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**Developments in national native title mediation**

# Good faith mediation in the National Native Title Tribunal

**John Sosso**

In March 2007 the Commonwealth Parliament passed legislation<sup>1</sup> which has the potential, among other things, to significantly affect the manner in which the National Native Title Tribunal (the Tribunal) provides mediation services for the resolution of native title proceedings.<sup>2</sup>

One of the more significant changes is the requirement that each party and each person representing a party 'must act in good faith in relation to the conduct of the mediation' by the Tribunal.<sup>3</sup>

There was already an obligation on parties<sup>4</sup> in negotiation matters to negotiate in good faith.<sup>5</sup> However, this obligation is restricted to a limited number of 'future acts', almost always the grant of a right to mine or conduct high impact exploration.<sup>6</sup> The content of the obligation to negotiate in good faith has been the subject of numerous Federal Court decisions and Tribunal determinations.<sup>7</sup>

The Commonwealth Parliament has now moved beyond the obligation to negotiate in good faith about a limited range of future acts to impose an obligation to act in good faith in relation to the mediation of all substantive native title proceedings. The extent and nature of this obligation to act in good faith is discussed below.

## Background

One of the changes brought about by the 1998 amendments to the *Native Title Act 1993 (Cth)*<sup>8</sup> (the Act) was that all native title and compensation claims were to be commenced in the Federal Court and, unless the Court ordered that there be no mediation, all such applications were to be referred to the National Native Title Tribunal for mediation.<sup>9</sup>

The Preamble to the Act explicitly states that:

... 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.<sup>7</sup>

Despite this clear legislative preference for native title to be resolved by agreement rather than litigation, and its explicit endorsement by the High Court,<sup>10</sup> there is no clear thread of decisions emanating from the Federal Court reflecting this goal.<sup>11</sup>

The Federal Court is required to refer to the Tribunal all applications for mediation unless the court determines that mediation will be unnecessary (because, for example, the parties have reached agreement) or there is no likelihood of the parties reaching agreement.<sup>12</sup>

Once an application is referred for mediation, the President of the Tribunal appoints a Member to have responsibility for the convening of mediation conferences and generally providing mediation assistance. Mediation conferences are convened with the parties to an application or their representatives, they are private<sup>13</sup> and they are given limited 'without prejudice' protection.<sup>14</sup>

The Act prescribes the purpose of Tribunal mediation in a very broad manner, which includes assisting the parties to reach agreement on whether native title exists or existed in relation to the area covered by the application.<sup>15</sup>

The Tribunal is required to carry out its functions, including the provision of mediation services, in 'a fair, just, economical, informal and prompt way'<sup>16</sup> and is 'not bound by technicalities, legal forms or rules of evidence'.<sup>17</sup>

A Tribunal Member provides written reports to the Federal Court on the progress of mediation. Such reports can either be given voluntarily<sup>18</sup> or at the request of the Court.<sup>19</sup>

Just as the legal concept of native title is *sui generis*, native title mediation has unique elements that differentiate it from other forms of mediation.<sup>20</sup>

Mediation can involve numerous parties, sometimes numbering in the hundreds, many of whom have totally different interests and perspectives. Importantly, there is often a chasm of understanding, expectations and objectives between the native title claimants and respondent parties. The parties to the mediation are usually not only strangers but have different 'world views' and approach issues from different cultural perspectives.

Each native title mediation presents different issues, different dynamics and different challenges. Further, native title mediation takes place both within the confines of Federal Court proceedings and within the context of different States and Territories where each government brings to the mediation table distinct policy agendas. As Boule explains, 'native title is an area in which mediation is practised in a deep shadow of legal regulation, state policy and judicial supervision'.<sup>21</sup>

It is in this context that the Commonwealth Government accepted a recommendation of the Native Title Claims Resolution Review (CRR), established in 2005 by the Attorney-General, that the Act be amended to impose an obligation to mediate in good faith. The CRR also recommended that a code of conduct be formulated to assist the parties, providing guidance on the standard of behaviour required. The rationale for imposing the statutory obligation was explained in the report on the CRR as follows:

