

**AGAINST ALL ODDS: THE MEDIATION OF NATIVE TITLE AGREEMENTS IN AUSTRALIA**

by

**Mr Graeme Neate**  
**President**  
**National Native Title Tribunal (Australia)**

**Associate Professor Craig Jones**  
**Director – Native Title Studies Centre**  
**James Cook University (Australia)**

**Professor Geoff Clark**  
**Member**  
**National Native Title Tribunal (Australia)**

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**Mr Graeme Neate**  
**President**  
**National Native Title Tribunal (Australia)**  
**GPO Box 9973**  
**Brisbane Queensland 4001**  
**Australia**  
**61 7 32268223 (w)**  
**61 7 32268235 (fax)**  
**[graemen@mntt.gov.au](mailto:graemen@mntt.gov.au)**

**Associate Professor Craig Jones**  
**Director – Native Title Studies Centre**  
**Law School**  
**James Cook University**  
**Cairns Queensland 4870**  
**Australia**  
**61 7 4042 1662 (w)**  
**61 7 4042 1037 (fax)**  
**[craig.jones@jcu.edu.au](mailto:craig.jones@jcu.edu.au)**

**Professor Geoff Clark**  
**Member**  
**National Native Title Tribunal (Australia)**  
**GPO Box 9973**  
**Cairns Queensland 4870**  
**Australia**  
**61 7 40481500 (w)**  
**61 7 4051 3660 (fax)**  
**[geoffc@mntt.gov.au](mailto:geoffc@mntt.gov.au)**

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## Contents

	Page
ABSTRACT.....	4
<b>1. INTRODUCTION</b>	
1.1 Aim and overview .....	5
1.2 Mediation of native title issues.....	5
1.3 Outline of the paper .....	6
<b>2. CONTEXT OF NATIVE TITLE MEDIATION</b>	
2.1 Legal context .....	7
2.2 Indigenous cultural context .....	8
2.3 Historical context.....	9
2.4 Economic context.....	9
2.5 Social context .....	9
2.6 Political context.....	10
<b>3. PURPOSE OF NATIVE TITLE MEDIATION</b>	
3.1 General legislative policy .....	10
3.2 Substantive native title outcomes.....	12
3.3 Related non-native title outcomes.....	13
3.4 Other ‘stand alone’ outcomes .....	13
<b>4. PRACTICE OF NATIVE TITLE MEDIATION</b>	
4.1 The scheme of the <i>Native Title Act 1993</i> .....	14
4.2 The role of the National Native Title Tribunal.....	16
4.3 Some special features of native title mediation.....	17
4.4 The interest-based approach .....	19
4.5 Phases of mediation .....	20
<b>5. POSSIBLE OUTCOMES OF NATIVE TITLE MEDIATION</b>	
5.1 Legal.....	25
5.2 Relationships between parties .....	26
5.3 Broader community outcomes .....	26
<b>6. ASSESSING THE PROCEDURES AND OUTCOMES</b>	
6.1 Need to evaluate procedures and outcomes.....	26
6.2 Need to evaluate and improve the National Native Title Tribunal .....	26
<b>7. CONCLUSION.....</b>	<b>27</b>

## ABSTRACT

The aim of this paper is to examine multi-party, cross-cultural mediation in relation to areas of land or waters in Australia, using a primarily interest-based model in a rights-based context. The paper will review mediation methodology and theory as it is applied to the mediation and negotiation of native title issues in Australia.

The rights of Indigenous Peoples to land in Australia have been a matter of conflict throughout the nation's history. Aspects of that conflict have been the subject of court cases for more than 30 years. A major turning point in the law was the decision of the High Court of Australia in *Mabo v Queensland (No 2)* where for the first time Australian judges recognised the native title rights of Indigenous Australians. The Australian Parliament's response to the High Court's decision is contained in the *Native Title Act 1993* (Cwth.) (the Act). The Act provides for the mediation of native title issues as an adjunct to the litigation process managed by the Federal Court of Australia. Mediation is conducted by the National Native Title Tribunal, which is separate from but under the supervision of the Federal Court.

Parties to this mediation, in addition to the Indigenous applicants, may include governments (local, state and federal), pastoral interests, mining interests, utilities providers and recreational users of the land. Parties can number in their hundreds, and the mediation often involves a complex interweaving of historical, social, political, economic and cultural interests. The task of the Tribunal is to provide a forum in which parties are able to explore their interests in a way that produces mutually acceptable outcomes.

The interest-based model has been modified to suit the context of native title in Australia. That approach provides a framework for designing a process that meets the needs of the parties. The method has been applied to native title applications as well as in the negotiation of resource development or pastoral agreements.

The paper addresses how the limits to interest-based methods in relation to cross-cultural mediation and negotiation have been addressed in Australia to produce durable and practical outcomes that have meaning within the Indigenous context, within Western legal frameworks and for non-Indigenous parties. Such outcomes have provided a basis for day-to-day co-existence between Indigenous and non-Indigenous parties and institutions as well as the practical basis for reconciliation in Australia.

## **1. INTRODUCTION**

### **1.1 Aim and overview**

On 3 June 1992, Australia's highest court, the High Court of Australia, decided, that:

the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.<sup>1</sup>

The case was *Mabo v Queensland (No 2)* and, in the months following judgment, the decision was variously described as a 'landmark decision'<sup>2</sup> which constituted either a 'judicial revolution'<sup>3</sup> or 'a cautious correction to Australian law',<sup>4</sup> a decision creating 'a legal, political and constitutional crisis',<sup>5</sup> and a decision that 'must be seen, not as a threat, but as a breakthrough offering enormous promise'.<sup>6</sup>

The *Mabo (No 2)* decision made a fundamental change in the way Indigenous peoples' interests in land were to be dealt with by the general law of Australia. Before *Mabo (No 2)*, some groups of Indigenous Australians had title over or rights to specific parcels of land through grants under state or federal land rights legislation. These grants may have been prompted by considerations of history and social justice, including a recognition that some groups retained traditional links to certain areas, but the power to grant title or not remained with the Crown.

The decision in the *Mabo (No 2)* case was the first time that an Australian court had recognised the entitlements of Indigenous people to their traditional lands under their traditional laws.

The eleven years since that decision have seen much activity. Native title laws have been enacted to identify, recognise and protect what already exists. The Crown grants nothing, as native title is not the Crown's to grant.<sup>7</sup> Native title has been recognised in parts of Australia and has been held not to exist in some other areas. Numerous agreements have been reached about activities to take place on areas where native title may exist.

Despite those developments, native title remains one of the most challenging issues for Australians. It raises questions about the rights and interests of Indigenous Australians and about the relationship between those rights and interests and the rights and interests of non-Indigenous Australians. Dealing with native title involves understanding, respect and reconciliation between Indigenous and non-Indigenous Australians.

One ongoing challenge is to work out where native title exists and who the native title holders are. Another challenge is to deal with the aspirations of Aboriginal peoples and Torres Strait Islanders who have maintained strong connections to land and waters where, as a matter of law, native title is extinguished or survives in a limited way.

In recent years, there has been a trend to deal with these issues by agreement rather than have a court decide them. Many of those agreements are reached, and some are formally given effect or registered, under the *Native Title Act 1993* (the 'Act'), which was enacted by the Federal Parliament to deal with various consequences of the judgment in the *Mabo (No 2)* case.

### **1.2 Mediation of native title issues**

Australian courts have recognised the value of agreement-making in resolving native title issues. A majority of the High Court has 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. To submit a claim for determination of native title to judicial determination before the stage of negotiation is reached is to invert the statutory order of disposing of such claims.<sup>8</sup>

That passage has been quoted with approval by other judges.<sup>9</sup>

Not only have judges recognised the benefit of agreement-making, some have noted the limitations of litigation leading to judicial decisions which deal partially with these matters.<sup>10</sup> A Court cannot and will not determine all the consequences of a determination that native title exists. There is work for the parties to do to make the Court's orders effective on the ground.<sup>11</sup> Accordingly, Judges of the Federal Court of Australia have congratulated parties for resolving native title claims by agreement.<sup>12</sup>

The Act also 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. Justice Kirby has noted 'the stated emphasis of the Act on the facilitation of agreement through negotiation rather than through instant recourse to judicial decision.'<sup>13</sup> Other judges have made similar observations.<sup>14</sup>

There are numerous references in the Act to mediation as the means by which various types of agreement might be reached.<sup>15</sup> The Act does not, however, define 'mediation.'

