether:
 - 19.1. the persons who attended and voted at the meeting are on the list used by Ms Antony;
 - 19.2. those who attended and voted are in fact members of the claimant group as duly determined; or
 - 19.3. which of the family groups listed in Schedule A to the two amended applications were represented at the meeting.¹⁰

20. Most importantly, other than saying that the conduct of the meeting – save the identity of the chairperson – was "typical" of other meetings, there is no evidence or even an assertion of what these attributes are, that is, of the traditional laws and customs or the otherwise agreed to procedures within the claimant group that need to be complied with.

21. It must be remembered, in considering the elements of *Order 20 Rule 2(1)* of the *Federal Court Rules*, that this material has been filed by lawyers (including counsel from the Melbourne Bar) reliant on outcomes obtained at meetings convened by them in their separate capacity as a representative body under the *Native Title Act*. It can be assumed that the resolutions that were carried at the 20 October 2001 meeting were drafted by them as well. The material is not merely the product of an unassisted combatant in a factional dispute. This is their second attempt at bringing proceedings to remove Mr Ruska. The limitations and shortcomings in the material are readily apparent and cannot

¹⁰ The minutes of the 20 October 2001 meeting, exhibit DJD-2 reveal some discussion about the list (at page 4):
"Ms Perry wanted to know who sent out the letters and why was a white mane given a letter. She stated that the list was wrong
Mr Damien Aidon replied that QSRBAC did the letters and we gathered the information from various sources, however we are here to take back the resolutions of the members and provide what assistance we can, we are not here to manipulate or control the meeting.
Mr Adam Delaney stated that Quandamooka Lands Council provided a list to QSRB and that list was drawn from Quandamooka files and all other Aboriginal organisations on the island. QLC then advised elders to look at this list, the elders who we believe know everyone in the 11 families, however it the elders did not get a chance to look through the list. It appears that some organisations such as housing allows non-Aboriginal people (spouses etc) on their membership lists, this is how we could have a letter about this meeting going to a non-claimant."

be excused as mere ignorance.

The relevant test to be applied to determine an application under section 66B

22. The power to replace a current applicant is set out in section 66B of the *Native Title Act* ("the Act") which provides:

"66B Replacing the applicant

Application to replace applicant in claimant application

(1) One or more members of the native title claim group (the **claim group**) in relation to a claimant application, or of the compensation claim group (also the **claim group**) in relation to a compensation application, may apply to the Federal Court for an order that the member, or the members jointly, replace the current applicant for the application on the grounds that:

(a) either:

(i) the current applicant is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it; or

(ii) the current applicant has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it; and

(b) the member or members are authorised by the claim group to make the application and to deal with matters arising in relation to it."

23. Also, section 251B provides:

"251B Authorising the making of applications

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) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind – the person in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

(b) where there is no such process – the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind."

24. The following matters therefore need to be established by Mr Delaney:

- 24.1. the identity of the members of the claimant group.
- 24.2. that Mr Ruska is no longer duly authorised by the claimant group; and
- 24.3. that he, Mr Delaney was authorised by the claimant group to bring an application for the removal of Mr Ruska.

25. The determination of the above may involve a determination of the customary and traditional laws and customs of the Quandamooka native title group and whether there has been compliance therewith or that there has been an alternative decision-making process agreed to by the claim group. For the reasons that follow, this is not necessary to resolve the present application.¹¹

¹¹ A similar approach was taken by Tamberlin J in *Ridgeway on behalf of the Worimi People, in the matter of Russell v. Bissett-Ridgeway* [2001] FCA 848 at paras 31-32. See further below.

