

11-1-2002

Reconciliation on the ground: meeting the challenges of native title mediation — Part 1

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Recommended Citation

Neate, Graeme (2002) "Reconciliation on the ground: meeting the challenges of native title mediation — Part 1," *ADR Bulletin*: Vol. 5: No. 6, Article 1.

Available at: <http://epublications.bond.edu.au/adr/vol5/iss6/1>

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ADR bulletin

The monthly newsletter on dispute resolution

Print Post Approved 255003/03417

Information contained in this newsletter is current as at November 2002

Volume 5 Number 6

Evaluating ADR in native title

Reconciliation on the ground: meeting the challenges of native title mediation — Part 1

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To begin: a short account of a long story

In 1992 the High Court of Australia decided in *Mabo v Queensland (No 2)* that 'the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands'.¹ That decision made it clear that the land mass of Australia was not terra nullius when the Crown assumed sovereignty. Rather, indigenous people held rights and interests in land which would be recognised and protected by the law of Australia.

The genesis of this landmark decision was a conference in Townsville, far north Queensland, in 1981 when the late Eddie Mabo met with lawyers to discuss the possibilities of a legal action to establish that Torres Strait Islanders had legally recognised rights in the Murray Islands (Mer, Dauar and Waier) in the Torres Strait. The proceedings commenced in the High Court in May 1982. The plaintiffs sought legal recognition and protection of the traditional land rights which they claimed to possess — rights which, they claimed, had existed in their people from time immemorial and which continued to exist despite the annexation by the Crown of the Murray Islands in 1879.²

On 27 February 1986 the then Chief Justice of the High Court, Sir Harry Gibbs, remitted the case to the Supreme Court of Queensland for a hearing of the evidence so that issues of fact raised in the case could be determined.³

The Queensland Parliament had passed legislation in 1985 which purported retrospectively to abolish or extinguish all such rights and interests as the Murray Islanders may have owned or enjoyed before its enactment.⁴ A High Court challenge to that legislation was successful and a majority of the Court⁵ ruled that the Queensland legislation was inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth).⁶ Consequently, under the Australian Constitution, the Queensland law was invalid because of the inconsistency.⁷

The hearing of evidence in the Supreme Court trial stretched over a three year period from October 1986 until September 1989. Some of the hearing was in Brisbane and some of it — unusually for that time — was on Mer and Thursday Islands in the Torres Strait. Justice Moynihan of the Supreme Court delivered his lengthy findings of fact in November 1990.⁸

The High Court heard legal argument in May 1991 and one year later, on 3 June 1992, declared that subject to certain exceptions 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands in the Murray Islands'.⁹



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The decision had, and continues to have, profound significance in Australia. Indeed its significance is recognised internationally and the UNESCO *Memory of the World* register contains the records of the case.¹⁰

But that was not the end of the story. The Meriam people originally asserted that they had native title to three islands in the Murray Islands group — Mer, Dauar and Waier. Because a sardine factory lease had been granted in the 1930s over Dauar and Waier, the High Court made no ruling on whether native title continued to exist there.¹¹ The question was left to another day. It was answered on 14 June 2001 when the Chief Justice of the Federal Court of Australia, Justice Michael Black, declared that native title exists over Dauar and Waier Islands.¹²

Many interesting comparisons can be made between the *Mabo* case and the subsequent determination of native title over Dauar and Waier Islands. For example:

- the *Mabo* dispute was resolved by litigation in superior courts, whereas the native title determination over Dauar and Waier was resolved by consent in mediation;
- the *Mabo* litigation took more than a decade to resolve, whereas the consent determination was reached in months once the mediation began;
- the Government of the State which had opposed the *Mabo* case supported the ruling in relation to the other two islands; and
- the High Court delivered its judgment in Canberra — about 2800 kilometres away from the land, whereas the Federal Court had a special sitting on Dauar Island to make the determination in the presence of the native title holders on their land.

So, on the islands where people had gone to Court to have their native title recognised, another new way of resolving native title issues was shown to work.

New scheme for resolving native title issues — an overview

How did such a change occur and what are the challenges ahead for Australia as we seek to recognise and respect different rights and interests on the ground?

The High Court's decision in *Mabo (No 2)* answered some questions but gave rise to many more. Because native title exists already — and, unlike statutory land rights, is not granted by the Crown — there were various questions facing indigenous Australians, governments and others with interests in land. For example:

- Where does native title exist?
- Who holds native title in relation to an area of land or water?
- What are the native title rights and interests in relation to each area?
- How are native title rights to be protected?
- What is the relationship between native title rights and interests and any other rights and interests in relation to each area?
- How can new interests be created in relation to areas where native title exists?

These are national issues with significant practical consequences. There were various options for dealing with them. One option was to allow indigenous Australians to assert their rights and, where it was necessary to prove those rights, require them to seek a judicial declaration that they hold native title. Another option was to create a more informal way of allowing indigenous Australians to assert their rights and allow others whose interests might be affected to negotiate with them about whether and how the native title should be recognised.

The latter approach was adopted in the *Native Title Act 1993* (Cth) (NTA), the preamble to which recites:

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character. Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

- (a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
- (b) proposals for the use of such land for economic purposes.