The literature on conflict or dispute resolution shows that various definitions of mediation are influenced, in part at least, by the context in which mediation takes place.<sup>16</sup> The mediation of native title issues by the National Native Title Tribunal<sup>17</sup> (the 'Tribunal') is the management of a negotiation or a conflict by one or more impartial persons who have limited or no authoritative decision-making power but who assist the involved parties in voluntarily reaching a mutually acceptable settlement of those issues.<sup>18</sup>

### **1.3 Outline of the paper**

This paper outlines the major features of the mediation of native title undertaken by the Tribunal. It does so, firstly by describing the various 'landscapes'<sup>19</sup> - legal, cultural, historical, economic, social, and political - that provide a unique context for the issues that usually need to be addressed and, hopefully, will be resolved or agreed by the parties in the native title mediation environment.

The paper then briefly examines the range of outcomes available from native title mediation under the Act and shows that many of those outcomes may not necessarily involve, in a strict legal sense, native title.<sup>20</sup>

A significant portion of the paper highlights various unusual features of native title mediation, some of which arise out of the variety of 'landscapes' present, some of which are present by reason of the matters under consideration, and some of which arise from the processes established by the Act that provide the framework for the process. Particular attention is paid to the general adaptation of the interest-based model of mediation and the development of a process for the conduct of such mediation, by the Tribunal, that involves the planning, management and design of the phases of mediation as a continuum of progress or activities.

Much of this paper is drawn directly, or is adapted, from the work of the Tribunal's Agreement-Making Strategy Group<sup>21</sup> which recently prepared the first edition of a guide to the Tribunal's practice in mediating native title applications.<sup>22</sup> That guide draws on the experience of the Tribunal since its establishment in 1994, and aims to describe current best practice in this area as well as provide a sound theoretical basis for that practice.<sup>23</sup> Because of the numerous unusual features of native title mediation described in this paper, the guide is not and could not be rigidly prescriptive. It must also be recognised that each Tribunal member who is mediating a native title application has broad discretionary powers under the Act, and can approach the mediation of a particular application having regard to the particular circumstances of the matter, including any orders made by the Federal Court.

This paper shows that, despite the range of legal, cultural, historical, economic, social and political factors that provide the context for dealing with native title issues in Australia, agreements can be reached which produce durable native title and related outcomes. Against all odds, mediated outcomes are possible.

## 2. CONTEXT OF NATIVE TITLE MEDIATION

Native title mediation sits within the broader context of social and legal recognition of the entitlement of Aboriginal peoples and Torres Strait Islanders to areas of their traditional lands and waters in accordance with their laws and customs. As the preamble to the Act recites, this context includes:

- recognition that Aboriginal peoples and Torres Strait Islanders have been progressively dispossessed of their lands, largely without compensation and that native title has been extinguished by valid government acts that are inconsistent with the existence of native title rights and interests
- acknowledgement that successive governments have failed to reach a lasting and equitable agreement with those peoples concerning the use of their lands
- acknowledgement that Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society
- the need to ensure that native title holders are able to enjoy fully their rights and interests (and, in certain circumstances, that their rights and interests under the common law of Australia be significantly supplemented)
- the need for a special procedure for the just and proper ascertainment of native title rights and interests
- the intended effect of the Act, as a special measure for the advancement and protection of Aboriginal people and Torres Strait Islanders, to advance further the process of reconciliation among all Australians.

### 2.1 Legal context

Native title mediation is conducted in a rights-based context, the rights being set out in the Act and other statutes as understood in light of an increasing number of court judgments. For example, a determination that native title exists in relation to an area of land or waters, is, among other things, a determination of the nature and extent of those native title rights and interests, the nature and extent of other interests in relation to the determination area, and the relationship between the various rights and interests.<sup>24</sup> It is a determination of rights in *rem*, not just the rights of the parties to the proceedings, and it has an indefinite character that distinguishes it from a declaration of legal rights as ordinarily understood.<sup>25</sup>

Although key terms such as ‘native title’ and ‘native title rights and interests’ are defined in the Act,<sup>26</sup> the law about native title (including the meaning of those terms) continues to develop. Decisions of the Federal Court and the High Court provide increasing certainty on such subjects as the nature and content of those native title rights and interests that are recognised at law,<sup>27</sup> what dealings in relation to land extinguish (in part or in whole) native title rights and interests,<sup>28</sup> the types of groups that can make registrable native title applications,<sup>29</sup> and what claim groups must prove to demonstrate that they have the native title rights and interests that they assert.<sup>30</sup>

It is possible that, between the filing of a native title application and its determination, there will be changes to or clarifications of the law that will affect:

- whether the application will be registered<sup>31</sup>
- whether native title has been extinguished over some or all of the claim area
- what native title rights and interests may be recognised in a determination of native title.

Changes to the law may significantly influence the prospect of a determination of native title being obtained over the claim area, and the attitude of some or all of the parties to the mediation. Such changes may shift the potential focus of the mediation from native title outcomes (e.g. a determination of native title with accompanying Indigenous Land Use Agreements) to non-native title outcomes (e.g. the grant of title to land, the negotiation of joint management arrangements). Some applications may be amended, withdrawn, dismissed or struck out in response to judicial decisions.

Although the Tribunal generally adopts an interest-based approach to mediation, the design of the mediation must take into account the current state of the law as it affects the rights and interests of the applicant and other parties. The mediation design may need to be revised (and timeframes adjusted) as the law changes or is clarified and parties reconsider and adjust their positions.

## **2.2 Indigenous cultural context**

Land is central to the identities of Aboriginal and Torres Strait Islander peoples. The centrality of that relationship is well documented. For example, Aboriginal leader Patrick Dodson has written:

Land gives you the essence of who you are. It relates you to the country, to the other people who were born and bred there. It is like a great mosaic or jigsaw puzzle, various parts contributing to an intelligible whole. Dreaming tracks and sacred sites are part of the law and part of day-to-day living. The spirit you have is related to that and relates back to the land.<sup>32</sup>

The challenge for a Western mind is to try to comprehend and describe the nature of that relationship to traditional land. Anthropologists have written about the notion of ‘country’ in Aboriginal thinking. For example, Deborah Bird Rose stated:

Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy. Country is not a generalised or undifferentiated type of place, such as one might indicate with terms like ‘spending a day in the country’ or ‘going up the country’. Rather, country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart’s ease.<sup>33</sup>

Well before the High Court’s judgment in *Mabo (No 2)* those links were recognised by Australia’s most senior judges,<sup>34</sup> and they have been recognised at the highest level by politicians.<sup>35</sup>

Thus the questions and issues at play in a native title mediation go beyond decisions about the form of land management that should occur within a particular claimed area.

Decision-making in Aboriginal and Torres Strait Islander communities or claim groups is also a significant form of cultural expression. For example, particular Aboriginal elders might have a right and responsibility to make particular decisions about the land or water within their traditional territory.

Decision-making processes are relevant to resolving native title matters. For example, each native title claimant application is made by a person or persons authorised by all the persons (described as the native title claim group) who, according to their traditional laws and customs, hold the common or group rights comprising the particular native title claimed.<sup>36</sup> Material accompanying each application includes a statement of the basis on which the applicant is authorised to make the application and deal with matters arising in relation to it.<sup>37</sup>

These decision-making processes can be seen as evidence that a group has retained a connection to the country claimed in their application. There may be complications when the traditional laws and customs of

a particular native title claim group provide that some or all of the decisions about land management or use are made (or contributed to) by persons who may not form part of that group. When carrying out its mediation and other functions, the Tribunal may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.<sup>38</sup> The parties and the mediator need to take into account such cultural factors as the relevant form of decision-making as part of the mediation process.