The relevant law on authorisation and de-authorisation

26. In *Moran v. Minister for Land & Water Conservation for the State of NSW* [1999] FCA 1637, Wilcox J relevantly held that in order to decide whether the applicant was “authorised by the claim group to make the application and to deal with matters arising in relation to it” and “in order to decide whether that requirement is satisfied, it is firstly necessary for the Court to determine who constitutes the “claim group ... by reference to the document or documents making the claim”.
27. His Honour went on to say, relevant to the present application:
- “The present cases illustrate the importance of proper authorisation. In order to establish proper authorisation, Ms Moran would have had to identify by name all the people within the claimant group, or a collective body able to speak for the group as a whole. If she had done either of these things, Mr Allen could have explored, and, possibly, ultimately demonstrated, the extent of his support as a replacement applicant. However, because the membership and/or leadership of the group was not properly defined, he has been unable to do this. The Court is left in the position of finding that Mr Moran and Mr Allen each apparently enjoy a measure of support from people who claim to fall within the group, but being unable to say which (if either) of them is entitled to act for the group as a whole.”¹²*
28. See also the application by Tamberlin J in *Ridgeway on behalf of the Worimi people., in the matter of Russell v Bissett-Ridgeway* [2001] FCA 848 of the principles in *Moran* (supra) to a factual contest not dissimilar to the present application. His Honour dealt with the insufficiency of authorisation without having to turn to material filed by the respondent of a genealogical kind. His Honour’s observations as to the shortcomings in the applicant’s materials in that case should be applied here.

At paras 24-25, 34-35:

“[The] notice states that ‘a meeting to resolve the question of authorisation of the group and other matters’... It is not appropriate to approach these notices as if they were legal notices required under some statutory regime. Nevertheless, they do not specifically address the precise issue for consideration.”

*“It is not necessary on this application to decide whether the applicants on the Motion are members of the claim group affiliated with the land. The limited amount of evidence before me indicates that they are more likely than not within that description. On the material before me, however, I am not satisfied that the members of the claim group have been sufficiently identified to determine whether there has been a proper decision authorise the Motion. Nor am I satisfied, given the limited and unsatisfactory notification of the meeting, that adequate notice was given of the specific purpose of the meeting or that those Worimi people affiliated with the land were put on notice of the holding of the meeting. In the case of the notice published in *The Newcastle Herald*, for example, it was not prominently placed in any Public Notice section, but rather appeared in the Positions Vacant column, which is not a location which would appear immediately relevant to those persons interested in looking at Public Notices. In relation to *The Koori Herald*, it is not apparent where and on which page the advertisement was located. In the case of *The Australian*,*

¹² This and the above passage was cited with apparent approval by Tamberlin J in *Ridgeway on behalf of the Worimi People, in the matter of Russell v. Bissett-Ridgeway* [2001] FCA 848 at pp.7-8.

the notice was in the Public Notices section, but there is not evidence or indication that members of the Worimi claim group would be likely to read The Australian, or indeed The Newcastle Herald, on a daily basis. I am satisfied that there is substantial force in the submissions advanced for Bissett-Ridgeway in relation to the failure to adequately identify members of the claim group and the manner in which the meeting was convened.

In addition to the unsatisfactory nature of the identification of the claim group and the way in which the meeting was called, there are further considerations in relation to the decision-making process followed at the meeting. The process appears to have been agreed upon at the meeting on an ad hoc basis by those present as an expedient course to adopt for the purposes of that particular meeting. The evidence does not establish that the decision-making process of nominating representatives of seven families was in accordance with any accepted or pre-existing traditional method of decision-making. It has not been shown that the seven families who adopted the procedure at the meeting constitute all or even a significant proportion of the persons comprised in the claim group. Nor is there any documentary record of the meeting which would enable the Court to consider the precise terms of the decision actually made"

The identity of members of the Quandamooka claimant group

29. The starting point in determining a section 66B motion is to identify the members of the native title claim group and to establish whether or not there is a process of decision-making under the traditional laws and customs of the persons in the native title group.¹³ It follows that an applicant must establish that such laws and customs exist and have been followed or prove that they no longer exist and that an alternative decision-making model has been adopted by the whole claim group, which procedure has been complied with to authorise the application for removal. Neither has even been attempted by Mr Delaney in his material.
30. The two applications in the present proceedings do not list the individual names of persons in the Quandamooka claimant group. To comply with section 61 of the Act both of the amended applications in proceedings QG 6010 of 1998 and Q6024 of 1999 state *inter alia* that:

"The application of Dale Alfred Eugene Ruska and Ian Delaney. The applicants have been authorised to make this application on behalf of the Nunukel, Ngugi and Korenpu subgroups comprising the Quandamooka peoples.

