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Graeme Neate

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ADR Bulletin

Evaluating ADR in native title

Reconciliation on the ground: meeting the challenges of native title mediation — Part 2

Graeme Neate

How native title mediation occurs under the Native Title Act

Where should parties meet?

Where a mediation conference is held can significantly influence who will attend and how successful the conference may be. Factors influencing the venue for a mediation conference include:

- the number of parties;
- where the parties live or where they or their representatives have their headquarters;
- whether it is appropriate to meet on or near the area claimed;
- whether the parties have resources to travel to or be represented at meetings;
- whether a venue is appropriate for informal private negotiations of this nature (by contrast with places that are too formal or have negative connotations); and
- whether negotiations have reached a stage at which face to face meetings are not always necessary and teleconferences or videoconferences are appropriate.[1]

When should parties meet?

Timing of meetings can also be significant. Factors influencing when mediation conferences take place include:

- how many parties are to attend each meeting;
- whether each party is sufficiently informed about the mediation process and the possible outcomes to readily engage in mediation;
- what other commitments the parties have (for example, ritual business such as initiation ceremonies, mustering or other work commitments);
- whether representatives (rather than the parties) are to meet;
- other events which affect whether a meeting should occur (for example, the death of an elder applicant) or can occur (for example, wet season closing access to some areas); and
- whether the parties are awaiting a decision of the Federal Court on a question of fact or law referred to the Court.[2]

Much of the National Native Title Tribunal's (NNTT) time and effort is spent preparing parties for mediation. This preparation takes various forms including:

- contact with individuals by telephone or letter to answer their questions;
- providing parties with brochures (such as the Tribunal's *Fact Sheets* on various concepts and processes);
- meeting individual parties at appropriate places (such as community halls, their homes or a Tribunal office);
- convening series of meetings of parties with common interests (such as farmers or graziers, local government councillors and officers);
- convening community information sessions; and
- conducting interviews with local newspapers and on local radio stations.

Some more indirect preparation is done by liaising with peak industry and professional bodies to enable them to better inform and assist those of their members most directly affected by native title issues.

In various ways the parties are informed about the scheme of the *Native Title Act 1993* (Cth) (NTA) and, in particular, about the purpose of mediation, the way meetings are conducted, the role they may play in the mediation process and what they can

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expect from other parties, the role and function of the Tribunal and the possible outcomes of the process. This work is done by members and staff of the Tribunal. It is the mediator who actively prepares people for mediation and thus helps to establish the conditions under which mediation can occur.

Some people or bodies are involved in many or all mediations. For example, a State or Territory government will be a party to each application within its jurisdiction. Those parties or their representatives bring the benefit of their experience to the process. They know what to expect and what to contribute. Many others, however, are apprehensive, fearful, sceptical, antagonistic, even angry, about the native title claim (or claims) that affect them. Such people need to be informed and prepared before they will participate appropriately in the mediation process.

The Tribunal has proceeded on the basis that, before there can be any prospect of a mediated outcome, parties need to have at least a basic understanding of the process and its possible outcomes. It may be necessary to meet more than once with each party over some months so that they have a chance to absorb information, think through its implications for them and to ask, and have answered, any questions.

Mediation may be stalled at a critical stage where there is an issue that needs to be resolved before the parties can move on. Such examples include the following.

- A question of fact or law might be referred to the Federal Court for resolution,[3] or a significant issue in one matter might be on appeal to the High Court, and parties in other matters where the same issue has arisen may be reluctant to proceed further until that issue is resolved.[4]
- A government policy may need to be settled in relation to a critical issue in one or more native title applications, such as what form of management regime should apply on national parks where native title is shown to exist.

The resolution of such matters may substantially delay part or all of the mediation timetable.

How often should parties meet?

Sometimes it is important to maintain a momentum towards resolution of the issues and in other cases it is important to give sufficient time between meetings to allow issues to be resolved. Factors influencing the number and frequency of mediation conferences include:

- how many separate sets of negotiations are being conducted simultaneously;
- the extent to which the parties have human and financial resources to meet or be represented at meetings;
- the actions which a party or parties have to take between meetings (for example, seeking legal advice or a client's instructions on an issue, or preparing a connection report);
- the urgency or otherwise of resolving the native title application and associated issues; and
- what orders or requests the Federal Court has made.[5]

It is important that, bearing those factors in mind, the parties develop and review a staged program for the resolution of issues that are raised by the native title application. Each meeting should be part of a process towards recognised outcomes. The mediator's role is to encourage the progress of mediation. To some extent, the Federal Court will influence that timetable by requesting the Tribunal report on the progress of mediation generally or the mediation of specific issues.[6]

Some other aspects of native title mediation

Identifying and dealing with power imbalances

One potentially difficult aspect of each mediation is the difference in the relative power of the parties.[7] The power imbalances are not the same in each case. They can arise from differences in levels of knowledge and experience, the competence of each party's representatives and advisers, and the financial resources to engage in protracted mediation and, if necessary, court proceedings.