### **2.3 Historical context**

Mediation of native title issues does not occur in a historical vacuum. A constant feature that needs to be borne in mind is the effect of colonisation (including the actions of governments, agencies and individuals), on the rights and interests of the native title holders. The challenges of historical circumstances to the establishment of native title have been recognised by the Australian Parliament,<sup>39</sup> judges<sup>40</sup> and others involved in native title proceedings.<sup>41</sup>

The impact of colonisation – which has been the subject of recent academic and public debates<sup>42</sup> – means that many Aboriginal and Torres Strait Islander communities have been fragmented over time. In Queensland, for example, many Aboriginal peoples were forcibly removed from their traditional lands to missions or government settlements such as Palm Island, Cherbourg or Woorabinda.<sup>43</sup> Among other things, this fragmentation of traditional communities has had a significant impact on the capacity of some claim groups to make decisions about their native title in the context of mediation. It is important to recognise that a capacity to make decisions in the context of native title mediations is essential in the settlement of agreements and the durability of those agreements.

### **2.4 Economic context**

Aboriginal and Torres Strait Islander people are for the most part among the poorest people in Australia. Most claimants do not, of themselves, have the resources to effectively lodge native title applications, prosecute those applications in court and participate in mediation.

The Parliament recognised this fact by legislating for native title representative bodies<sup>44</sup> which were established (or existing bodies were recognised) and are funded under the Act primarily to assist native title holders to prepare for, manage and prosecute claims.<sup>45</sup>

Representative bodies play a vital role in the preparation and progress of native title claims and the strategic direction of claims within their geographic region. Resource priorities and information flow are very important issues for the mediation process.

The functionality or otherwise of a representative body will have a major impact on the ability of the native title claim groups to meaningfully and positively take part in the mediation process, and on the ability of other parties to negotiate with them.

Generally speaking, representative bodies are substantially under-funded and are under-resourced in terms of experienced personnel. The paucity of resources available to representative bodies has been the subject of much comment.<sup>46</sup>

There is a constant tension between the representative body's desire to assist the native title parties through the process and the lack of resources to do so.

### **2.5 Social context**

The recognition of native title can lead to a reclaiming of traditional pride. In some circumstances the making of native title agreements provides an opportunity to 'bring the grand-children up in the law'<sup>47</sup> and therefore ensure cultural survival.

In Western terms, the motivation that drives claim groups to pursue the native title process where there are often few tangible benefits (in terms of concepts of acknowledged or recognised interests in property) is the strongly held belief that the processes of negotiation constitute or manifest an element of respect and

recognition of them as traditional owners of their country by parts of society that had previously either not afforded them that recognition or had not had an opportunity to do so.

The social context is not, however, a matter only for the native title claim group or other Indigenous parties. The mediation of native title issues necessarily involves a range of cross-cultural issues. It takes account of the diverse values and concerns of the groups and communities to which the parties belong and that they bring to the process.

The social context of agreement-making may be intensely local in outlook. The Western Yalanji People are the beneficiaries of a successful determination of native title by consent over a pastoral lease called Karma Waters, situated to the west of Mareeba in the southern part of Cape York Peninsula in Queensland.<sup>48</sup> Part of the determination involved an agreement about land use and access by the Western Yalanji native title holders on the Karma Waters lease. While the details of the negotiations about the lease provided the substance for negotiations between the parties, both the pastoral family and the Western Yalanji were concerned about their futures. They saw the determination as providing a viable social context for a joint future.<sup>49</sup> In the ongoing social context, co-existence between the lease holder and the native title holders is a primary concern for the parties involved in native title mediation.

## **2.6 Political context**

The mediation or other resolution of native title issues takes place within the political context of the state, territory or region where native title is said to exist. One factor is the policy of the relevant government(s) in relation to native title. As governments change, so may the policies (and hence potential outcomes for particular matters may be varied). But 'political' in this sense does not only involve a government or governments. It includes the politics of the local representative body, the politics of any industry organization that is likely to be a party or represent groups of parties, and the politics of the region in a broad sense.

The legal, Indigenous cultural, historical, economic, social and political contexts all have potential implications for the design and conduct of native title mediation.

## **3. PURPOSE OF NATIVE TITLE MEDIATION**

### **3.1 General legislative policy**

As noted earlier, the Act was enacted in response to the decision of the High Court of Australia in *Mabo v Queensland (No 2)*<sup>50</sup> that the common law of Australia 'recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands'.

The Act:

- provides for the recognition and protection of native title
- establishes a mechanism for determining claims to native title
- establishes ways in which future dealings affecting native title may proceed.<sup>51</sup>

The Preamble to the Act sets out the policy considerations taken into account by the Australian Parliament when making the Act. The Preamble recites, among other things, that:

The High Court has ... held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands ...

The people of Australia intend:

- (a) to rectify the consequences of past injustices by the special measures contained in this Act ... for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
- (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests.

The Preamble also states that the Act (together with other initiatives) is intended to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.

The procedures created by the Act emphasise agreement-making as the preferred means of resolving native title issues, and describe the methods of reaching agreements variously as conciliation, mediation or more generally as making an agreement. So, for example, there are references to:

- a procedure for ascertaining native title rights and interests by conciliation<sup>52</sup>
- the mediation of matters relating to native title,<sup>53</sup> including native title applications such as claimant applications<sup>54</sup> and certain land access agreements<sup>55</sup>
- the mediation of future act matters<sup>56</sup>
- parties making agreements about such matters as part or all of native title application proceedings in the Federal Court of Australia,<sup>57</sup> proposed future acts,<sup>58</sup> access rights to certain non-exclusive agricultural and pastoral leases<sup>59</sup> and other matters,<sup>60</sup> or native title matters generally<sup>61</sup>
- agreements taking the form of Indigenous Land Use Agreements (ILUAs), negotiated and registered under the Act.<sup>62</sup>

The Preamble states that governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to claims to land (or aspirations in relation to land) by Aboriginal peoples and Torres Strait Islanders, and proposals for the use of such land for economic purposes.

The Tribunal is established under the Act.<sup>63</sup> It has various functions, including mediating in accordance with the Act and providing assistance to people who wish to make agreements.<sup>64</sup>

In a series of judgments,<sup>65</sup> the High Court has emphasised the primacy of the Act in dealing with native title applications, and has explained key concepts contained in the Act, including the definition of 'native title' and 'native title rights and interests'.<sup>66</sup> The High Court has, for example, articulated the concept that native title comprises a bundle of rights and interests and has ruled that native title rights and interests can be partially or completely extinguished by certain types of acts. The High Court has also provided guidance on the nature and extent of the connection to an area that claim groups must establish as the basis for obtaining a determination of native title.<sup>67</sup>

Those judgments have demonstrated the technical, and hence expensive, process that may be required to determine whether native title exists in some parts of Australia, particularly those areas with a history of extensive occupation by people other than the claim groups and where numerous grants of estates and interests in land have been made over many decades. Tribunal mediation is designed to provide a just,

proper and transparent process whereby the rights and interests of parties can be accommodated and protected without recourse to divisive and costly litigation.

### **3.2 Substantive native title outcomes**

The Act provides the legislative base for mediation to help parties achieve a range of outcomes including:

- consent determinations of native title
- consent determinations that compensation is payable where native title has been extinguished or impaired
- agreements in relation to various types of native title application proceedings in the Federal Court
- agreements in relation to future acts or various other native title issues, including agreements that involve matters other than native title.

If full agreement is not reached, the parties may agree on some matters or in relation to some areas, thus limiting the matters in dispute to be decided by a court or tribunal.

This paper concentrates on claimant applications made for the purpose of obtaining a determination that native title exists. It does not deal with compensation applications or the mediation of future act agreements.

The purpose of mediation in a claimant application proceeding is to assist the parties to reach agreement on some or all of the following matters:

- whether native title exists in relation to the area of land or waters covered by the application
- if native title exists in relation to the area of land or waters covered by the application:
  - who holds the native title
  - the nature, extent and manner of exercise of the native title rights and interests in relation to the area
  - the nature and extent of any other interests in relation to the area
  - the relationship between the native title rights and interests and other interests (taking into account the effects of the Act)
  - 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.<sup>68</sup>

The substantive outcome of successful mediation is a determination of native title made with the consent of all parties.