Schedule A [Act, s 61]

*The names (including the Aboriginal names) of the persons on whose behalf this application is made (**the native title claim group**) or a sufficiently clear description of the persons so that it can be ascertained whether any particular person is one of those persons."*

Schedule A to the application asserts that the "*application is made on behalf of the following*

¹³ In *Duren v. Kiama Council* [2001] FCA 1363, Lindgren J, in dismissing a similar application held: "*The matter of the authorising of a person to make an application is dealt with in s 251B of the Act. The starting point is to identify the members of the native title claim group and to establish whether or not there is a process of decision-making under the traditional laws and customs of the persons in the native title group. It is clear beyond question that the affidavits here do not even begin to address either of those questions. 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 do not address the question whether there is, or is not, a decision-making process under the traditional laws and customs of the Elourea Aboriginal People.*"

groups of people in accordance with traditional law and customs” before listing 11 family names.

31. The National Native Title Tribunal delegate properly accepted this description as sufficient for the purposes of sections 61 and 190B(3) of the Act. This issue is not disputed and is not under consideration in the present proceedings. It is referred to merely to demonstrate that there is no proper basis to suggest that Mr Ruska is not a member of the Quandamooka native title claimant group. He is a member and spokesperson for the “Moreton group” which is one of the families listed in Attachment A to both applications.¹⁴
32. In this evidentiary context, the bare assertion by Ms Antony that she obtained “*from the Quandamooka Land Council a list of people who are members of the claim group in these proceedings*” falls far short of the evidentiary standards that should apply.
33. The authorisation spoken of in sections 66B and 251B is that of the claim group. That is defined under sections 61(1) and 253 of the Act as those who hold native title rights, not just those that may appear on an unsourced list. In the present material the identity of the person who produced this list, his/her authority to certify the list as one of all registered claimants and the list itself is not even published. Even if this list is valid it does not cover those entitled to native title rights and therefore to determine authority, who have not registered with the Quandamooka Lands Council to date.
34. There are fundamental shortcomings in the evidence which bespeaks a frivolous approach to litigation funded primarily by the public purse. These shortcomings are only compounded by how the meeting was convened and conducted (as described in Mr Ruska’s 11 December 2001 affidavit), particularly having regard to the consent order of the Court following the mediation before the Registrar.

Is Mr Ruska no longer duly authorised by the claimant group and has Mr Delaney been authorised by the claimant group to bring an application for the removal of Mr Ruska?

35. Mr Delaney relies upon the 20 October 2001 meeting to seek to establish his case. As has been demonstrated above, it does not do so.
36. The observations in *Risk v National Native Title Tribunal* [2000] FCA 1589 (10 November 2000) by O’Loughlin J at para 48 of the result in *Moran* (supra) are quite apposite:

“At the end of the day both Mr Allen and Ms Moran were the losers. Mr Allen succeeded in establishing that Ms Moran no longer commanded the allegiance of all the group but Mr Allen failed to establish that he did. As His Honour [in Moran] said in his concluding remarks: ‘It is important that those who come to the Court asserting a native title right, with all this involves in terms of effort and expense to other parties and the Court itself, should be properly authorised to make the claim. As I have explained, this does not necessarily mean the applicant must be individually authorised by each member of the claimant group. It will be enough that the

¹⁴ See generally the affidavit of Dale Ruska sworn and filed by leave on 11 December 2001. It is also not contended by Mr Ruska in these proceedings that Mr Delaney is not a member of the Quandamooka native title claim group.

applicant has been authorised to make the claim in accordance with a process of decision-making recognised under the traditional laws and customs of the claimant group.’’