By asserting that they have native title rights and interests the applicants claim to hold legally enforceable rights *in rem* that exist now and into the indefinite future. The making of a native title application can have a significant impact on others and may suggest that the applicants have a substantial advantage in mediation. The practical reality may be quite different. First, the applicants bear the ultimate burden of proving that they have native title rights and interests.[8] Second, contrary to some widely held views, applicants are not generously funded to pursue their claims. Those groups which have obtained assistance from representative bodies[9] find that they are competing for a limited range of financial and human resources. For various reasons, some applicant groups have not attracted such assistance and have had to seek money, advice and other help elsewhere.

Some other parties have sufficient resources to participate to an appropriate extent. Many parties attend mediation conferences in person. Some need to join together and arrange representation from an industry organisation or legal representation. Some seek assistance from the Federal Attorney-General's Department.[10]

Just as power imbalances can arise in various ways, so there may also be various ways of dealing with them. The Native Title Registrar may give 'such assistance as he or she considers reasonable' to:

- help people prepare applications and accompanying material and to help them at any stage of a proceeding with matters related to the proceeding; and
- help other people, at any stage of a proceeding, with matters related to the proceeding.[11]

Such assistance may include providing research assistance (such as the research reports described earlier in relation to overlapping applications) or conducting searches of registers or other records of current or former interests in land or waters.[12]

In a broader sense, at least some of the assistance provided by the Tribunal is aimed at capacity building; that is, enhancing the capacity of parties to play an informed role in the mediation process.

The challenge for the mediator is to ensure that, where there are manifest

power imbalances between parties, each mediation conference is conducted in a way that gives each party a clear opportunity to explain its interests and seek an appropriate agreement on the matters in issue. There is always a risk that, in identifying and making allowances for a power imbalance, the mediator will lose the confidence of some parties in the mediator's independence and impartiality.

Independence and impartiality of the mediator

The mediator needs to try to establish the trust of parties:

- who have different levels of knowledge and understanding of the process and possible outcomes, and may need to be given some guidance in each mediation conference;
- some of whom are apprehensive about, or hostile to, the process; and
- who want to be sure that the mediator understands their particular circumstances and that that understanding will be reflected in the conduct of the mediation.

Although it is the parties, and not the Tribunal, who decide whether agreement is possible and what the agreement contains, the mediator will sometimes receive significant information (including about culturally sensitive matters) on a confidential basis. There are constantly competing demands on the attention of the mediator. At times of informal contact outside main meetings (such as during meal breaks or in the course of after work social relaxation in a country town), the mediator must be careful not to appear to be favouring a party or parties. This is a counsel of perfection. The best response is not to withdraw from personal contact (particularly where working between parties may facilitate an outcome) but to act in a manner which should not give rise to justified concerns.

Rights and interests in native title mediation

Although most native title mediation has involved an interests based approach, rights are not ignored. Indeed the matters specified in s 86A of the NTA as matters to be mediated are rights based. Those rights are established by reference to:

- legislation (Commonwealth, State and Territory);
- the common law (which, as noted earlier, is still developing); and
- the traditional laws and customs of the claim group(s) involved in the mediation.

Negotiations towards an agreed outcome (including a determination of native title) proceed against a background of what can be legally proved and enforced. Interest based agreements can be negotiated, however, despite what might be strictly established at law or because the law is uncertain on critical matters.

Where claimants consider that they could prove their native title rights in court, they may still have to decide whether to agree to something less than what they demonstrably hold because they lack the resources to proceed to a court hearing. The issue is a serious one for the parties (and may pose issues concerning the role of the mediator) given that:

- one object of the NTA is to recognise and protect native title;[13]
- a determination of native title is a determination of rights *in rem* rather than of rights between parties;[14] and
- as a general rule, there is to be only one approved determination of native title in relation to a particular area.[15]

Isolating and dealing with the issues

As noted earlier, s 86A(1) of the NTA provides that the purpose of mediation is to assist the parties to reach agreement on some or all of the matters listed there. That list provides the basis for determining:

- what issues are agreed between some or all of the parties;
- what issues need to be mediated;
- what information might be necessary to resolve the issues; and
- whether it would expedite the reaching of agreement on any matter in mediation if any question of fact or law were to be referred to the Federal Court for determination.