The main objects of the NTA include:

- providing for the recognition and protection of native title; and

• establishing a mechanism for determining claims to native title.¹³ The NTA commenced operation on 1 January 1994 and was extensively amended in 1998. Although the passages quoted from the preamble use the words 'conciliation' and 'negotiation', the amended Act contains numerous references to 'mediation' as the preferred process for resolving such issues.¹⁴ As one Federal Court judge has observed:

One important object and purpose to be found in the Act is resolution of issues and disputes concerning native title by mediation and agreement, rather than by Court determination. Detailed procedures are set out in the Act to achieve those objects.¹⁵

Another Federal Court judge stated:

Various provisions of the Act are designed to achieve reconciliation through mediation processes.¹⁶

And a third Federal Court judge has written:

Underlying the Act is an acknowledgment by Parliament that unless mediation or consultative processes are provided by the Act for the purpose of encouraging parties to use direct and less costly means of resolving their differences, the prosecution of 'inter partes' litigation on a 'parcel by parcel' basis will incur great cost and tend to prolong uncertainty about the existence and effect of native title.¹⁷

There has been some debate about whether 'mediation' is the correct word to describe the process set out in the Act. Whatever words like 'mediate' and 'negotiate' mean to each party, the aim of the process is to resolve a range of issues by agreements that will endure based on relationships that will develop. It can do what in many places has not been attempted before — reach mutually agreed and legally binding:

- native title determinations which set out exclusive and co-existing rights and interests in land or waters; and
- land use agreements.

Choosing whether to mediate or litigate

Legal context

People who claim to hold native title may:

- choose to have their rights recognised by seeking a declaration of their

common law rights from a State or Territory court of competent jurisdiction; or

- apply for a determination of native title under the NTA.

Almost all applications for determinations or declarations of native title are being processed under the NTA.¹⁸ At 28 October 2002, there were 616 active claimant applications at various stages in the system throughout Australia.

Reasons for mediating

There are two main reasons for preferring a mediated outcome to a litigated outcome. In summary:

- a mediated outcome is more likely to provide a complete resolution of the issues; and
- litigation is more expensive and may lead to an incomplete and less satisfactory result for the parties.

Experience to date supports both propositions.

First, a mediated outcome is more likely to be comprehensive and flexible in content with practical application to the parties affected and hence provide a long lasting and durable basis for the recognition, protection and exercise of the rights and responsibilities of the persons whose interests are involved.

The desirability of mediated agreements about the existence of native title was emphasised in a joint judgment in the *Waanyi* case, where five Justices of the High Court stated:

If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers.¹⁹

Indeed, it is arguable that a mediated outcome is the only way that the range of complex and interrelated issues facing a disparate set of parties can be addressed and settled. Such issues might arise where two neighbouring Aboriginal groups each assert overlapping native title rights in respect of

an area that includes various privately owned pastoral properties, interlinking public stock routes and camping reserves, exploration and mining interests (or applications for the grant of such interests), and national park land. The resolution of those issues involves not only the identification and recognition of a range of rights and interests (including native title) but also the establishment (or reconfiguration) and maintenance of relationships between people in the region.

There is judicial support for the proposition that a mediated outcome is desirable in such circumstances. Near the end of his judgment in the *Yorta Yorta* case, Justice Olney called into question 'the suitability of the processes of adversary litigation for the purpose of determining matters relating to native title',²⁰ especially where the issues are complex and the resources expended prove to be unproductive.

In his reasons for judgment in the *Spinifex* matter, Chief Justice Black congratulated the parties for resolving the application by agreement. He continued:

Discussions leading to consent determinations about existence and workings of native title will often involve very difficult questions for the parties to consider and yet agreement, if it can be reached, is highly desirable. The courts have always encouraged parties to settle their claims amicably and have often congratulated them when they have done so. I am following a long tradition of common law judges in congratulating the parties to this application; but I would add that it is especially desirable that there be agreed resolutions of applications for the determination of native title cases. These cases involve matters of great importance and great sensitivity to many people. If not resolved by agreement they can be lengthy and very costly to all concerned. They can also cause distress. If an appropriate outcome can be arrived at by agreement, and it is an outcome that represents goodwill and understanding on all sides, that is something to be applauded.²¹

Second, a litigated outcome is likely to be more expensive (in financial and personal terms) than a mediated outcome, narrower in the issues that



are resolved and, in some instances, less satisfactory to one or more of the parties.