37. It is incontrovertible that Mr Ruska was duly authorised by the claimant group to be an applicant on behalf of the native title group, that is, pursuant to section 61 of the Act.
38. Mr Delaney’s material in support of the present application only shows that 39 people at a meeting (with 26 opposing) expressed a loss of confidence in Mr Ruska and wished to have him replaced.¹⁵ The claimant group comprises of about 2000 or so members.¹⁶ The resolution at the 20 October 2001 meeting could not amount to evidence of a loss of confidence in Mr Ruska within a majority of the claimant group but should that have been the case, reference should be made to the apposite comments of Stone J in *Johnson, in the matter of Lawson v. Lawson* [2001] FCA 894, viz. that loss of confidence should not be confused with loss of authority.
39. The assertions by Mr Burns that in his opinion, the meeting was held as other Quandamooka Land Council meetings and is how Quandamooka group decision-making is commonly done is clearly insufficient to meet the evidentiary requirements of authorisation in sections 66B and 251B.¹⁷
40. As the respondent to the Motion, it is not, for Mr Ruska to disprove Mr Delaney’s authority in the latter’s bringing of an application for removal. The onus rests squarely upon Mr Delaney.
41. However, it is readily apparent upon the materials already before the Court and the National Native Title Tribunal that there exists traditional laws and customs of the Quandamooka claimant group in making decisions concerning the native title rights and interests of the community. These include an ILUA concerning the Dunwich sewerage plant and the original materials concerning the appointment of Messrs Delaney and Ruska as applicants. See Exhibit PM-8 to the affidavit of Ms Morreau filed 22 January 2002.
42. It is not Mr Ruska’s position that the matters set out in the ILUA certification provide an exhaustive list of the criteria that is necessary for a section 66B application, however it is submitted that such an application would require as a minimum, compliance with that criteria in seeking the authority of the claimant group. There are however several matters therein prescribed that have not been complied with by Mr Delaney and his group in their convening of the 20 October 2001 meeting viz.,

¹⁵ As shown above, there is insufficient evidence as to compliance with the claim group’s traditional laws and customs or any other agreed process in ascertaining that view.

¹⁶ See para 18 of Mr Ruska’s 11 December 2001 affidavit.

¹⁷ See relevantly *Ridgeway on behalf of the Worimi People, in the matter of Russell v Bissett-Ridgeway* [2001] FCA 848 per Tamberlin J at paras 31-32:

“In this case, no evidence has been relied upon to submit that the 15 February meeting adopted a traditional or customary process of decision-making. The affidavits of Merrick and Anderson both state, in the same words, that the meeting:

‘sought a way of [authorising the removal and replacement of Bissett-Ridgeway] ... which was consistent with the way in which Worimi people have always made decisions about Worimi business. We prefer to reach agreement where possible about matters affecting us. We do not avoid disagreement but try to work together even where there is a difference of opinion.’

This statement, in itself, is not sufficient to establish the adoption of customary or traditional processes at the 15 February meeting...”

- 42.1. Ensuring that ample notice (approximately 21 days notice was given in relation to the ILUA) is given to the listed registered claimants with a contact to provide travel assistance to the meeting from the mainland. Publication in local newspapers likely to be read by indigenous people particularly from within the claim group.
 - 42.2. Ensuring that full details of the issue to be discussed is sent out to the claimants so that pre-meeting discussion could take place.
 - 42.3. Assessment at the commencement of the meeting to ascertain the representative nature of the descent group members present at the meeting to determine whether a decision can be made at the meeting with the authority of the entire native title claim group on the particular issue.
 - 42.4. Consultation of the Elders present to make this interim determination;
 - 42.5. Ensuring that only those members that enjoy the authority of their respective decent groups to participate in the determination of the issue at hand;
 - 42.6. Making a sensible attempt at determination by consensus.¹⁸
43. These measures may or may not increase the numbers who attend meetings but it does ensure that those who wish to be involved in important decisions of the claim group are at least given that opportunity. The claim group demographic is disparate but generally the cost of attending is often likely to be prohibitive and otherwise requires considerable planning.¹⁹ This is a representative claim and there is a need to ensure that those attending the meeting are representative of the 11 descent groups and speak with the authority of these groups.
44. It is telling that the terms agreed to between Messrs Delaney and Ruska with the Registrar in mediation in respect of Mr Delaney's earlier similar application reflected the conditions under which important meetings are held.