Some of the matters listed in s 86A(1) and the issues associated with them are set out below.

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Does native title exist in relation to the area of land or waters covered by the application?

This is the threshold issue. Parties from the area, or those who have done some research, may form a preliminary opinion about whether indigenous people have maintained the requisite links to the area. Information provided by the applicants (including information of the type provided to the Native Title Registrar) may assist the other parties to decide whether native title could continue to exist. The collation of published material about the area and research undertaken by one or more of the parties (such as the preparation of a Connection Report)[16] may confirm that native title exists. Research reports of the type mentioned earlier, prepared by Tribunal staff for the assistance of parties, may also be relevant.

Who holds native title?

In many instances, the main issue is not whether native title exists, but who holds it. The issue may arise particularly where:

- other parties do not know the applicants or have no knowledge of indigenous Australians with traditional links to the area; or
- there are overlapping native title applications.

In the former circumstance, the applicants will need to explain who they are and how their history links them to the area of land or waters covered by the application.

Where there are overlapping native title applications, or other indigenous Australians have contested some or all of the applicant's claim, this may be the critical issue to be resolved. In some instances, the overlap may be because members of one applicant group are unsure about the extent of their traditional country. That uncertainty may result from historical circumstances such as the relocation of groups or the separation and relocation of members of groups.

In other instances there are disputes between groups about the extent of each other's traditional country. As noted earlier, if there are disputes between neighbouring groups, particularly if there are contested overlapping applications, those issues may need to be addressed first. Governments and other parties will not usually consent to a determination of native title where there is a dispute between groups about who holds native title in relation to the area.

Sometimes the overlap may reflect areas which are traditionally shared. Although an area or particular place may be seen as primarily that of an identifiable group, there may be others with traditional rights and interests in, or responsibilities for, that land. It is not uncommon for sites at the edges of neighbouring estates to be areas where neighbouring groups are jointly involved in ceremonial activity.[17]

What is the nature, extent and manner of exercise of the native title rights and interests in relation to the area?

Given that:

- native title is *sui generis*, and so may not have the features of other estates or interests in land;
- the native title rights and interests of one group may be different from the native title rights and interests of another group;
- more than one group may have native title rights and interests in relation to an area of land or waters; and
- the content of the native title is relevant not only to the applicants but to others with interests in land which may involve inconsistent rights,

it is important that the parties seek to identify what the content of the native title is, and how it is to be exercised, on a case by case basis.

What is the relationship between native title rights and interests and other interests in relation to the area?

Most interests in land, such as a non-exclusive agricultural lease or a non-exclusive pastoral lease,[18] do not extinguish native title[19] but prevail to the extent of any inconsistency with native title rights and interests.[20] Consequently, the parties need to agree on the extent of the respective sets of rights and interests — which may vary from parcel to parcel — in order to work out the relationship between them.[21] In practical terms this can be resolved by agreements about how people go about their daily business, including indigenous land use agreements.

Agreements could be reached in conjunction with a consent determination and could deal, in the case of pastoral leases, with such matters as:

- a means of identifying who has native title rights which can be exercised on the land;
- methods of native title holders notifying the lessee about who is to have access to the land, the area to be accessed, the time and duration of the access, the purpose of the access and the name of a contact person;
- the use (if any) of firearms on the land;
- the consumption (if any) of alcohol on the land;
- any restrictions on the use of fire (such as for agreed purposes including campfires, cooking fires and ritual purposes);
- removal of rubbish from the land;
- practices for opening gates, closing gates or leaving gates to and on the land as they are found;
- whether vehicles should only use existing roads and tracks or can be driven elsewhere;
- whether the native title holders should contribute to the maintenance of roads used by them on a regular basis;
- whether any animals may be brought onto the land;
- whether native title holders should assist with the control of noxious weeds, vermin or feral animals on the land;
- the period during which native title holders may camp on the land;
- the extent to which native title holders may hunt, fish or collect bush medicine on the land;
- the extent to which native title holders may collect and use natural resources from the land;
- the identification and protection of sites of significance; and
- the processes for amending and resolving any disputes under the agreement.