It has reliably been reported that there is a growing tendency for parties to mediation to exhibit a lack of good faith during mediation. One option to

increase the effectiveness of mediation is to impose a requirement that those formally participating in mediation act in good faith.<sup>22</sup>

The Senate Legal and Constitutional Affairs Committee set out in its *Report on the Native Title Amendment Bill 2006 [Provisions]* the following examples of behaviour which it was advised warranted the inclusion of a 'good faith' provision:

- abusive and threatening behaviour;
- personal violence during a mediation conference;
- persistent non-compliance with agreed actions, leading to stalling of the process;
- persistent last minute non-attendance at meetings;
- publicly releasing confidential material in contravention of an agreement reached about non-disclosure in relation to the mediation process; and
- adopting a negotiation position contrary to the instruction of clients.<sup>23</sup>

### Recent Australian legislative precedents

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In Australia compulsory mediation has been mandated at both a federal and State level in various contexts. At a federal level it is now mandatory in the Federal Court,<sup>26</sup> Administrative Appeals Tribunal and the National Native Title Tribunal. At a State level it has been mandated in various industrial relations, native title and farm debt mediation statutes.

Perhaps of most significance has been the history of court-ordered mediation in the Supreme Court of New South Wales. In 1994 the *Supreme Court Act 1970* (NSW) was amended to allow a judge of the Supreme Court to refer a matter to mediation if appropriate and if the parties consented. In 2000<sup>27</sup> the voluntary nature of mediation was replaced by a scheme of mandatory mediation.<sup>28</sup>

The importance of the NSW Supreme Court experience is that the parliament also imposed an obligation to mediate in good faith. Section 110L of the *Supreme Court Act 1970* (NSW) provided:

It is the duty of each party to the proceedings the subject of a referral under section 110K to participate, in good faith, in the mediation or neutral evaluation.<sup>29</sup>

The legislative requirement of mediating in good faith is not, however, limited to the NSW Supreme Court. There are now numerous examples at

both a federal<sup>30</sup> and State level.<sup>31</sup> The experience of mandating good faith mediation in these jurisdictions will be of assistance in understanding the content of the obligation in native title mediation.



### Amendments to the Native Title Act

Prior to the passage of the recent amendments to the Act, as a general rule any person who was a party to native title proceedings had the right, but not the obligation, to attend mediation conferences convened by the Tribunal.<sup>32</sup> A presiding Tribunal Member could exclude persons from attending a mediation conference but was not empowered to compel attendance.<sup>33</sup>

The Act now empowers a presiding Tribunal Member to:

- ‘direct a party to attend a mediation conference’;<sup>34</sup> and
- ‘if the Member believes that a document is in the possession, custody or control of a party, and that its production at a mediation conference may assist the parties to reach agreement, direct the party to produce the document as specified in the direction’.<sup>35</sup>

If a party fails to comply with a direction, the Tribunal may report such failure to the Federal Court.<sup>36</sup> The Court is empowered to make orders in similar terms to the directions made by the Tribunal.<sup>37</sup>

Two points can be noted about these provisions. First, the Tribunal is only empowered to issue directions, not to enforce them. Second, enforcement lies

obligation imposed on each party and each person representing a party, to act in good faith in relation to the conduct of the mediation.<sup>38</sup>

A party can be represented by a barrister or a solicitor, or by leave of the Federal Court, another person.<sup>39</sup> The Act also allows a party to appoint a society, organisation, association or other body to act as agent on behalf of the party in relation to a proceeding.<sup>40</sup> Consequently, if a party is represented at a mediation conference that representative must act in good faith and cannot engage in conduct which may fall below that standard on the basis that he or she is ‘acting on instructions’ or ‘cannot obtain instructions’. The Act now mandates an objective standard of conduct which cannot be evaded by attempting to use the client as a justification for substandard mediation behaviour.

### What is ‘good faith’ in relation to mediation?

The amendments, while mandating acting in ‘good faith’ in relation to the conduct of mediation, do not define the term.