The four cases decided by the Federal Court in 1998 and 1999 illustrate the scale of the cost. The hearing of the *Miriuwung Gajerrong* case²² ran for 83 days between 17 February 1997 and 23 October 1998. The *Yorta Yorta* case²³ ran for 114 hearing days between 8 October 1996 and 4 November 1998. The *Croker Island* case²⁴ was heard on 23 days between 22 April 1997 and 23 April 1998. The hearing of the *Hayes* case²⁵ took 35 days between 1 July 1997 and 9 February 1999. Court hearings can be very costly for parties. In the *Miriuwung Gajerrong* hearing at first instance, the costs for the WA Government were approximately \$8 million — approximately \$3.4 million of the State's costs and \$4.7 million of the applicants' costs as a result of a costs order.²⁶

The potential appellate workload in native title matters is also significant. For example, the decisions in the first three cases were appealed and the appeals were heard by the Full Federal Court in the second half of 1999.²⁷ In the *Miriuwung Gajerrong* appeal to the Full Federal Court there were 19 counsel, approximately 2000 pages of outline submissions, 3 weeks of oral submissions and 350 title extinguishment issues.²⁸ The judgments of the Full Federal Court in the *Croker Island* case, the *Miriuwung Gajerrong* case and the *Yorta Yorta* case²⁹ were appealed to the High Court.

It should also be noted that the costs in time and money are not the only costs of proceedings. The personal and emotional toll on the parties and the impact of such litigation on future relationships should not be underestimated.

Reasons for litigating

There are, however, at least two reasons why it may be appropriate for part or the whole of a matter to be litigated.

- Native title holders may consider that their native title will be compromised or significantly reduced if they agree to a determination in the form acceptable to other parties, and hence they may seek a determination from

the Federal Court of 'the nature and extent of the native title rights and interests in relation to the determination area'.³⁰

- There are important legal issues that need to be resolved and test cases are appropriate to obtain authoritative rulings.

Even in those cases, negotiations and mediation may still be necessary after judgment is delivered. Where the Federal Court makes a determination that native title and other legal rights exist, the Court will not resolve the numerous practical consequences of that decision. The position is well illustrated at the conclusion of the lengthy judgment in the *Miriuwung Gajerrong* case where Justice Lee wrote:

How concurrent rights are to be exercised in a practical way in respect to the determination area must be resolved by negotiation between the parties concerned. It may be desirable that the parties be assisted in that endeavour by mediation.³¹

Purpose and distinguishing features of native title mediation

Purpose of mediation

The NTA states that the purpose of mediation of native title claimant applications is to assist the parties to reach agreement on some or all of the following matters:

- (a) whether native title exists or existed in relation to the area of land or waters covered by the application;
- (b) if native title exists or existed in relation to the area of land or waters covered by the application:
 - (i) who holds or held the native title;
 - (ii) the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
 - (iii) the nature and extent of any other interests in relation to the area;
 - (iv) the relationship between the rights and interests in subparagraphs (ii) and (iii) (taking into account the effects of this Act);
 - (v) to the extent that the area is not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease —



whether the native title rights and interests confer or conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others.³²

These matters are, in essence, the matters to be included in a determination that native title exists. Such a determination could be made as a result of an agreement between the parties or after the Federal Court has heard a contested matter.³³

Some features of native title mediation

As noted earlier, there has been some debate about whether 'mediation' is the correct word to describe the process that is meant to lead to agreement about some or all of those matters. Whatever the arguments about the definition might be, 'mediation' is the term used by the NTA and hence by the National Native Title Tribunal (the Tribunal).

It is certainly the case that the circumstances in which native title mediation takes place are different in many respects from the circumstances surrounding other types of mediation. The following five examples highlight key differences.

- Most mediation (such as the mediation of commercial or matrimonial issues) involves two parties, yet native title mediation often involves scores, if not hundreds, of parties (for example, the Wotjobaluk people's application originally involved 447 parties organised into 17 groups according to their interests).
- Most mediation involves people who know each other and have an existing relationship. Although some native title cases involve people who have been sharing the land for generations, native title mediation often involves people who do not know (or even know of) the applicants and hence a relationship or series of relationships is developed in the course of and for the purpose of the mediation. Even where relationships are in place before the native title process unfolds, the nature of those relationships is likely to change by virtue of the assertion that native title rights exist and as a consequence of the process

by which the issues are resolved. Existing relationships are unlikely to be based on the rights of indigenous people that are legally enforceable rights *in rem*.³⁴ Native title rights attach to the land. They are not just rights held by particular people. New relationships are created in a context where, whatever the relative position and power may have been previously, indigenous people are now asserting that they have significant rights. Their assertions have consequences for the local community generally. The applicants should be taken seriously. Like it or not, governments, corporations, landholders and others have to sit down and talk face to face with the applicants. Whether the relationship is old or new, a power shift is foreshadowed by a native title application and is precipitated by the process of resolving it.

- Most mediation is supported by a common understanding of or background to the matters in issue, yet native title mediation involves an attempt to understand and reconcile culturally different (and divergent) views of land and waters.
- Most mediation is a form of ADR, yet native title mediation does not commence because of a dispute but by an application for a determination of pre-existing rights which may affect the rights and interests of others.
- Native title mediation can take a long time. Various factors (including the number of parties, the area of land or waters covered by the application, the number and range of issues that need to be resolved, and the human and financial resources available to the parties and the Tribunal) will influence the pace and duration of the mediation process. It can often take years.

Because of those differences, native title mediation poses particular challenges for the parties and the mediator(s). Accordingly, techniques need to be developed and employed for the purpose of native title mediation generally, and often on a case by case basis.

Understanding native title as a basis for mediation

Fundamental to the successful resolution of native title applications is

an understanding of what native title is.