Such agreements may take the form of indigenous land use agreements (ILUAs) that are registered and legally binding under the NTA.[22]

Other outcomes

In the course of mediating a native title outcome, some or all of the parties may decide to negotiate with a view to agreeing to action that will result in:

- the application being withdrawn or amended;
- the parties to the proceedings being varied; or
- anything else being done in relation to the application.

The agreement may involve matters other than native title. The parties may request assistance from the Tribunal in negotiating the agreement.[23]

Role of the Federal Court in relation to mediation

The parties and the mediator do not always determine the pace and purpose of mediation. The Federal Court has a role, which it is exercising increasingly, to supervise mediation and to set the timeframe within which a mediated outcome should be achieved.[24]

As noted earlier, each native title determination application made under the NTA is lodged in the Federal Court. Thus, whether or not there is a mediated outcome, native title applications begin and end as court proceedings. It is the Federal Court which decides:

- whether to refer an application to the Tribunal for mediation once the application has been notified;[25]
- whether the Court should mediate in respect of the matter;[26]
- whether mediation should cease in relation to the whole or a part of the proceeding;[27]
- whether a matter is set down for trial and, if it is, whether mediation should cease during the pre-trial period; and
- whether at any stage before or during a trial the whole or part of the proceeding should be referred to the Tribunal for mediation.[28]

While a matter is with the Tribunal for mediation the Court supervises the mediation by:

- requesting the Tribunal to provide mediation progress reports,[29] sometimes with increasing frequency,[30] or receiving mediation progress reports initiated by the Tribunal to assist the Court in progressing the proceeding;[31]
- holding directions hearings in relation to each matter; and
- holding case management conferences in respect of some matters.

The form of mediation progress reports has been settled by agreement between the Court and the Tribunal. Reports should not include confidential information. They should relate to the progress, not the content, of the mediation and should provide the Court with an assessment of whether or not further mediation is likely to achieve an agreed outcome. Mediation progress reports are sometimes, though not always, made available to the parties.[32]

As noted in the Tribunal's *Annual Report 2000–2001*,[33] the Federal Court looks to the Tribunal for clear assessments of the prospects of mediated outcomes in relation to native title determination applications and compensation applications. There is an increasing propensity for the Court to direct applications into trial unless a clear and concise timetable for resolution is advanced. In some instances the Court orders that mediation is to cease. In other cases the application remains in mediation while the parties prepare for trial. Case management in the latter category is aimed at encouraging the resolution of the issues, or at least the reduction of parties and issues, before the trial commences.

Although the Court acknowledges and encourages the desirability of mediated outcomes, the Court manages native title proceedings in light of various perceived imperatives, such as public confidence in the system and public interest in the timely resolution of native title matters. Some judges have expressed their concern about the length of time some matters are taking and have indicated that the parties and the Tribunal will need to provide a convincing basis for those matters remaining in mediation. For example, when making a consent determination for part of the Wik peoples' application, Justice Drummond said:

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> I still accept, at least for the moment, that an agreed resolution of the balance of the Wik peoples' claim is preferable to a court-imposed result. That is so because that is more likely to provide a more useful framework than a court decision limited to specific issues for dealing with the resolution of conflicting interests of the Wik peoples and particularly the pastoralists over the specific access and usage questions that are likely to arise in the future.
> But the Court cannot allow the remainder of the Wik peoples' claim to be the subject of yet more protracted negotiations. The cost benefits of such a negotiated resolution of a case, if that is ultimately achievable, in comparison with the costs of a court-imposed decision are likely to be largely illusory. The uncertainty for all with interests in the Wik peoples' lands, if allowed to continue for any extended further period, is unacceptable both to the public interest and to the interest of all the parties involved in this litigation.[34]

Statements such as that, together with close supervision by the Court, should encourage parties to seriously engage with each other, clarifying what is agreed and what is in dispute between them.

The Court may also convene case management conferences, sometimes presided over by an officer of the Court (such as a Deputy District Registrar), to resolve practical issues and to assist in progressing matters. Orders may be made obliging parties to take specific actions.

The Tribunal has also noted that the fact that the Federal Court is increasingly setting the timeframes for the mediation and litigation of native title applications can have implications well beyond the progress of a particular application.[35] Court orders may also affect the capacity of parties to engage in other activities, such as negotiating ILUAs and future act agreements.

The setting of matters down for trial has significant resource implications for the representative body acting on behalf of the applicants, as well as for parties who may be common respondents to other matters (such as a State or Territory government). The preparation and presentation of a court case draw substantially on resources which (in some instances) would have been directed to attempting a mediated outcome and will necessarily limit the resources available to mediate other claimant applications in the region as well as to undertake future act and ILUA negotiations.