The Explanatory Memorandum circulated with the Native Title Amendment Bill 2006 noted the CRR recommendation that the government prepare a code of conduct for parties

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with the Federal Court, but the mechanism for enforcement is by the Court making orders in terms similar to the direction of the presiding Member and enforcing its orders.

These additional powers are supplemented by the insertion of the

involved in native title mediations. It was explained that the government was giving further consideration to this issue.<sup>41</sup> During the public hearings conducted by the Senate Legal and Constitutional Affairs Committee, the Commonwealth Attorney-General’s

Department informed the committee that it would be developing a code of conduct, but that it would not be prescriptive nor would it have the status of a regulation.<sup>42</sup>

The Senate Committee considered that such a code should be developed without delay to ensure that parties attending Tribunal convened mediation conferences are very clear about their obligations. Further the committee did not support any attempt to define the concept of 'good faith' in the Act.<sup>43</sup>

At the time of writing a code has not been issued; however the President of the Tribunal informed the Senate Committee that in addition to any code he would give consideration to issuing a practice direction<sup>44</sup> to ensure consistency of practice between Tribunal Members in the manner in which the good faith obligation is administered.

Although there is no statutory guidance on this question, it is of interest to compare other legislative attempts to prescribe what constitutes 'good faith' in mediation.

Section 170QK of the (now repealed) *Industrial Relations Act 1988* (Cth) outlined a non-exhaustive list of matters that could be taken into account, namely whether the parties to negotiations have:

- agreed to meet at reasonable times proposed by another party;
- attended meetings that the party had agreed to attend;
- complied with negotiation procedures agreed to by the parties;
- not capriciously added or withdrawn items for negotiation;
- disclosed relevant information as appropriate for the purposes of the negotiations; or
- refused or failed to negotiate with one or more of the parties.<sup>45</sup>

As previously noted, there is a considerable body of case law on the question of what constitutes 'good faith' for the purpose of 'right to

negotiate' matters under the Act. It is considered that the high standards of conduct required of negotiating parties in shorter, more targeted commercial negotiations would not be demanded of parties in native title mediation.

Further, the Tribunal in its submission to the Senate Committee noted that there are instances where

Third, if a Member considers that a legal practitioner is not acting in good faith, a report may be forwarded to the legal professional body that issued the legal practitioner with a practising certificate.<sup>48</sup>

Fourth, a Member can report an alleged failure to act in good faith to the Federal Court.<sup>49</sup>

It was recognised that it is not a failure to act in good faith to refuse to mediate if there is a legitimate reason to do so. However, the onus is on the party refusing to mediate to explain the refusal to engage.

some parties will refuse to mediate on the basis that there are points of law requiring clarification or the belief that a claim is fundamentally flawed. It was recognised that it is not a failure to act in good faith to refuse to mediate if there is a legitimate reason to do so. However, the onus is on the party refusing to mediate to explain the refusal to engage.

### Reports about breaches of the requirement to act in good faith

The Act prescribes various classes of persons and entities the presiding Member may report about if the Member considers that the person has breached the requirement to act in good faith.

First, if the party or its representative is the Commonwealth or a State or Territory, the presiding Member may report to the relevant Minister of the Crown.<sup>46</sup> If it is a respondent party funded by the Commonwealth, the report is sent to the Commonwealth Attorney-General.

Second, if it is a native title representative body or a body performing the functions of a representative body, a report may be forwarded to the Secretary of the relevant Department.<sup>47</sup>

Finally, the Act allows for a limited form of public reporting of breaches of the requirement to act in good faith by a government party or that party's representative. A presiding Member can initiate action to have particulars of the failure and the reasons why that Member believes that the conduct was not in good faith inserted in the Tribunal's annual report. In such a case the Member must inform the government party (or representative) before doing so.<sup>50</sup>

The Explanatory Memorandum states<sup>51</sup> that the intention of this amendment is to 'ensure that Government parties are publicly accountable for their actions, and the actions of their representatives, in the course of native title mediations.' The insertion of a 'shame and name' provision of this sort is clearly aimed at ensuring that if a report is provided to a Minister about the performance of government officials during a Tribunal mediation and no remedial action is taken, or if a course of conduct persists, the presiding Member can draw public attention to the negotiating tactics of a particular level of government. Consequently a failure to mediate in good faith can, with the insertion of this public naming



provision, possibly have serious ramifications for a government.