A determination of native title is a determination whether or not native title exists in relation to a particular area of land or waters (the 'determination area') and, if native title exists, a determination of:

- who the persons, or each group of persons, holding the common or group rights comprising the native title are
- the nature and extent of the native title rights and interests in relation to the determination area

- the nature and extent of any other interests in relation to the determination area
- the relationship between the native title rights and interests and any other interests (taking into account the effect of the Act)
- to the extent that the land or waters in the determination areas are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease, whether the native title rights and interest confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.<sup>69</sup>

Mediation, if requested, may also assist parties to a proceeding in relation to a native title application to negotiate an agreement that will result in:

- the application being withdrawn or amended
- the parties to a proceeding being varied
- any other thing being done in relation to the application.<sup>70</sup>

Such assistance can be provided whether or not the Federal Court has referred a native title application to the Tribunal for mediation. The agreement may involve matters other than native title.<sup>71</sup>

### **3.3 Related non-native title outcomes**

In some cases, parties may wish to explore options other than, or in addition to, native title outcomes (such as determinations of native title) that will satisfy their interests and hence deal with some or all of the issues that prompted the claim group to make a native title application. These options are known as ‘non-native title’ outcomes. They could possibly include statements of formal recognition of traditional ownership of lands in which native title had been or might have been extinguished, consultation or joint management agreements in relation to the use of traditional lands and the grants of interests in those lands under state or territory land rights legislation or other legislation.<sup>72</sup>

Consequently, although the court-ordered mediation of native title applications is focussed on matters specified in the Act, the parties may agree on those and other matters leading to creative and flexible solutions that deliver benefits beyond narrowly prescribed ‘native title’ outcomes, including various land use, ownership, management, access and planning agreements.

### **3.4 Other ‘stand alone’ outcomes**

Along the way to a formal determination of native title much of the discussions and negotiation is concerned with the day-to-day matters of co-existence between Indigenous peoples and others. Mining companies and Indigenous peoples, for instance, are involved in the negotiation of agreements that ensure that Indigenous cultural heritage is protected during the process of exploration or the mining of minerals, that appropriate compensation is paid to particular Indigenous peoples for any impact on their native title, and that the company achieves a valid grant of tenure upon which to conduct its activities.

Similarly there are many negotiations between pastoralists and Aboriginal peoples who are seeking to achieve land use and access agreements. These agreements are about the day-to-day co-existence between pastoralists and Aboriginal peoples and concern the management of on-the-ground issues such as access, gates, guns, dogs and camping.

Other agreements have been reached with local government authorities and other governments around Australia that do not depend on a determination of native title, but involve Indigenous communities in a range of negotiations or decision-making processes.<sup>73</sup> Sometimes these ‘stand alone’ agreements are in the form of Indigenous Land Use Agreements registered under the Act.<sup>74</sup>

#### 4. PRACTICE OF NATIVE TITLE MEDIATION

##### 4.1 The scheme of the *Native Title Act 1993*

The Act provides for the recognition and protection of native title - essentially the legal recognition of certain traditional rights of Indigenous people in land and waters that, in many instances, will co-exist with the rights and interests of others. The Preamble to the Act also states:

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.

The procedure involves the Federal Court of Australia and the Tribunal dealing with each native title application from the time it is made (or even in its preparation) to its final determination.

Aboriginal people and Torres Strait Islanders who wish to seek formal recognition of their native title rights and interests may do so by making a native title application to the Federal Court<sup>75</sup>.

Under most circumstances, the Federal Court must refer each native title application to the Tribunal for mediation as a way of reaching agreement about various native title issues.<sup>76</sup> The central role of the Tribunal in the mediation of native title applications is apparent from the mandated terms of referral,<sup>77</sup> and the Federal Court's power to request the Tribunal to provide reports on the progress of any mediation.<sup>78</sup>

The Tribunal conducts mediation pursuant to Federal Court orders,<sup>79</sup> or at the request of parties<sup>80</sup> as a type of assistance to people who wish to negotiate an agreement.

The interest-based approach to mediation adopted generally by the Tribunal has been developed in light of the requirements of the Act and various specific features of native title mediation.

The stages at which the Tribunal is involved in mediation and various types of pre-mediation activity are primarily determined by the scheme set out in the Act for dealing with native title applications and (less prescriptively) for dealing with other native title issues or forms of agreement-making.

The main steps in the claimant application process are summarised in Table 1.

**Table 1: Main steps in the claimant application process**

Main steps in native title application process	Responsible agency		Relevant section(s) of the Native Title Act
	Federal Court	National Native Title Tribunal/Native Title Registrar	
Filing	Application filed		s.61 s.61 A s.62
Referral #1	Copy of application given to Native Title Registrar		s.63 s.64(4)
Notification #1		State or territory government and native title representative bodies provided with a copy of application by the Registrar	s.66(2) s.66(2A)
Registration		Registration test applied to native title application by Registrar	ss.190A-190C

Main steps in native title application process	Responsible agency		Relevant section(s) of the Native Title Act
	Federal Court	National Native Title Tribunal/Native Title Registrar	
Notification #2		Native title application advertised and other potential parties notified by Registrar	s.66(3) s.66(A)
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 by Tribunal	ss.86A,136A-136G
Referral of question of fact or law to the Federal Court		Referral by Tribunal	s.136D
Determination of question or fact or law	Federal Court		s.86D
Agreement reached and mediation successfully concluded		Report setting out results of mediation provided to Federal Court by Tribunal	s.136G(1)
Agreed determination of native title	Court considers if appropriate to make determination of native title		s.81 s.87 s.94A s.225
Other agreements in relation to proceeding	Federal Court		s.86F s.87
No agreement		Tribunal makes mediation report to Federal Court	s.86E s.136G(3)
Order that mediation cease	Federal Court		s.86C
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.86B(5))

After the notification #2 process is complete and parties to the claim have been determined by the Federal Court, a claimant application will usually move into mediation. Indeed, except in limited circumstances when the Federal Court may order otherwise, all claimant applications are referred to the Tribunal for mediation.<sup>81</sup> Members of the Tribunal or consultants appointed by the President for this purpose preside at mediation conferences for claimant applications.<sup>82</sup>

When the Federal Court refers an application to the Tribunal for mediation, the Tribunal has the responsibility to undertake mediation of all aspects of the application relevant to the purposes defined in section 86A of the Act. This can include the development of a detailed negotiation protocol, the exchange of information between the parties (possibly including information about a claim group's traditional connection to the claim area), the identification of issues to be resolved and times and venues of conferences under the Act in furtherance of the mediation process.<sup>83</sup> The provisions of the Act relating to

mediation conferences are ancillary to the referral of applications to the Tribunal for mediation. They do not define the limits of the Tribunal's role.<sup>84</sup>

Mediation protocols and timetables may provide for bilateral negotiations between parties, with them reporting back to the Tribunal. Timetables for such bilateral discussions are an element of the mediation process undertaken by the Tribunal in the exercise of its statutory function and in respect of which it may be required to report to the Federal Court.<sup>85</sup>

As noted earlier, the purpose of mediating claimant applications is to assist parties to reach agreement on all or some issues specified in the Act, such as whether native title exists and, if it does exist, who holds native title; what constitutes the native title rights and interests; whether there are any other (non-native title) interests in the claimed area and, if so, the relationships they have with the native title rights and interests; and whether the native title rights and interests confer exclusive possession, occupation, use and enjoyment of any of the land or waters.<sup>86</sup>

If the parties agree on some or all of those matters and an order is required, the parties will set out their agreement in the form of a proposed order of the Federal Court.<sup>87</sup> It is then for the court to decide whether it can, or will, make an order consistent with the terms of the agreement reached between the parties.<sup>88</sup> Where agreements involve non-native title matters,<sup>89</sup> the court may have no say in the form of the outcomes.

Table 1 suggests a simple, step by step process from the filing of a native title application to its finalisation by the Federal Court, either by agreement of the parties or following a trial. In fact, the pre-mediation and mediation processes are not simple, nor do they necessarily follow in a strict order from one discrete step to the next (although the progress of a matter might be regulated by a program endorsed in orders of the Federal Court).<sup>90</sup>

#### **4.2 The role of the National Native Title Tribunal**

The Act provides the foundation of the work of the National Native Title Tribunal. The Tribunal's main functions are:

- providing information about native title processes
- mediating between parties to native title applications and assisting parties to reach agreement about relevant matters
- mediating between parties to assist them in reaching agreement about certain future acts that might take place on areas where native title exists
- arbitrating in relation to certain future acts where parties are unable to reach agreement
- assisting parties to negotiate legally binding agreements (such as Indigenous Land Use Agreements) that resolve a variety of native title issues
- maintaining registers of native title applications, determinations and agreements.