Thus, although the Court is only directly guiding a limited number of matters with a limited range of outcomes, the case management practices of the Court can profoundly influence a range of other activities or potential activities. The extent of that influence supports the ongoing need for communications between key institutions and stakeholders and the desirability of the strategic listing and management of cases before the Federal Court.

Results of native title mediation

What happens when mediation succeeds?

If the parties agree on all of the matters set out in s 86A(1) of the NTA, the mediation can be described as successfully concluded.[36] The parties will set out their agreement in the form of an order of the Federal Court in relation to those matters.[37] As soon as practicable after mediation is successfully concluded, the presiding member of the Tribunal (or the consultant) must provide a written report to the Federal Court setting out the results of the mediation.[38] It is then for the Court to take the proceedings to conclusion. The Court may adopt any agreement on facts between the parties reached during mediation.[39]

The terms of the agreement, signed by or on behalf of the parties, will be filed in the Federal Court. If:

- the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court; and
- it appears to the Court appropriate to make an order in, or consistent with, those terms,

the Court may give effect to the terms of the agreement without dealing with the matters at a hearing.[40]

The Court has considerable discretion and will take into account a range of factors in deciding whether to make a determination in the form agreed.[41] Justice Emmett has stated:

> The Court must, of course, exercise caution where any declaratory order involving property rights is sought. Orders that have particular public interest elements require closer examination by the Court than orders that operate solely *inter partes*. A determination under the Act that native title exists, and perhaps even a determination that it does not exist, is a *real* action, in the sense that *an* order generally operates against the entire world. It does not only resolve an issue *inter partes*.[42]

An order making a determination of native title must set out details of the matters mentioned in s 225 of the NTA.[43] Where the Court proposes to make an approved determination of native title to the effect that native title exists, the Court must, at the same time as it makes the determination, make an appropriate determination under s 56 (which deals with holding the native

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title on trust) or s 57 (which deals with the non-trust functions of prescribed bodies corporate).[44]

Agreement by some or all of the parties on some matters may also be considered a successful outcome, particularly if the Court has to resolve fewer issues and there are fewer parties involved in the trial stage of the proceedings. Agreements may include or comprise of non-native title outcomes.[45]

What happens when mediation fails?

If the parties do not agree on the matters listed in s 86A(1) and have not reached an agreement under s 86F, the mediation has failed and the Federal Court may order that mediation ceases and that the matter be set down for trial.[46]

An order that mediation should cease can be made in various circumstances.

- The Court may, of its own motion and at any time in a proceeding, order that mediation is to cease in relation to the whole or a part of the proceeding if the Court considers that any further mediation will be unnecessary in relation to the whole or that part *or* there is no likelihood of the parties being able to reach agreement on (or on the facts relevant to) any of the matters set out in s 86A(1) in relation to the whole or that part.[47]
- At any time from three months after the start of mediation, a party may apply to the Court for an order that mediation cease in relation to the whole or a part of the proceeding.[48]

In deciding whether to make an order that mediation cease, the Court must take into account any report provided by the Tribunal or the presiding member of the Tribunal.[49]

The Court will then give directions and make orders in relation to the trial of the application. The Court may refer a matter to the Tribunal before or during the course of a trial.[50] At the end of the trial the Court will make a determination whether or not native title exists.

An order making a determination of native title must set out details of the matters mentioned in s 225 of the NTA.[51] Where the Court proposes to make an approved determination of native title to the effect that native title exists, the Court must, at the same time as it makes the determination, make an appropriate determination under s 56 (which deals with holding the native title on trust) or s 57 (which deals with the non-trust functions of prescribed bodies corporate).[52]

Conclusion

The recognition of native title and the practical exercise of native title along with other rights and interests is a national issue. But the resolution of native title issues is carried out at a local community level and involves the people most directly affected. Every native title claimant application provides challenges and opportunities for each of the parties. Parties or their representatives need to consider carefully what the real issues are in each case and the options available to them to resolve those issues.

The NTA provides a process that favours the mediation of native title claimant applications and provides a range of options for recording the agreements that are made. The NNTT has been established as an impartial, independent body to assist parties to reach agreements on some or all of the matters relevant to native title applications.

Mediated outcomes are desirable for a range of practical reasons, primarily because an agreement between parties that recognises each other's rights and interests should provide a durable basis for long term relationships on the ground.

Where agreements cannot be reached, the Federal Court will determine the matters in issue. Parties should attempt to reach agreement on as many issues as possible and so reduce the number of issues and parties that come before the Court.