Although not every party to an application will need to comprehend the nature and extent of the native title rights and interests to the area covered by the application, the major parties should attempt to focus on what might be recognised, either by agreement of the parties or by the Federal Court after hearing evidence and submissions. Applicants need to understand what is — and is not — meant by 'native title' so that they can make well informed applications. Governments need to understand the potential scope of native title rights and interests and, in light of that general understanding, consider what is being asserted on a case by case basis.

The legal framework for an understanding of native title is found in various statutes (primarily the NTA) and in the common law (primarily the decisions of Australian courts from *Mabo v Queensland (No 2)* onwards).

In *Mabo v Queensland (No 2)*, Brennan J (with whom Mason CJ and McHugh J agreed) delivered the lead judgment. He stated:

The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants ...

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.³⁵

Justice Brennan's statements, and statements by other members of the Court in a similar vein, have been adopted in a number of subsequent decisions by the High Court and the Federal Court.³⁶

In the NTA, the main part of the definition of 'native title' found in s 223 is as follows.

Common law rights and interests
(1) The expression 'native title' or 'native title rights and interests' means the communal, group or individual



rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), 'rights and interests' in that subsection includes hunting, gathering, or fishing, rights and interests.

The same, or similar, definition is used in State and Territory legislation.

Some general observations can be made about native title. Although native title is recognised by the judgments and statutes of the general law of Australia, its source is in the traditional laws and customs of the group of people who have a connection with a particular area of land or waters. A majority of the High Court stated in 1998:

Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* prerequisite for native title but their existence is not a *sufficient* basis for recognising native title.³⁷

More recently, a majority of the High Court observed that the NTA:

... presupposes that, so far as concerns native title rights and interests, the two systems — the traditional law acknowledged and the traditional customs observed by the relevant peoples, and the common law — can and will operate together. Indeed, not only does it presuppose that this will happen, it requires that result.³⁸

Because native title rights and interests come from traditional laws and customs, the content of those rights and interests will not necessarily equate to other forms of property under the general law. Courts have described

native title as *sui generis* or unique. For the same reason, native title rights and interests may vary from place to place and group to group around Australia.³⁹

Native title is different from statutory land rights titles. Under statutory land rights schemes, groups of indigenous Australians are granted a fee simple title or a lease by the Crown. Native title is the recognition of something which groups of indigenous Australians already have.⁴⁰ Native title laws exist to identify, recognise and protect what already exists. The Crown grants nothing, as native title is not the Crown's to grant.

Although it has survived more than two centuries of introduced common law and statutes, native title has been described as fragile. It can be extinguished by a range of valid acts of the Crown. Consequently, the law will not recognise native title rights and interests in areas where as a matter of law native title has been extinguished — irrespective of whether indigenous Australians retain traditional links to and use of those areas.

In some areas, native title might survive in a limited form where there are other overlapping, non-exclusive legal interests which do not extinguish native title. The High Court and the Parliaments have recognised that there are tenures which give title holders certain legal rights which prevail over native title rights where there is an inconsistency between the two. Where there is no inconsistency, the native title rights and interests survive.⁴¹

The common law of Australia on native title is developing from case to case.⁴²

Procedures of native title mediation

Statutory scheme

The statutory scheme for the resolution of native title claimant applications provides that:

- claimant applications are to be filed in the Federal Court;
- applications are sent to the Registrar of the Tribunal (the Native Title Registrar) who undertakes various administrative procedures (including applying the registration test to each application and notifying the relevant persons and bodies and the public about each application);

Native Title Application Process			
Main steps in native title applications	Responsible agency:		Relevant section of the <i>Native Title Act</i>
	<i>Federal Court</i>	<i>National Native Title Tribunal or equivalent State or Territory body</i>	
Filing	Application filed and checked for compliance with procedural requirements		s 61 s 61A s 62
Referral #1	Application referred to Tribunal or equivalent body		s 63
Notification #1		State or Territory Government and native title representative bodies provided with a copy of application	s 66(2) s 66(2A)
Registration		Registration test applied to native title application	s 190B s 190C
Notification #2		Native title application advertised and other potential parties notified	s 66(3)
Parties	Applications for party status assessed and determined		s 84 (s 84A)
Referral #2	Native title application referred to Tribunal or equivalent body for mediation		s 86B
Mediation		Mediation conducted	s 136A
Agreement		Mediated agreement referred to Federal Court	s 136G(1)
Agreed determination	Court considers if appropriate to make determination of native title		s 81 s 87 s 94A
No agreement		Tribunal makes mediation report to Federal Court	s 86E s 136G(3)
Contested determination	Court decides whether to make a determination of native title (Court may refer matter back to Tribunal or equivalent body for further mediation)		s 81 s 94A s 86B(5)

- after registration testing and notification, the Federal Court decides who should be parties to the proceedings and whether each application should be referred to the Tribunal for mediation;⁴³
- the Tribunal carries out the mediation of each matter referred to it and reports to the Federal Court on the progress of mediation; and
- where native title exists, the Federal Court makes an appropriate determination of native title, either in or consistent with the terms agreed by the parties or as decided by the Court after a trial.