In carrying out its functions, the Tribunal seeks to:

- be fair, just, economical, informal and prompt
- take into account 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.<sup>91</sup>

The mediation of claimant applications by the Tribunal is one of its more important functions. It is still the case that, as Justice French<sup>92</sup> observed, the 'heart of the Tribunal's work' is found in the provisions dealing with mediation.<sup>93</sup> Justice Kirby expressed a similar view when he wrote:

It is important to emphasise that the purpose of the Tribunal is to facilitate negotiation, discussion and agreement, if at all possible.<sup>94</sup>

Other judges have noted the importance of mediation as the means of achieving outcomes. For example:

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.<sup>95</sup>

Various provisions of the Act are designed to achieve reconciliation through the mediation process.<sup>96</sup>

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.<sup>97</sup>

The objectives are clear enough – but how are they achieved?

#### 4.3 Some special features of native title mediation

Native Title mediation occurs in circumstances different from most mediation. For example:

- 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 each other. Hence the Tribunal is involved in developing relationships for the purposes of the mediation.
- Most mediation is supported by a common understanding of or background to the matters in issue; native title mediation requires the Tribunal to assist parties in understanding and reconciling culturally different views of land and waters.
- Most mediation is a form of alternative dispute resolution, yet native title mediation does not commence because of a dispute but by an application for a determination of (or in relation to) pre-existing rights that may affect the rights and interests of others. For example, a claimant application may be made without any history of past relations or dispute between the claim group and other persons with interests in the area of land or waters covered by the application (the 'claim area'). Although the mediation does not necessarily involve the resolution of a particular matter in dispute, the involvement of diverse interests and groups means that native title proceedings may, and often do, give rise to or identify differences between parties that need to be resolved.
- Native title mediation can often take years before the issues are resolved.

The Tribunal conducts multi-party, cross-cultural mediation in relation to areas of land or waters, using a primarily interest-based model in a rights-based context.

**Multi-party:** Most mediation (such as the mediation of commercial or matrimonial issues) involves two parties. Mediation in the native title context is multi-party because there are generally more than two parties. In relation to the mediation of some claimant applications there may be scores or hundreds of parties.<sup>98</sup> In the case of future act mediations or Indigenous Land Use Agreement negotiations/mediations, there are usually fewer parties but two or more parties will be involved.

**Cross-cultural:** Cross-cultural mediation acknowledges and takes into account the diverse values and concerns of the groups or communities to which the parties belong, including the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.<sup>99</sup>

The Tribunal seeks to ensure that such values and concerns are addressed in the design and implementation of the mediation process so that the ability of the parties to participate in mediation is optimised.

**Interest-based:** For the purpose of resolving native title issues, interest-based mediation focuses on the parties' interests as distinct from their positions or rights and adopts a problem-solving approach to negotiation or to conflict resolution in order to achieve mutually acceptable agreements. It should be noted that the 'interest' in interest-based mediation is not restricted to material questions between the parties. In the native title context there will be spiritual, cultural and historical factors that fall within parties' interests.

The Tribunal may draw also upon aspects of other models or approaches to conflict resolution when dealing with particular aspects of mediation.

**Rights-based context:** As noted earlier, mediation is conducted in a rights-based context in the sense that it is carried out within a legal framework whereby the parties may seek a judicial determination of their respective rights and interests at law. This rights-based context has various facets under the Act.<sup>100</sup>

The pace and progress of mediation on a case-by-case basis will be influenced also by such factors as:

- *The number of parties, the range of interests and the variety of issues involved.* Where there are many parties, they may be grouped according to common interests (e.g. pastoralists, explorers, small miners) with common representatives.
- *The willingness of the parties to participate in the process.* Many people and bodies are drawn into the mediation of native title proceedings not because they want to be there but because they consider that they need to be involved, at least to some degree, to protect their interests. Some are reluctant participants and may resent the process. The willingness of parties to be involved at relevant stages is essential to the progress and any outcomes of the process. If key parties are unwilling to take an active role in mediation, the progress and potential outcomes will be impeded. The Federal Court has recognised that it is appropriate that within a particular region timetables may be staggered to reflect priorities within that region.<sup>101</sup>
- *The capacity of parties (and their representatives) to participate in the process.* Whatever their attitude to the proceedings, the involvement of parties to actively engage in mediation will be influenced by their capacity to participate. In this context, capacity can include the resources available to them to participate (such as financial resources, properly qualified representation, and their own knowledge of the system and mediation process).
- *The extent to which parties participate personally in the process.* It is increasingly common for legal or other representatives, rather than the parties, to attend native title mediation conferences. Often a person will represent more than one party (e.g. an industry group's nominee may represent scores of the group's members). The nature and extent of the representation may directly affect how mediation is conducted.
- *The predictability or consistency of the parties' approaches to the mediation.* Some parties are involved in many native title proceedings. For example, the relevant state or territory government will be the first respondent to every claimant application in its jurisdiction. Some governments have a publicly known position on key issues (e.g. what types of information are required to prove an Indigenous group's connection to the claim area) or publicly known practices in relation to steps in the process (e.g. what information it will need from the applicants before undertaking tenure research in relation to the claim area). Such positions and practices will affect the pace and possible outcomes of mediation.
- *The resolution of threshold issues.* Some parties will not wish to be actively involved in mediation until a threshold issue is resolved (e.g. overlapping and disputed claimant applications, or the establishment of a claim group's connection to the area).

- *External time constraints or deadlines.* There are no statutory time limits on the mediation of native title applications, or on other types of negotiations under the Act. In that sense, the mediation process is ‘open-ended’. However, because the mediation of native title applications is initiated when an application is referred by the Federal Court to the Tribunal, and the court then supervises the progress of mediation, the court can impose a timetable and set various deadlines by which progress should be shown (or an agreement reached) or it will set the matter down for trial and may order that mediation cease. Practical time constraints can be imposed if the parties need to resolve issues within a commercially-driven timeframe and, for example, they want an agreement to take the form of a registered Indigenous Land Use Agreement or they are willing to seek arbitration if agreement is not reached about some forms of future act.<sup>102</sup>
- *Changes in the external environment.* As noted earlier<sup>103</sup> native title law and practice continues to change. Such changes can affect the range of outcomes that might be available to the parties or the conditions that need to be satisfied in order to achieve a particular outcome (e.g. a consent determination of native title). Because the process of resolving a native title application usually takes some years to complete, some of the parties may change or the attitude of a party may change during the mediation (e.g. as a result of a change of government after an election).

Such factors must be taken into account in each phase of the mediation process and must be factored into the design of the mediation of each application. They operate as constraints on both the design and the progress of mediation, and provide opportunities to the Tribunal to assist parties by developing their capacity to participate appropriately in the process.

#### 4.4 The interest-based approach

The Tribunal’s practice of drawing primarily upon the interest-based mediation model in the mediation of native title applications, particularly claimant applications, is based upon an analysis of dispute resolution theory, its implementation and practice. Various models for dispute resolution exist. The Tribunal’s Agreement-Making Strategy Group has reviewed the key models and considered their potential application to the resolution of native title issues by mediation.<sup>104</sup>

Of the various approaches to conflict resolution, the interest-based and rights-based approaches are most directly relevant to its mediation practice. In summary, as noted earlier, the Tribunal conducts multi-party, cross-cultural mediation in relation to areas of land or waters, using a primarily interest-based model in a rights-based context.

The particular mediator seeks to create a mediation environment in which the parties are encouraged to identify and explore their own and other parties’ interests, with a focus upon exploring possibilities for mutual problem-solving. This methodology involves the mediator taking an active role, where possible, in preventing parties from resorting to coercive or power-based tactics. Taking this role is intrinsic to effecting the statutory obligation on the Tribunal to conduct mediation in a fair and just manner.<sup>105</sup>

Of the various mediation models, the interest-based model is generally most appropriate in the context of resolving native title issues for a variety of reasons.

**Effectiveness:** In the experience of the Tribunal to date, interest-based mediation has proven to be the most effective model for exploring negotiation issues and moving parties towards agreement. It focuses on the management of negotiations whilst also providing a framework for dispute resolution within the native title context.

Interest-based mediation provides an effective mechanism for uncovering and identifying the underlying issues that drive parties’ stated positions and that form the basis of issues that need to be resolved.