Recent developments suggest that the climate for agreement making about native title is more positive than ever before. At 30 June 2001 there had been 24 determinations that native title exists over at least part of the area of each application.[53] Fifteen of these determinations were made in the previous 12 months. Fourteen of the determinations made in that period were by agreement of the parties. Most

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of those consent determinations were supported by or conditional upon indigenous land use agreements.[54]

The outcomes in the past year suggest that agreements will be struck in relation to many claimant applications and (by ILUAs or otherwise) in relation to future activities on land where native title exists or may exist.

This trend is evident because in some parts of the country governments and other parties are attempting to resolve claimant applications by agreement. Also, as more determinations of native title are made, there will be greater certainty about who has native title and what the native title rights and interests in different areas are.

As more native title trials are concluded and appeals are decided, the law of native title will be refined and made more certain. As parties become more informed about the possible outcomes and what is needed to achieve them, they should become increasingly confident about assessing the prospects of success of particular applications, determining whether agreements can be reached and deciding the terms of any agreements. Parties should work to see whether agreements can be reached and, where agreement is not possible, to isolate the real issues so that they can be resolved judicially.

The content of approved determinations of native title will also guide parties in framing appropriate consent determinations that reflect their local circumstances and accord with the current state of the law.

The outcomes reached in the past year or two indicate that we are moving as a nation from litigation towards mediation for the resolution of many (if not most) native title applications.

The size, complexity and nature of native title matters means that mediation techniques need to be adapted or refined to suit a variety of circumstances. The mediation of native title matters is a developing practice. The process should draw out the best in the participants. By tackling each challenge in a creative and informed way, positive results are possible and stronger communities will emerge.

The lessons learned in meeting those challenges may also inform the mediation practice of others.

Postscript

The law of native title continues to develop. Since this paper was delivered there have been significant judicial decisions which have clarified areas of native title law and practice. For example, in 2002 the High Court delivered judgment in *Western Australia v Ward*[55] and *Wilson v Anderson*,[56] and the Federal Court delivered judgment in *De Rose v South Australia*.[57] Those judgments affect, among other things, the mediation of native title applications.

In *Western Australia v Ward* the High Court clarified various outstanding legal issues. By majority[58] the Court held among other things that it is to the terms of the NTA that primary regard must be given. They made the following points.

- The NTA treats native title as a bundle of rights and allows for it to be partially extinguished.
- Where the native title claimants cannot make or sustain a claim to exclusive possession over an area, the rights and interests they are claiming may need to be described by the activities they can do because of the rights they have under their traditional law and customs.
- Some uses by others of cultural knowledge (for example, the reproduction of a photograph of an artwork or a video of a ceremony) are not protected by the NTA but the native title holders may be able to protect it under other laws, such as copyright law.
- Native title claimants do not necessarily need to prove that they have recently used or been present in an area to show connection.
- The relevant mining and petroleum Acts extinguished any native title rights to minerals and petroleum in WA and the NT.
- Native title is not extinguished completely by the grant of a pastoral lease in WA or the NT. Some native title rights and interests are extinguished by the grant of a pastoral lease; that is, the right to control the use of and access to the area. This is because these rights were determined to be inconsistent with the rights granted to the pastoralists.
- A mining or general purpose lease granted under WA mining legislation does not necessarily extinguish native title completely. Some native title rights and interests are extinguished by the grant of one of these leases; that is, the right to control the use of and access to the area. Again, this is because these rights were determined to be inconsistent with the lessee's rights.
- Some questions about whether or not any other native title rights are inconsistent with mining tenements and pastoral leases have been referred back to the Federal Court.
- Native title is extinguished by the vesting of Crown reserves under s 33 of the *Land Act 1933* (WA) (such as national parks and nature reserves) where such vesting occurred before the commencement of the *Racial Discrimination Act* (Cth) on 31 October 1975.

In *De Rose* a judge of the Federal Court provided a long and detailed analysis of the evidence when deciding that the applicants had not proved that they had native title in relation to the claimed area because they had lost physical and spiritual connections to the land in recent years. The judgment indicates the type of evidence that may be necessary to prove a claim of native title and some of the issues that the parties may wish to consider in deciding whether to negotiate an outcome.