The various steps taken in relation to a native title application are summarised in the table above.

National Native Title Tribunal: powers and functions

Establishment and purpose

The Tribunal⁴⁴ is an administrative body⁴⁵ established⁴⁶ in accordance

with the main objects of the NTA,⁴⁷ with power to make determinations about whether certain future acts can be done and whether certain agreements concerning native title are to be covered by the NTA, and to provide assistance or undertake mediation in other matters relating to native title.⁴⁸ The powers and functions, membership and administration of the Tribunal are governed by the NTA and its Regulations.

Powers and functions of the Tribunal in relation to native title matters

The NTA confers various specific functions on the Tribunal, only some of which are directly relevant for the purposes of this article.

The Tribunal has certain functions in relation to Federal Court proceedings arising from native title determination applications, revised native title determination applications and compensation applications. When

the Court refers proceedings to the Tribunal for mediation, the Tribunal holds conferences of the parties.⁴⁹ The Act sets out how mediation conferences are to be conducted, who may attend or participate in the conferences, the circumstances in which questions of fact or law may be referred to the Court and the way in which reports about the mediation are to be made to the Court.⁵⁰

Tribunal's way of operating

The Tribunal must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way.⁵¹ In carrying out its functions the Tribunal may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved.⁵² The Tribunal is not bound by technicalities, legal forms or rules of



evidence.⁵³ The Tribunal may sit at any place in Australia or in any other place to which the NTA extends.⁵⁴

Regulations may make provision in relation to the way in which any assistance or mediation is provided by the Tribunal.⁵⁵

The Tribunal may carry out research for the purpose of performing its functions, including research into anthropology, linguistics or the history of interests in relation to land or waters in Australia.⁵⁶

How native title mediation occurs under the Native Title Act

Generally speaking, the Federal Court refers every claimant application to the Tribunal for mediation, including the ascertaining of agreed facts, as soon as practicable after the end of the notification period for the application.⁵⁷ In addition, the Court may, at any time in a proceeding, refer the whole or part of the proceeding to the Tribunal for mediation if the Court considers that the parties will be able to reach agreement on any of the matters set out in s 86A(1).⁵⁸

Numerous factors will affect how mediation occurs in each case. There is no one way of proceeding and the Tribunal is given considerable flexibility in the performance of its functions.

The Tribunal 'may hold such conferences of the parties or their representatives as the Tribunal considers will help in resolving the matter'.⁵⁹ There is no requirement to hold a conference of all the parties (which was known as a 'plenary conference'), though such a conference may be appropriate in some instances.

Each mediation conference must be presided over by a member of the Tribunal or a consultant engaged by the President of the Tribunal for that purpose.⁶⁰

A mediation conference must be held in private, unless the member presiding directs otherwise and no party objects.⁶¹ The 'without prejudice' nature of the conferences is protected by the NTA which provides that in a proceeding before the Court evidence must not be given and statements must not be made concerning any word

spoken or act done at a conference unless the parties otherwise agree.⁶² In addition, the presiding member may prohibit or restrict the disclosure of any information given or statements made at a mediation conference, or the contents of any document produced at a conference.⁶³

The Tribunal member or consultant appointed by the President to conduct mediation in particular proceedings⁶⁴ will develop a process or framework for progressing from stage to stage towards the resolution of the issues raised by the application. The program should include a timeframe for mediation or for each stage of the process.

Usually there are various stages of mediation, many of them more aptly described as 'pre-mediation'. The Tribunal may, for example, be involved in capacity building, so that parties are better equipped to take part in the process. That may include:

- informing parties about the procedures, steps in the process (and what they may need to do at critical stages), possible timeframes and possible outcomes; and
- helping to establish effective communication within and between parties so the members of each group that is a separate party (such as claimant groups who may need to establish a steering committee), each group of parties with common interests (such as pastoralists who may engage a common representative), and their representatives are informed at each stage of the process.

The Tribunal will also attempt to adapt conventional interest based mediation techniques to the circumstances of these multi-party, cross-cultural situations. For example, some disputes between neighbouring Aboriginal groups may arise under, or involve issues of, traditional law and custom. Those disputes fall to be resolved under the NTA. Recognition of local traditional laws and customs may be significant to both the resolution process and outcome so that the results are durable.

In deciding how best to proceed in each case, the parties and the Tribunal need to answer various questions



including: Who should meet? In what order should parties meet?

Who should meet?

The presiding member may direct that only one or some of the parties may attend or be represented at a mediation conference. The presiding member may also, in certain circumstances, exclude a party or a party's representative from a conference.⁶⁵

If all the parties present at a conference consent, the presiding member may direct that other persons be permitted to attend as observers of the conference, or to participate in the conference where their participation would assist the parties to reach agreement on any of the matters mentioned in s 86A(1).⁶⁶ At some stages, the parties may not meet at all, but may communicate with each other by way of 'shuttle diplomacy' conducted by the mediator.

Factors influencing who should attend a mediation conference include:

- the numbers of parties;
- whether the parties have been grouped according to their interests by the Federal Court or by the parties themselves;
- whether the parties are represented or are acting on their own behalf; and
- what matters need to be resolved.