**Durability of agreement outcomes:** Interest-based mediation provides an opportunity for all the issues to be put on the table for consideration by the parties. This improves the likelihood of increased durability for any agreement reached as most or all of the relevant issues are addressed.

**Acknowledgement of human emotion:** Interest-based mediation acknowledges the human dimension of conflict resolution, recognising that emotions are a legitimate part of the mediation process, both in terms of allowing for their expression and understanding their role in informing parties' positions.

**Relationship building:** Interest-based mediation often operates to create and strengthen good working relationships. It does not position parties in opposition but provides opportunities for them to work co-operatively in tackling a common problem. Where this model operates, parties develop a sense of ownership of the conflict resolution process and solution options. This also serves to enhance the durability of any agreement reached.

**Flexibility of process:** The Tribunal values the flexibility of process inherent in the interest-based approach. It allows the mediator to be responsive to the needs of parties and accommodates the complexity of logistics, numbers of parties and wide scope of interests involved in multi-party native title negotiations.

The interest-based model is not rigidly prescriptive. It accommodates the use of aspects of other models and approaches within its general structure. This is important in native title mediation to assist in addressing cross-cultural issues and power imbalances between the parties.

Interest-based mediation is conducted, however, in a rights-based context in the sense that it is carried out with a legal framework whereby parties may seek a judicial determination of their respective rights and interests at law and the Federal Court supervises the mediation.

If the parties are failing to reach agreement and it appears to the court that there is no likelihood that agreement will be reached, the court may order that mediation is to cease.<sup>106</sup> Where such a cessation occurs, the court may determine the rights of the applicant and parties in accordance with Australian law. Cessation of mediation and resultant judicial determination may also be initiated upon application by any of the parties to the mediation in certain circumstances.<sup>107</sup>

Even where an agreement is reached in respect of the matters the subject of court-ordered mediation, the agreement (or at least key aspects of it) will be given effect by an order of the Federal Court in the form of a determination of native title.<sup>108</sup>

This close interaction with the court gives the rights-based approach a particular imminence in native title mediations, although it may limit the options that parties may otherwise consider. In some cases, a party may attempt to use its recourse to judicial determination to coerce other parties. In other cases the likely outcome of a judicial hearing of the matter may be the 'bottom line' informing the development of a party's best alternative to a negotiated agreement. How the rights-based approach may impact upon the context of a particular mediation will vary in accordance with the particular circumstances and parties involved.

#### **4.5 Phases of mediation**

The interest-based mediation approach generally practised by the Tribunal, primarily for use in the mediation of claimant applications, provides the foundation for a mediation process with six main phases. These phases, as adapted from those described by Clark,<sup>109</sup> involve activity by members and staff of the Tribunal. The references below to the mediator are to the Tribunal member(s) or consultant appointed by the President of the Tribunal to mediate a particular matter.<sup>110</sup>

In summary, the phases involve:

**Phase 1 Information gathering and giving:** in which parties are provided with information about the mediation process and what might be achieved, and the Tribunal obtains information about the parties and the general context in which mediation will occur to inform the design of the mediation process in relation to that application.

In practical terms this involves the mediator in gathering information to enable an assessment of the likely parties and the respective 'landscapes' or backgrounds, value sets and perceptions that they will most probably bring to the mediation process. The information gathered is used to inform the design

phase. This phase is often used to provide information to the parties about the mediation process; the roles of the parties, the Tribunal and the Federal Court; where mediation fits in the context of the overall native title claim process; and what the parties can expect in and from the mediation.

**Phase 2 Process design:** in which the framework for the mediation of the application is initially established.

This phase (and ongoing design work) is critical to the entire mediation process. It involves the mediator in some or all of the following:

- interpreting and analysing the information gathered, adding this to information the mediator may already possess, and obtaining other information
- attempting to anticipate some or all of the issues which some or all of the parties are likely to bring to the mediation
- attempting to anticipate what positions some or all of the parties will take as an articulation of their underlying interests or issues
- developing the macro–design of the mediation process, including likely design review points
- initial structuring of the micro-design elements
- building into the designed framework appropriate points for parties exit and re-entry to the mediation.

Design considerations for mediation may include:

- the elements of interest-based mediation and the stages of interest-based mediation, and the possible use of other types of mediation theory and practice at various stages of the process and for various parties
- the political, cultural and legal context in which mediation as a whole occurs
- the political, cultural, ‘landscape’ and group dynamic issues already identified or anticipated for some or all of the parties
- each of the parties’ positions, interests and aspirations to the extent that they have been articulated, identified, anticipated or surmised at that time
- resources available to each of the parties and to the Tribunal to devote to mediation
- choice of possible mediation tools and styles (e.g. One Text technique, shuttle mediation, caucusing, conflict resolution domain)
- the management of identified cross-cultural issues and power imbalances in the mediation
- methods for encouraging parties to bring forward issues of concern into the process and leave their positions outside the process
- the order in which matters, concerns, or issues raised by parties are to be dealt with in the process
- the order in which resources or tools (such as maps or documents) are to be introduced into the process
- possible methods/techniques for removing some of the technical issues from the processes until agreement in principle is reached on some or all of the matters under consideration
- the possible impact of persons, organisations, or anticipated or predictable events outside the mediation on the activities and processes within the mediation space

- how to design for the exit and re-entry of parties to the process, including rules for consulting with the mediator prior to leaving the process
- who should meet with whom (including whether there should be a conference of all the parties, and whether or not legal representatives should be present)
- in what order the parties should meet, and where, when and how often parties should meet.

**Phase 3 Capacity-building and party development:** in which parties are assisted to prepare to participate in the later phases of the process.

The capacity of groups to engage in the mediation is crucial to the success of any agreement-making process. If they are well prepared, the parties will be able to concentrate and make informed decisions about their rights and interests rather than be distracted by misunderstandings or uncertainty about the process.

Different parties will have different resources (financial and human) and different levels of knowledge and experience (if any) in native title mediation. Their capacity to engage productively will be influenced by such factors.

The objectives of this Phase are:

- to identify and implement strategies that increase the ability of the parties to participate effectively in mediation, and
- by that means, to enhance a mediation environment that is conducive to achieving outcomes acceptable to the parties.

That involves seeking to ensure that each of the parties understands what the mediation process involves; their role in it; the role of other parties in it; and how the mediation will be conducted.

To achieve those ends the mediator may need to take a number of steps including:

- explaining the claims process to the parties, including the respective roles of the Federal Court and the Tribunal
- explaining the roles and responsibilities of the various parties in the mediation process
- assisting the parties to explore and decide what their issues may be
- assisting the parties to decide if they have a dispute at all, and
- assisting parties to prepare for the mediation – both psychologically and by physically preparing material.

In addition to providing information and guidance of that nature, the Tribunal may need to:

- direct the parties to sources of representation or other assistance<sup>111</sup>
- provide assistance from its own resources that is targeted to particular mediation outcomes (e.g. training, research, mapping, and, in limited circumstances, assisting people to attend meetings).

The Tribunal usually arranges and pays for the hire of the venue and the provision of food and beverages for mediation conferences.

The design and conduct of a particular mediation will be influenced by the capacity of parties to engage effectively. Consequently, mediation conferences will not necessarily be convened immediately following the referral of a matter to the Tribunal for mediation.

**Phase 4** *Exploration and identification of issues, interest and options:* in which parties meet collectively or in smaller groups to identify their interests and issues and explore options which satisfy their interests.

This is the Phase where ‘typical’ mediation usually starts. It is marked by some or all of the parties meeting to start to explore each others’ interests and, hopefully, the issues or interests underlying those positions with the objective of ultimately determining whether it is possible for agreement to be reached on some or all of those interests.

It is the Phase where the elements of the interest based model start to be put into practice. This phase typically starts with table-setting and hopefully moves on to storytelling as a means of moving beyond positions.

In this Phase the member is concerned with a number of matters including:

- establishing the rules to apply in the mediation and persuading the parties to subscribe to those rules
- assisting parties to articulate their positions in a manner that can be understood and appreciated by the other parties present
- encouraging the parties to engage in storytelling as a means of starting to articulate the issues and interests behind their position
- helping each of the parties to identify, understand and articulate their interests
- identifying and exploring issues that are to be the subject of the mediation
- reality testing and working with parties’ positions
- brainstorming of options
- selecting an option or options.