One common response to these most recent High Court judgments was an express desire to find ways other than litigation to resolve native title matters. Many have said that the way forward is to try to negotiate agreements. This is despite Justice McHugh's view that the current state of the law of native title 'can hardly be described as satisfactory'.[59] He also argued that the time may have come to think of abandoning the present system, which 'simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits'.[60] He further suggested that a better system may be an arbitral system that 'declares what the rights of the parties *ought to be* according to the justice and circumstances of the individual case'.[61]

I suggest that the present scheme has delivered, and will continue to deliver, a range of direct and indirect benefits to people in many parts of Australia. As

noted earlier, the NTA emphasises agreement making as the preferred method of resolving a wide range of native title issues, including where native title exists and what acts can be done where native title exists or may exist. The *Ward* decision has thrown up some new challenges for those who want to negotiate outcomes, such as the following.

- How should parties deal with native title applications where native title survives, but to a limited extent (and perhaps to a different extent), over various parcels within a claimant application area?
- How should parties resolve issues where (as the High Court acknowledged) Aboriginal people retain links to land which would constitute native title except for an extinguishing event or events?

But this ought not be a deterrent nor a reason to abandon the present scheme. We need to look to ways of improving it and creating or reviving the use of other schemes along side it, so that comprehensive agreements can be negotiated with native title outcomes and or (where appropriate) non-native title outcomes. ●

Graeme Neate is President of the National Native Title Tribunal and can be contacted at judithr@nntt.gov.au.

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Endnotes

1. *Native Title Act 1993* (Cth) (NTA) s 136A(6).
2. NTA s 136D.
3. NTA s 136D.
4. Note, however, that in two recent consent determinations of native title, the parties and the Court agreed to orders that recognised the uncertainty of the law on a particular issue, contained a determination based on the current state of the law and included a mechanism to vary the determination if appropriate after a pending High Court decision. See *Ngalpil v Western Australia* [2001] FCA 1140 (20 August 2001) BC200104882; *Brown v Western Australia* [2001] FCA 1462 (19 October 2001) BC200106325.
5. For example, see the NTA ss 86E and 136G(3).
6. See the discussion later in this paper of 'The role of the Federal Court in relation to mediation'.
7. See Dodson M 'Power and cultural difference in native title mediation' (1996) 3 *Aboriginal Law Bulletin* 8; Dolman K 'Native title mediation: is it fair?' (1999) 4 *Indigenous Law Bulletin* 8.
8. See for example *De Rose v South Australia* [2002] FCA 1342 (1 November 2002) BC200206460.
9. For the provisions concerning Aboriginal and Torres Strait Islander representative bodies see the NTA ss 201A–203FH.
10. See the NTA s 183 and 'Guidelines for the provision of financial assistance by the Attorney-General in native title cases' available from the Assistant Secretary, Legal Aid Branch, Attorney-General's Department, National Circuit, Barton ACT 2600 or on the Department's website at <www.law.gov.au/aghome/commaff/lafs/legal_aid/ntguide.html>.
11. NTA s 78(1).
12. NTA s 78(2) and (3); see also s 108.
13. NTA ss 3(a) and 10.
14. 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/Juhnjlar 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) 115 FCR 109 at 114 [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.
15. NTA s 68.
16. The Queensland Government has published the *Guide to Compiling a*

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Connection Report for native title applications in Queensland. On 19 October 2001 the Victorian Government published *Guidelines for Native Title Proof in Victoria*. In October 2002 the WA Government published *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title*.

17. See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 190, citing *Milirrpum 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.

18. See ss 241–249C of the NTA for definitions of the various types of leases.

19. For extinguishing tenures see ss 11, 23A, 23B, 23C, 23E, 237A, 247A, 248A, 249C and Sch 1 — Scheduled interests of the NTA.

20. *Wik Peoples v Queensland* (1996) 187 CLR 1; 141 ALR 129.

21. See *Hayes v Northern Territory* (1999) 97 FCR 32 and the final determination of *Hayes v Northern Territory* [2000] FCA 671 (23 May 2000) BC200002683.

22. The relevant provisions of the NTA include ss 24AA–24EC and 199A–199F. Various aspects of indigenous land use agreements are discussed in a special edition of the (1999) *Indigenous Law Bulletin* 4(21). See also the papers delivered at the Negotiating Country national native title forum held in August 2001 on the Tribunal's website at <www.nntt.gov.au/metacard/speeches.html>.

23. NTA s 86F(1) and (2).

24. For discussions of the role of the Federal Court in native title matters, including the case management of native title claimant applications, see Justice A M North 'From the internet to the outback — a world class court' in Keon-Cohen B (ed) *Native Title in the New Millennium* 2001 AIATSIS pp 23–29; and Anderson L 'Managing native title in the Federal Court' paper delivered at the Negotiating Country national native title forum on 3 August 2001.