In what order should parties meet?

The more parties and issues there are, the more the mediator needs to give attention to arranging an orderly and effective series of meetings between some or all of the parties. Factors influencing the order in which mediation conferences take place include:

- the number of parties;
- the number and range of issues;
- whether a question of fact or law that is relevant to those parties has been referred to the Federal Court for determination;⁶⁷ and
- the extent to which the issues relevant to some parties are influenced by the resolution of other issues.

The following examples show how circumstances can influence the order in which parties meet.

Resolving disputes between neighbouring indigenous groups

If there are disputes between neighbouring indigenous groups, particularly if there are contested overlapping applications, those issues may need to be addressed at the outset because governments and other parties⁶⁸ will not usually consent to a determination of native title where there is a dispute between Aboriginal groups about who

The more parties and issues there are, the more the mediator needs to give attention to arranging an orderly and effective series of meetings between some or all of the parties.

holds native title in relation to the area.⁶⁹

As a general rule, there can be only one determination of native title for an area.⁷⁰ Although such a determination may be in favour of more than one group,⁷¹ it is important to identify who can establish native title rights and interests for an area so that any determination includes all relevant people. It is in the interests of indigenous groups to resolve these matters between themselves where possible and so avoid a public trial in the Federal Court where culturally sensitive issues would be dealt with in an adversarial context (between indigenous groups, as well as between applicants and other parties) where a Court would impose a decision made under the general law of Australia rather than local law and custom.

Because the resolution of overlapping applications is often a threshold issue, there may be related questions about whether the matter is best dealt with by:

- the native title representative body exercising its statutory dispute resolution function,⁷² with or without the assistance of the Tribunal;⁷³ or
- mediation conducted by the Tribunal at the direction of the Federal Court.⁷⁴

The Tribunal may offer various types of assistance at this stage, in addition to mediation. The Tribunal's geospatial

unit might, for example, provide maps showing the area in dispute so that the groups can negotiate about the extent of each group's traditional country by reference to topographic features and named sites or Dreaming tracks across the landscape. The Tribunal's research section sometimes prepares research reports, which collate published material about the area in dispute or each group who asserts native title

over the area. These documents do not offer a commentary on the material, nor is there any analysis that might indicate any assessment of the relative prospects of success of each application. They merely put into the hands of relevant parties the material that is already on the public record but which may not all be known to each party. Such material produced by the Tribunal⁷⁵ may assist, even expedite, the resolution of issues so that the applicants can then have useful meetings with other parties.

In some cases, the mediation of overlapping applications will take years, and hence it will be years before other parties become actively involved in mediation.

One party taking the lead

Some parties may be guided by the approach taken by one or more of the other parties. Landholders whose rights to the land are granted and regulated by a State or Territory government may look to that government for guidance on whether native title exists. If the government is satisfied that the applicants' case is sound, other parties may be willing to negotiate land access agreements on that basis. Accordingly, priority may be given to communications between the applicants and the government before engaging in concentrated mediations with others.



Keeping parallel negotiations co-ordinated

Because an agreement (or absence of agreement) between some parties may influence the attitude of other parties or the options open to other parties, the Tribunal needs to monitor each set of negotiations and, where appropriate, communicate between parties to ensure that any agreement is consistent with other agreements. For example it would not be possible to resolve a native title application by consent if different parties agreed to a determination that native title exists but differed about:

- the composition of the group of native title holders; or
- the nature, extent and manner of exercise of the native title rights and interests.

Keeping all parties 'in the loop'

Experience is demonstrating the importance of involving all parties at significant stages of the process. If, for example:

- the parties agree to a staged mediation (with, say, the applicants and the State attempting to reach agreement first); and
 - selected parties are negotiating positively towards a consent determination of native title,
- the mediator needs to be attuned to the stage at which other parties should be re-engaged in the process. There is a real risk that if:
- the major parties reach agreement;
 - that agreement is recorded in writing in precisely negotiated terms; and
 - other parties are presented with a document with which they broadly agree but the terms of which they want to revise,

the agreement making process will be stalled, even retarded, because the detailed results of protracted negotiation are gradually pulled apart and attempts are made to recast the agreement in terms that are acceptable to all the parties and to the Court.⁷⁶ So, for example, graziers and those in the fishing industry may not accept as a *fait accompli* the terms of an agreement negotiated (with their knowledge but without their participation) between the applicants and the State. ●

This is Part 1 of a slightly revised version of a paper presented to the Asia Pacific Mediation Forum 'Reconciliation: conversations beyond cultural boundaries' University of South Australia 29 November to 1 December 2001 <www.unisa.edu.au/cmrg/apmf>. Part 2 will appear in a forthcoming issue.

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Endnotes

1. (1992) 175 CLR 1 at 15. For more about the 'long story' referred to in the heading see Keon-Cohen B A 'The Mabo litigation: a personal and procedural account' (2000) 24 MULR 893.

2. See *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 199; 83 ALR 14 at 18 per Wilson J.

3. *Mabo v Queensland* (1986) 64 ALR 1; 60 ALJR 255.