Conclusion

45. It is accepted that summary dismissal of an application pursuant to *Order 20 rule 2* ought to be cautiously exercised. Wilcox J in *Moran* held:

"It will not, ordinarily, be appropriate summarily to dismiss a proceeding that is even arguably justifiable. However, in a clear case, there is every reason to exercise the power, and thereby free other parties from the burden of the proceeding. Importantly, the power conferred by Order 20 rule 2 is not dependent upon an application by a party. The Court may exercise the power of its own motion; although of course the Court must always warn the parties of the contemplated action and give them an opportunity to present submissions in relation to it."

46. At the directions hearing, notwithstanding several statements from Drummond J querying the efficacy of the material filed on behalf of Mr Delaney,²⁰ his counsel

¹⁸ The ILUA was passed unanimously and was registered with the Tribunal on 7 August 2000.

¹⁹ Contrast the financial mobility of shareholders in a multi-national corporation and their capacity to attend extra-ordinary general meetings.

²⁰ Coram Drummond J, p. 7 –9 including

"Now, Mr Duggan, I have just been looking at Section 66B. Given the reasonable assumption that this factional dispute is very likely to continue, how are you going to satisfy Section 66B(1)(b)? You have to satisfy Section – as I understand it, you have got to satisfy Section 66B(1)(a)(i) and also B(1)(b). Its not enough for you to just show that the current applicant, Mr Ruska, is no longer authorised by the claim group to make the application and to deal with

maintained that his case could rest on that material [see footnote 1].

47. The task of compiling the evidence necessary to determine the decision-making procedures within the community would involve a considerable amount of time and cost and undue pressure on the claimant group. It would involve a determination of all the issues associated with section 61, the genealogical evidence partly completed in the Connection report of Dr Memmott and widespread communications and meetings in the community. Despite all the indications by Drummond J on 11 December 2001 and the communication of these matters to the representative body, which has seen it appropriate to fund Mr Delaney's applications, Mr Ruska remains unfunded.
48. In all the circumstances it is submitted that it is the apparent on the material already before the Court, that the appropriate order would be that the Notice of Motion be summarily dismissed and Mr Ruska's costs be met by Mr Delaney, without it being necessary to require Mr Ruska to present the necessarily extensive evidence of the traditional laws and customs of the claimant group.

Further orders

49. It is equally obvious that the dismissal of the Notice of Motion is unlikely to resolve the current impasse in the claimant group. The unfortunate conflict within the two factions in the claimant group needs to be facilitated, mediated or arbitrated. As a minimum it would be necessary to engage an anthropologist to complete the genealogies and other investigations so that a model can be developed to ensure that conflicts between factions are resolved in an appropriate way given the depths of views to be canvassed in this process.
50. An order directing the arbitration of this conflict and indeed the creation of an easily identifiable structure that facilitates the decision-making processes of the claimant group seems a necessary precursor to any other aspect of determination of native title.
51. Power for the Court to intervene in this way is contemplated in section 53A of the *Federal Court Act 1967*. Mr Ruska would consent to an order for arbitration and has sought the concurrence of Mr Delaney to that end however, as apparent in the correspondence exhibited to the affidavit of Ms Morreau, this has not been forthcoming. It is submitted that a practitioner, despite having experience in native title work would not hold all of the skills necessary to facilitate this process. An arbitrator of experience in mediation/arbitration like a former Supreme Court or Federal Court Judge, as suggested in the correspondence, would be necessary given the depth of the issues that need to be resolved.

Ancillary matters

52. At the directions hearing, leave was granted to the State and Federal Governments and ACI to participate in this Notice of Motion. However, it is submitted that although these

matters arising in relation to it; you also have to show that the member that you want to be the replacement member is authorised by the claim group, not only to make the application but to deal with the matters arising in relation to it. How are you going to establish that given the not unreasonable expectation that this factional dispute is going to remain on foot?"

proceedings are in a public process of litigation, they do not affect in any way the rights of any party other than members of the claim group. For that reason, it is submitted that leave granted to those parties should be withdrawn as it would only unduly add to the cost of the proceedings.

Andrew Boe
22 January 2002