The 'without prejudice' protection afforded to parties participating in Tribunal convened mediation conferences does not apply for the purpose of the Tribunal reporting to legal professional bodies and to the Federal Court.<sup>52</sup>

It should be noted, however, that the 'without prejudice' protection afforded by s 136A(4) only applies 'in a proceeding before the [Federal] Court'. Accordingly, a presiding Member is at liberty to outline in his or her report to a Minister, the Attorney-General or the Secretary of the relevant Department the matters occurring in mediation which evince a failure to act in good faith as these are not 'a proceeding before the Court.'<sup>53</sup>

Reports must include details of the failure to act in good faith and the context in which the mediation took place.<sup>54</sup> At the time that the report is forwarded to the relevant office a copy must also be provided to the person to whom it relates.<sup>55</sup> There is no specific statutory obligation to provide a draft of the report to the person before it is forwarded. The manner in which reports are prepared and issues of procedural fairness will be dealt with in the Practice Direction to be issued by the President. In its submission to the Legal and Constitutional Affairs Committee the Tribunal said:

The Tribunal will adopt transparent practices aimed at ensuring a consistency of approach amongst members and in a manner that will ensure that all parties and their representatives are accorded procedural fairness. Importantly, the Tribunal sees the insertion of an obligation to act in good faith as bolstering the chance of a successful mediation. Accordingly, the reporting of a breach of this obligation will be taken as a serious step to be taken only when necessary to preserve the integrity of the mediation process.

No mandated consequence results from a report, and the manner in which such reports are dealt with are left to the discretion of the relevant Minister, Secretary or legal professional body. However, the fact that the 'without prejudice' rule has

been specifically removed when reports are forwarded to a legal professional body is outlined in the Explanatory Memorandum as follows:

This is to ensure the legal professional body is not prevented from pursuing disciplinary action on receipt of a report if this would involve a proceeding before the Court.

The New South Wales *Supreme Court Act 1970* also was silent about the ramifications of a failure to mediate in good faith. These ramifications have been addressed by the NSW Supreme Court as follows:

[Counsel] seemed to be preoccupied with what sanction would apply in the event of a party not acting in good faith under s110L. That remains to be determined. Insofar as that obligation arises consequent upon the making of an order of the Court, it is feasible that one sanction might well be contempt.<sup>56</sup>

Accordingly while the Act contains no specific sanction for a failure to act in good faith, the reporting of the Member's view that a party or their representative has not acted in good faith, arms the person or entity receiving that report to take such action as is deemed appropriate within the confines of their inherent powers.

## Conclusion

The Tribunal conceded in its submission to the Senate Legal and Constitutional Affairs Committee that the insertion of a good faith obligation in the Act would not be a 'silver bullet' that would immediately turn around all mediations. Nonetheless the requirement that parties act in good faith is clearly intended to improve the behaviour of system participants and increase the chances of non-litigated outcomes of native title claims.

The imposition of a good faith requirement must be seen as part of a much broader package of reforms designed to improve the prospects of agreement-making in an evolving and complex area of the law. ●

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## Endnotes

1. *Native Title Amendment Act 2007*.

2. The native title proceedings referred to are claimant, non-claimant and compensation applications: s 61 of the *Native Title Act 1993*. All references to sections are to provisions in this Act.

3. Section 136B(4).

4. Section 30A. Negotiation parties normally are mining or exploration parties as well as the relevant government and native title parties.

5. Section 31.

6. The right to negotiate also extends to certain classes of compulsory acquisition of native title rights and interests: s 26.

7. The key decision on the indicia of good faith is the early Tribunal determination *Western Australia v Taylor* (1996) 134 FLR 211 where it outlined an extensive, but not exhaustive, list of indicia of what may constitute good faith negotiations: see 224–225.

8. *Native Title Amendment Act 1998*.

9. Section 86B. Applications are referred after the Registrar has given notice in the manner prescribed under s 66 and the Federal Court has settled the parties to the proceedings under s 84.