In this Phase the mediator needs to be constantly monitoring, adjusting and refining the process design to take account of the emerging process

**Phase 5.** *Mediating the negotiation of agreements:* the ‘mediation proper’ or formal mediation phase in which some or all of the parties, in a controlled environment, start to deal with each other’s (and their own) interests with a view to reaching an agreement which accommodates those interests.

It is in this Phase that the full creativity of the principles of interest-based mediation begins to operate. The parties will be extended here by activities such as brainstorming to identify options, having established each other’s issues. They will also be exploring, weighing, assessing and selecting options which they have previously identified to try and select options which satisfy their own (and hopefully the other parties’) interests.

For the mediator this Phase is the most intellectually taxing period. The interest-based model provides an array of tools for the mediator to use in assisting the parties to reach an agreement in principle.<sup>112</sup>

In this Phase the process design is being constantly monitored and refined.

**Phase 6** *Closure:* in which agreements are documented and other formal steps taken.

This is the Phase following the parties reaching agreement in principle. It is the period between agreement and the Federal Court determination.

This Phase essentially involves drafting, exchanging, agreeing and settling detailed and complex legal documents.

It is the period or Phase where there is the highest risk of the process failing. This is because usually:

- the persons who negotiated the agreement become nervous about their ability to 'sell' the agreement to the persons they represented in the mediation
- legal representatives often demonstrate a desire to 're-write' the agreement
- the parties start to comprehend the amount of work required to convert the agreement in principle into formal documentation
- a number of 'new' faces appear as representatives of the parties.

All of these factors (and the inherent risks) need to be managed by the mediator.

This Phase is usually a very resource-intensive period for the Tribunal which can be involved in such activities as mapping, drafting documents, arranging and conducting meetings and detailed project management.

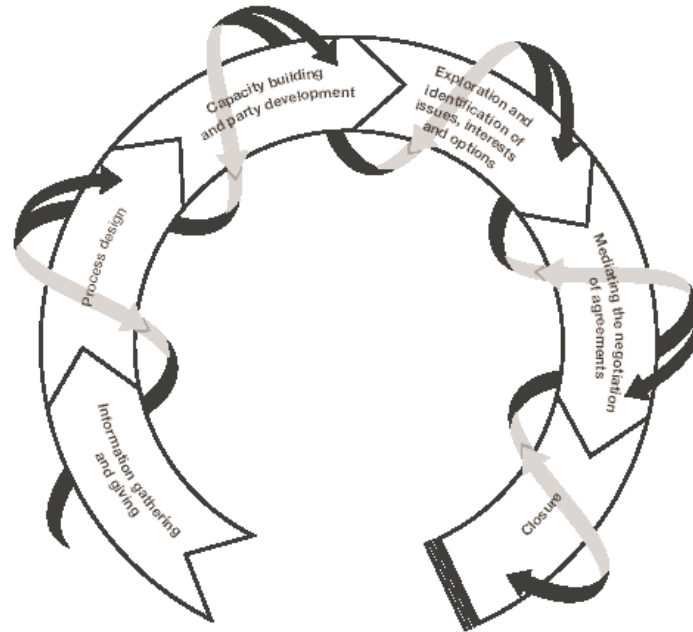
As a general rule the various phases of the process commence at the time when the Federal Court refers a native title application to the Tribunal for mediation. Although the first three (or four) phases are not 'mediation proper' or formal mediation, each phase is integral to the mediation of issues raised by native title applications. An application would usually move through each phase in that order, but aspects of some phases appear in other phases. Some phases may be repeated. Mediation is a dynamic process which need not proceed in a strictly sequential manner.

Accordingly, the Phases of Mediation diagram shows a process:

- that has a beginning (usually when the application is referred to the Tribunal for mediation) and an end (e.g. a determination of native title or some other formal outcome)
- where each application in mediation moves through various phases between referral and conclusion
- in which the parties may move forward and backward between phases (or to an aspect of a particular phase, such as storytelling or brainstorming), or where one phase has elements of (or is informed by) one or more other phases.

The diagram is in a curved format to emphasis the iterative nature of mediation and the integral relationships of the phases. The diagram shows a continuum in which there is looping back between and within phases of the mediation process.

## PHASES OF MEDIATION



## 5. POSSIBLE OUTCOMES OF NATIVE TITLE MEDIATION

### 5.1 Legal

As noted earlier in this paper, the possible legal outcomes of the mediation of claimant applications could include:

- a determination of native title which, when it involves a determination that native title exists, is a determination of who the persons (or groups of persons) who hold the native title rights are, the nature and extent of the native title rights and interests in relation to the determination area, the nature and extent of other interests in relation to the area, the relationship between the various rights and interests, and whether there are exclusive native title rights and interests over any of the area<sup>113</sup>
- an Indigenous Land Use Agreement registered under the Act which has effect as if it is a contract among the parties to the agreement, and binds all persons holding native title in relation to any of the land or waters in the area covered by the agreement
- other forms of agreement, including agreements that an application is withdrawn or amended, the parties to the proceeding are varied, or any other thing that may be done in relation to the application, including an agreement that involves matters other than native title.<sup>114</sup>

## **5.2 Relationships between parties**

In addition to addressing substantive issues, mediation may:

- create relationships between those parties who have had no relationship before the native title proceedings commenced
- reframe relationships where there have been pre-existing relationships
- improve relationships where there is conflict (that may have historical as well as contemporary expression and may be relevant to the matters being mediated)
- result in the cessation of negotiations in a manner that aims to minimise damage to relationships.

## **5.3 Broader community outcomes**

In the process of developing relationship between the disparate parties involved in native title mediation a number of important beneficial outcomes are potentially available at the community level. The process of mediation shifts the locus of decision-making about important issues for the community to the local level. For example, the building of the capacity of the native title claim group, local government and the pastoral community in a local area to participate in the native title process enhances that community's ability to engage in other issues affecting their future. Ultimately, the goal of reconciliation may lie at the heart of such agreement-making. Indeed, as noted earlier, the intended effect of the Act is to advance further the process of reconciliation among all Australians.<sup>115</sup> Communities engaged in direct negotiation of issues of importance to them are more likely to develop ongoing durable relationships. The building of the relationship between Indigenous peoples and communities at the local level is an example of such reconciliation.

# **6. ASSESSING THE OUTCOMES**

## **6.1 Need to evaluate outcomes**

Native title law and practice is still relatively new, and is continually changing and developing to meet numerous challenges. As this paper has illustrated, conventional mediation models and practices have necessarily been adapted to address the unusual, if not unique, combination of factors that affect the mediation of native title applications, or native title agreement-making more broadly.

A decade or so down the track, we are at a stage where evaluation of procedures and outcomes can be undertaken in light of a considerable body of experience. Such evaluation can help to identify:

- any flaws in the mediation process
- any factors that might affect the durability (or otherwise) of agreements
- ways in which the processes and outcomes can be improved.

Ideally all major participants (including governments, native title representative bodies, the Federal Court, the Tribunal, and industry representative bodies) should be involved periodically in such evaluation in order to assess what progress is being made and how, individually or in a coordinated manner, they can improve processes and outcomes.

In this paper, it is appropriate to look briefly at how the Tribunal approaches that challenge.

## **6.2 Need to evaluate and improve the National Native Title Tribunal**

In its Strategic Plan 2003-2005 the Tribunal has identified four Key Success Areas which, implicitly or explicitly, involve the periodic evaluation and improvement of Tribunal practice in light of experience and feedback from clients and stakeholders.<sup>116</sup> The Strategic Plan refers, for example, to reviewing and

improving the Tribunal's organisational processes and service delivery in response to information about the Tribunal's performance.

The Tribunal, as a publicly funded statutory body, is publicly accountable for its work and receives information about its performance in various ways.

In formal terms, the work of the Tribunal can be assessed by reference to the annual report on the management and administrative affairs of the Tribunal that its President must prepare. That report goes to the Federal Attorney-General, who must table it in each House of the Australian Parliament.<sup>117</sup> A special parliamentary committee<sup>118</sup> is obliged, under the Act, to examine each annual report and to report to both Houses of the Australian Parliament on matters that appear in, or arise out of, that annual report and to which, in the committee's opinion, the Parliament's attention should be directed.<sup>119</sup> That committee's other duties include reporting to the Parliament from time to time on the implementation and operation of the Act, and inquiring into and reporting on the effectiveness of the Tribunal.<sup>120</sup> The first inquiry into the effectiveness of the Tribunal has been undertaken and the committee's report is expected soon.