25. NTA s 86B(1)–(4).

26. *Federal Court of Australia Act 1976* (Cth) s 53A. See, for example, *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109 at 110 [2] per Emmett J. In *Adnyamathanha People v South Australia* [1999] FCA 402 (29 March 1999) BC9901427, O'Loughlin J expressed his opinion that the provisions for mediation in the *Federal Court of Australia Act 1976* (Cth) 'are of general application and should take second place to an Act of Parliament, such as the *Native Title Act*, which contains its own credo for mediation. I do not think it would be appropriate to utilise the powers in the FCA when there are specific powers on the same subject in the *Native Title Act*' (at [28]).

27. NTA s 86C.

28. NTA s 86(5). See *Smith v Western Australia* (2000) 104 FCR 494.

29. NTA ss 86E and 136G(2).

30. See *Wik Peoples v Queensland* [2000] FCA 1443 (3 October 2000) BC200006103 at [11] and [12] per Drummond J.

31. NTA s 136G(3).

32. See Edmunds M and Smith D *Members' Guide to Mediation and Agreement Making under the Native Title Act* NNTT 2000 pp 20–22.

33. *National Native Title Tribunal Annual Report 2000–2001* pp 18–19.

34. *Wik Peoples v Queensland* [2000] FCA 1443 (3 October 2000) BC200006103 at [5] and [6].

35. Above note 33 at pp 28–29.

36. See, for example, *Mualgal People v Queensland* [1999] FCA 157 (12 February 1999) BC9905752 at [1] per Drummond J; *Saibai People v Queensland* [1997] FCA 158 at [1] per Drummond J.

37. NTA s 87(1)(a)(iii). See, for example, *Congoo v Queensland* [2001] FCA 868 (28 June 2001) BC200103690 at [6] per Hely J; *Passi on behalf of the Meriam People v Queensland* [2001] FCA 697 (14 June 2001) BC200103037 at [5] per Black CJ.

38. NTA s 136G(1).

39. NTA s 86D(2).

40. NTA s 87. See *Kovalev v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 323 at [12].

41. See, for example, *Smith v Western Australia* (2000) 104 FCR 494; *Wik Peoples v Queensland* [2000] FCA 1443; *Ngalpil v Western Australia* [2001] FCA 1140 (20 August 2001) BC200104882; *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109. See also Beesley S 'The role of the Federal Court when parties reach agreement: s 87 of the Native Title Act 1993' (2001) 5 NTN 3; and Pocock T 'The role of the Court in consent determinations of native title' paper presented at AIATSIS Native Title Representative Bodies Conference Townsville 27–30 August 2001.

42. *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109 at 114 [22].

43. NTA ss 94A and 225.

44. NTA ss 55–60AA; see also *Mualgal People v Queensland* (1998) 160 ALR 386; and Mantziaris C and Martin D *Guide to the Design of Native Title Corporations* NNTT 1999.

45. See NTA s 86F.

46. See, for example, *Bidjara Aboriginal Housing & Land Co Ltd v Indigenous Land Corporation* (2001) 106 FCR 203 at 206 per Ryan, Drummond and Hely JJ; *Strickland v Native Title Registrar* (1999) 168 ALR 242 at 250 per French J.

47. NTA s 86C(1).

48. NTA s 86C(2)–(4).

49. NTA s 86C(5) and *Federal Court Rules* O 78 r 21.

50. See, for example, *Smith v Western Australia* (2000) 104 FCR 494.

51. NTA ss 94A and 225.

52. NTA ss 55–60AA; see also *Mualgal People v Queensland* (1998) 160 ALR 386; and Mantziaris C and Martin D *Guide to the Design of Native Title Corporations* NNTT 1999.

53. As of 10 October 2002 there were 31 determinations that native title exists and 14 determinations that native title does not exist.

54. Above note 33 at pp 23–25 and 53–69.

55. *Western Australia v Ward* (2002) 191 ALR 1.

56. *Wilson v Anderson* (2002) 190 ALR 313.

57. *De Rose v South Australia* [2002] FCA 1342 (1 November 2002) BC200206460.

58. The majority of the judges were Glesson CJ, Gaudron, Gummow and Hayne JJ. Kirby J agreed with most of the judgment of the majority.

59. *Western Australia v Ward* (2002) 191 ALR 1 at 156 [560] agreeing with Callinan J at 280–81 [969].

60. At 156 [561].

61. At 156–57 [561].