4. *Queensland Coast Islands Declaratory Act 1985* (Qld).

5. Brennan, Deane, Toohey and Gaudron JJ; Mason CJ, Wilson and Dawson JJ dissenting.

6. *Mabo v Queensland (No 1)* (1988) 166 CLR 186; 83 ALR 14. The Queensland legislation was subsequently repealed by the *Torres Strait Islander Land Act 1991* (Qld).

7. Section 109 of the *Constitution* states: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

8. For a partial report of his decision see *Mabo v Queensland* [1992] 1 Qd R 78.

9. *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1 at 56.

10. The other Australian Collection listed on the *Memory of the World* register is the manuscript journal of Captain Cook on board the *Endeavour* in 1768-71.

11. See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 72-73 per Brennan J, at 117 per Deane and Gaudron JJ, at 197 per Toohey J and at 175 per Dawson J.

12. *Passi on behalf of the Meriam People v Queensland* [2001] FCA 697 (14 June 2001); BC200103037.

13. NTA s 3(a) and (c).

14. References referring to mediation in the NTA include ss 4, 43A, 44F, 44G, 79A, 86A, 86B, 86C, 86D, 86E, 108, 123, 131A, 131B, 136A, 136D, 136G, 136H, 183. Before the 1998 amendments the Act contained only one reference to mediation.

15. *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109 at [28] per Emmett J. See also *Smith v Western Australia* (2000) 104 FCR 494 at 499 [24] per Madgwick J; *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 at 5; 148 ALR 46 at 48–49 per Black CJ.

16. *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 at 16; 148 ALR 46 at 59 per Lockhart J.

17. *North Ganalanja Aboriginal Corporation v Queensland* (1995) 61 FCR 1 at 17; 132 ALR 565 at 580 per Lee J.

18. Although native title holders could seek a common law declaration from an appropriate court, few have chosen to do so. See, for example, *Utemorrh v Commonwealth* (1992) 108 ALR 225; 66 ALJR 642, and subsequent unreported decisions of the Supreme Court of WA; *Jones v Queensland* [1998] 2 Qd R 385.

19. *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 617 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ. See also *Fejo v Northern Territory* (1998) 195 CLR 96; 156 ALR 721 at 742–45 per Kirby J.

20. *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998); BC9806799 at [130].

21. *Anderson on behalf of the Spinifex People v Western Australia* [2000] FCA 1717 (28 November 2000); BC200007246 at [7]–[8].

22. *Ward on behalf of the Miriuwung Gajerrong People v Western Australia* (1998) 159 ALR 483.

23. *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998);

BC9806799.

24. *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370.

25. *Hayes v Northern Territory* (1999) 97 FCR 32.

26. See Australian Law Reform Commission (ALRC) *Managing Justice: A Review of the Federal Civil Justice System* Report No 89 (2000) para 7.43. The costs decision was subsequently set aside on appeal in *Western Australia v Ward* (2000) 170 ALR 159. The decision in that case was the subject of an appeal to the High Court; see *Western Australia v Ward* (2002) 191 ALR 1.

27. See *Commonwealth v Yarmirr* (1999) 101 FCR 171; 168 ALR 426; *Western Australia v Ward* (2000) 99 FCR 316; 170 ALR 159.

28. ALRC above note 26 at para 7.43.

29. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244; 180 ALR 655.

30. NTA s 225(b).

31. *Ward on behalf of the Miriuwung Gajerrong People v Western Australia* (1998) 159 ALR 483 at 639. See also *Wik Peoples v Queensland* [2000] FCA 1443 (3 October 2000); BC200006103 at [5].

32. NTA s 86A(1); see also ss 94A and 225.

33. In either case, s 225 of the NTA states that ‘a “determination of native title” is a determination of whether or not native title exists in relation to a particular area (the determination area) of land or waters’. It then lists what is decided by the determination, such as who holds the rights to the native title and the extent of those rights.

34. See *Wik Peoples v Queensland* (1994) 49 FCR 1; 120 ALR 465; *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151 at 175; 152 ALR 294 per Drummond J; *Western Australia v Ward* (2000) 99 FCR 316 at 368–69, 375; 170 ALR 159 at 208–209, 215 per Beaumont and von Doussa JJ; *Mitakoodi/Juhnjar People v Queensland* [2000] FCA 156 (18 February 2000); BC200000389 per Spender J; *Munn for and on behalf of the Gunggari People v Queensland* [2001] FCA 1229 (23 August 2001); BC200105205 at [22] per Emmett J; *Gale v NSW Minister for Land and*

Water Conservation [2001] FCA 1652 (23 November 2001); BC200107277 at [9] per Madgwick J.

35. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57–58.