10. *North Galanjanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 617 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

11. Compare, for example, decisions of the Court refusing to postpone a trial to allow time for Tribunal mediation such as *Bolton v Western Australia* [2001] FCA 1074 and *Wilkes v Western Australia* [2003] FCA 142 with *Colbung v Western Australia* [2001] FCA1342 where the Court recognised the central place of mediation and the limitations of the adversarial system.

12. Section 86A(3). The Court is required before making an order that there be no mediation to consider a list of factors set out in s 86A(4), including matters such as the number of parties, the size of the area and the nature and extent of any non-native title rights and interests in relation to the area claimed.

13. Section 136E.

14. Section 136A.

15. Section 86A.

16. Section 109(1).

17. Section 109(3).

18. Section 136G(3).

19. Sections 86E and 136G(2).

20. See *Boulle Mediation: Principles Process Practice* Butterworths (2nd ed) 2005 at pp 352–3.

21. Above note 20 at p 349.

22. At para 4.39.

23. Para 4.45

24. G Smith ‘Unwilling actors: Why voluntary mediation works, why mandatory mediation might not’ (1998) 36 *Osgoode Hall Law Journal* 849.

25. J Lande, ‘Using dispute system design methods to promote good-faith participation in court-connected mediation programs’, (2002) 50 *UCLA Law Review* 69.

26. Section 53A of the *Federal Court of Australia Act 1976*. Advantages of making mediation mandatory were explained by Black CJ in ‘The courts, tribunals and ADR: assisted dispute resolution in the Federal Court of Australia’ (1996) 7 *ADRJ* 138.

27. *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW).

28. The history of the legislation and the reasons underpinning the changes are set out by Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 at [15]–[24].

29. Now see s 27 of the *Civil Procedure Act 2005* (NSW).

30. See the now repealed s 170QK of the *Industrial Relations Act 1988*, s 34A of the *Administrative Appeals Tribunal Act 1975* and Sch 3 cl 27 of the *Telecommunications Act 1997*.

31. At a State level the requirement to mediate in good faith is found in mining, industrial relations, retirement village and farm debt mediation statutes. An interesting body of case law has built up around the requirement to mediate in good faith under the *Farm Debt Mediation Act 1994* (NSW), see *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252.

32. Section 136A. The presiding Tribunal member could, under s 136B(1), direct that only one or some

of the parties may attend, and be represented, at a mediation conference.

33. Section 136B.

34. Section 136B(1A).

35. Section 136CA.

36. Section 136G(3B).

37. Section 86D(3).

38. Section 136B(4).

39. Section 85. Such leave is not given lightly: see *Harrington-Smith v Western Australia* [2002] FCA 871.

40. Section 84B.

41. Native Title Amendment Bill 2006 Explanatory Memorandum at para 2.99.

42. Above note 41 at para 4.55.

43. Above note 41 at para 4.57.

44. Under s 123 the President may give directions on a range of matters relating to the business of the Tribunal.

45. This list was adopted by the Queensland Parliament in its examples of good faith negotiating in the context of industrial relations law: s 146 of the *Industrial Relations Act 1999* (Qld). A model code for defining good faith in mediation was developed by Kovach in ‘Good faith in mediation — requested, recommended or required? A new ethic’ (1997) 38 *South Texas Law Review* 557 at 622–623.

46. Section 136GA(1).

47. Section 136GA(1). Currently it is the Department of Families, Community Services & Indigenous Affairs.

48. Section 136GA(2). If the practitioner does not have, or need to have, a practising certificate (eg a barrister in a divided profession jurisdiction), this provision will not apply and the legal practitioner would be reported to the Federal Court.

49. Section 136GA(4).

50. Sections 133 and 136GB.

51. At para 2.126.

52. Section 136GA(3) and (4).

53. A presiding Member can, however, prohibit the broader disclosure of information provided at mediation conferences under s 136F.

54. Section 136GA(5).

55. Section 136GA(6).

56. *Waterhouse v Perkins* [2001] NSWSC 13 at [95] per Levine J.