36. See, for example, the recent decisions of the High Court in *Fejo v Northern Territory* (1998) 195 CLR 96; 156 ALR 721 at 737 per Gleeson CJ and Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Yanner v Eaton* (1999) 201 CLR 351; 166 ALR 258 at 277–78 [72]–[73] per Gummow J; *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 206 per Callinan J; and the Federal Court in *Hayes v Northern Territory* (1999) 97 FCR 32 at [10]. See also *Ward v Western Australia* (1998) 159 ALR 483 at 498; *Western Australia v Ward* (2000) 99 FCR 316 at 337; 170 ALR 159 at 178 per Beaumont and von Doussa JJ; *Wandarang, Alawa, Marra and Ngalakan People v Northern Territory* (2000) 104 FCR 380 at 391 per Olney J; *Commonwealth v Yarmirr* (1999) 101 FCR 171 at 183; 168 ALR 426 at 434 per Beaumont and von Doussa JJ; *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 536 per Olney J; *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998); BC9806799 at [4] per Olney J.

37. *Fejo v Northern Territory* (1998) 195 CLR 96 at 128; 156 ALR 721 at 737 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See also *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 120–21 [10] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, and at 149 [117] per McHugh J; *Western Australia v Ward* (2000) 99 FCR 316 at 338 [57], 349 [108]; 170 ALR 159 at 178, 189 per Beaumont and von Doussa JJ.

38. *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 128 [37] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

39. See *Mabo v Queensland (No 2)* 175 CLR 1 at 89 per Deane and Gaudron JJ; *Yanner v Eaton* (1999) 201 CLR 351; 166 ALR 258 at 278 [72] per Gummow J. See also *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 121–22 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, and at 183–84 per Kirby J; *Western*



Australia v Strickland (2000) 99 FCR 33 at 53 per Beaumont, Wilcox and Lee JJ; *Ward v Western Australia* (1998) 159 ALR 483 at 498–99, 582 per Lee J; *Western Australia v Ward* (2002) 191 ALR 1.

40. There is some debate about when native title comes into existence. See, for example, the discussion in Mantziaris C and Martin D *Native Title Corporations: A Legal and Anthropological Analysis* Federation Press Sydney 2000 chapter 1.

41. See principally *Wik Peoples v Queensland* (1996) 187 CLR 1; 141 ALR 129; see also ss 238, 247B and 248B of the NTA.

42. See, for example, the statements in *Western Australia v Commonwealth* (1995) 183 CLR 373 at 484–88. See also *Wik Peoples v Queensland* (1996) 141 ALR 129 at 228–32 per Gummow J.

43. See *Bropho v Western Australia* (2000) 96 FCR 453 at 455, 456, 461–62; 169 ALR 365 at 368, 373 per French J.

44. See s 253 of the NTA for definitions of ‘National Native Title Tribunal’ and ‘Tribunal’.

45. See, for example, *North Gananja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 621–23 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, 636–37, 641 per McHugh J, and 655 per Kirby J; *Fourmile v Selpam Pty Ltd* (1998) 81 FCR 151; 152 ALR 294.

46. NTA s 107.

47. NTA s 3.

48. NTA s 4(2) and (7).

49. NTA ss 61, 86B, 108(1A).

50. NTA ss 86E, 136A–136G.

51. NTA s 109(1).

52. NTA s 109(2). Similar provision is made for the Federal Court’s way of operating (s 82(2)).

53. NTA s 109(3). By comparison, the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders (s 82(1)).

54. NTA s 127. The Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (Cth).

55. NTA s 136H.

56. NTA s 108(2) and (3).

57. NTA s 86B(1). See *Bropho v Western Australia* (2000) 96 FCR 453 at 455, 456, 461–62; 169 ALR 365 at 368, 373 per French J.

58. See *Smith v Western Australia* (2000) 104 FCR 494 at 498 per Madgwick J.

59. NTA s 136A(1).

60. NTA ss 131A(1), 136A(2), (3) and (7).

61. NTA s 136E.

62. NTA s 136A(4).

63. NTA s 136F.

64. NTA ss 123(1)(b), 131A.

65. NTA s 136B.

66. NTA s 136C.

67. NTA s 136D.

68. See, for example, Esbenshade H W ‘The pastoralists’ perspective on mediating native title claims’ paper presented at the BLEC Native Title Conference 7–8 August 2001.

69. NTA ss 67, 68. See, for example, *Bidjara Aboriginal Housing and Land Co Ltd v Indigenous Land Corporation* (2001) 106 FCR 203 at 206 per Ryan, Drummond and Hely JJ. See also the comments of French J in *Strickland and Nudding on behalf of the Maduwongga People v Native Title Registrar* [1999] FCA 1089 (11 August 1999); BC9904589; (1999) 106 LGERA 8 at [23].

70. NTA s 68.

71. NTA ss 223(1), 225(a). See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 190, citing *Milirrump v Nabalco Pty Ltd* (1971) 17 FLR 141 at 273 and reports by Aboriginal Land Commissioners; *Wik Peoples v Queensland* (1996) 141 ALR 129 at 185.

72. NTA s 203BF.

73. NTA s 203BK.

74. NTA ss 67, 86B.

75. NTA ss 78, 108.

76. Experience in Queensland has shown that where parties agree on the form of a determination of native title, the Court takes an active role in settling terms of the order and will not consider itself obliged to adopt the language or drafting style of the parties. See, for example, the transcript of directions hearing in *Wik Peoples v Queensland* QG 6001/1998 before Drummond J in Brisbane on 17 April, 13 June, 26 June and 31 August 2000.