Each year, the Aboriginal and Torres Strait Islander Social Justice Commissioner must prepare a report to the Federal Attorney-General on the operation of the Act and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.<sup>121</sup> Those reports sometimes focus on aspects of the Tribunal's work.

In other ways, the Tribunal receives comment from people and organisations involved in native title matters, in relation to individual applications or regional or state-wide matters. Much of the most valuable feedback occurs during or after the mediation of particular applications, often assisting the mediator to revise the design of the particular mediation along the way. Members of the Tribunal and case management staff are able to share experiences and improve the knowledge and skills of individuals within the Tribunal.

At conferences and forums, comments are made about the adequacy or otherwise of the processes and the Tribunal's role in them.

The Tribunal recently commissioned professional consultants to undertake a client satisfaction survey. Responses were sought from a wide range of clients or stakeholders.<sup>122</sup> Overall the survey showed that 65% of those surveyed were satisfied or extremely satisfied with the services of the Tribunal. The survey identified the areas of highest satisfaction and areas in which the Tribunal might be able to improve.

As noted earlier, the Tribunal's Agreement-Making Strategy Group has developed for internal Tribunal purposes a detailed guide to the mediation of native title applications. It also provides the basis for comprehensive, staged and specially tailored training for members and staff. It is another tool to improve the way in which Tribunal members mediate.

## **7. CONCLUSION**

The objects of the Native Title Act include providing for the recognition and protection of native title, and establishing a mechanism for determining claims to native title.<sup>123</sup> The purpose of the National Native Title Tribunal is to work with people to develop an understanding of native title and reach enduring native title and related outcomes. In many ways those objects and that purpose are being realised.

There are various formal indications of what has been achieved to date. As at 8 October 2003, there were 31 determinations that native title exists over part or all of the areas covered by native title applications, and most of those determinations were made by consent of all the parties. In some cases, determinations were made by the Federal Court after a trial. In some cases, the courts have decided that native title does not exist over some areas, either because native title has been extinguished by acts of the Crown or because the local Indigenous community have not been able to prove their ongoing traditional connection to the area claimed. The areas where native title has been shown to exist range in size from a few hundred hectares of islands in the Torres Strait to approximately 136,000 square kilometres in one determination in favour of

the Martu people (and part also for the Ngurrara people) in the Western Desert region of Western Australia.<sup>124</sup>

Some 90 Indigenous Land Use Agreements have been registered, and many more are being negotiated or have been lodged for registration. This special form of agreement, negotiated and registered under the Act,<sup>125</sup> covers such diverse subjects as mineral exploration and mining, local government issues (such as the construction of a city esplanade and future acts of a shire council), the provision of infrastructure (such as telecommunications, electricity services, and Air Force facilities), a gas pipeline, a boat harbour development, a marina development and the creation of a new national park – the Arakwal National Park at Byron Bay in New South Wales. Some of these agreements have significance beyond the benefits for the contracting parties. In September 2003, the Packard Award for Distinguished Achievements in Wildlife Conservation was presented to the Arakwal People of Byron Bay and the New South Wales National Parks and Wildlife Service at the World Parks Congress in Durban, South Africa.<sup>126</sup>

Thousands of other agreements have been made dealing with native title or future acts (such as exploration or mining) on land where native title exists or might exist.<sup>127</sup>

These agreements build on legal rights and are negotiated by reference to processes that were not recognised or did not exist before the development of the law on native title, principally the Native Title Act.

But the benefits of native title and the processes surrounding its recognition and protection extend beyond formal court orders or written agreements. There is a significant human element. People are involved at every stage – native title parties, individual land holders, government officers, company representatives, recreational land users, Tribunal members and employees, judges and many others. Each will have a range of experiences of, and responses to, the native title regime.

Recognition of a group's native title can bring profound social and psychological benefits to members of the group. These benefits are evident in a sense of pride and worth as a people who can 'walk tall' because they have been acknowledged by the broader community as the people for that area. For some people, that is the chief value of the native title process.

Although native title itself may not be an economically valuable commodity, economic benefits as well as heritage protection and other benefits are being secured as by-products of native title processes. Indigenous people are using their procedural rights to negotiate a range of agreements before, after and independently of determinations that native title exists.

Many groups of Indigenous Australians who were, for the most part, invisible or marginalised in the day-to-day business of the nation are now seen and have seats at the table. Around the country, hundreds of Indigenous people meet with government, miners, graziers, infrastructure developers, and local authorities to discuss and talk about how activities can occur on land in which Indigenous people have an interest in a way that minimises the impact of those Indigenous interests by the activity.

Their traditional rights to land and waters under their traditional laws and customs are now recognised, respected and protected. Many of them, in turn, have come to accommodate the rights and interests of others to the same areas of land and waters.

Some people come to the table reluctantly, but most are grateful for a forum to meet and deal with these important and often difficult issues.

Thus, in often quiet and local ways, we are engaged in the stuff of rebuilding or reshaping communities. New relationships are formed where they did not exist before. Old relationships are restructured or reinforced. A desire to reach enduring outcomes motivates the people directly involved. Commitment to the processes helps them reach their goals. Community cohesion at local levels can have a powerful effect nationally.

In the past decade there has been a shift in thinking across many sectors of Australian society – from boardrooms to back paddocks. There is a greater recognition that, whether or not the local Indigenous people have legally defined native title rights to their traditional land, it is appropriate to involve them in decisions about the use of that land.<sup>128</sup> Difficult and drawn out as the processes often are, there is an underlying willingness and commitment to achieving mutually acceptable outcomes, whether or not the law requires them.

For the most part, native title does not cover the front pages of our newspapers or dominate our public discourse as it once did. Determinations of native title and major agreements are publicised only if they have a feature that makes each different – the first of its type, or the biggest in area.

Increasingly, native title issues are resolved in the day-to-day dealings of people, tribunals and occasionally courts. In other words, native title is now part of the legal and social landscape of the nation.

Positive results have been achieved and many more have yet to be negotiated.<sup>129</sup> Despite the range of legal, cultural, historical, economic, social and political factors that affect the resolution of native title issues in Australia, agreements can be reached which produce durable native title and related outcomes. Against all odds, mediated outcomes are possible. With goodwill and commitment we can work towards: ‘An Australian where native title is recognised, respected and protected through just and agreed outcomes.’<sup>130</sup>

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<sup>1</sup> (1992) 175 CLR 1 at 15.

<sup>2</sup> Wheeler, F. (1993) “Common Law Native Title in Australia – An Analysis of *Mabo v Queensland (No 2)*” *Federal Law Review*, No 21, p. 271.

<sup>3</sup> Stephenson, M. A. and Ratnapala, S. (eds) (1993) *Mabo: A Judicial Revolution*, University of Queensland Press, Brisbane.

<sup>4</sup> Nettheim, G. (1993) “Judicial Revolution or Cautious Correction *Mabo v Queensland*” *University of New South Wales Law Journal*, Vol.16, No. 1, p. 2.

<sup>5</sup> Morgan, H. (1993) “Mabo and Australia’s Future”, *Quadrant*, p. 64.

<sup>6</sup> Wilson, Sir R. (1993) “**Forward Together: A Study in Integrity**”, *Wallace Kyle Memorial Oration*, 30 April 1993.

<sup>7</sup> For a comparison of native title and statutory land rights regimes see Neate, G. (2002) “**Indigenous Land Rights and Native Title in Queensland: A Decade in Review**” *Griffith Law Review*, Vol 11, No. 90, pp. 90-146.

<sup>8</sup> *North Gananja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 617 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

<sup>9</sup> See *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 at 24 per Merkel J; *Fejo v Northern Territory* (1998) 195 CLR 96 at 134 per Kirby J; *Mitakoodi/Juhnjar People v Queensland* [2000] FCA 156 at [11] per Spender J; *Anderson v Western Australia* [2000] FCA 1717 at [8] per Black CJ.

<sup>10</sup> *Members of The Yorta Yorta Aboriginal Community v Victoria*, No VG 6001 of 1995, unreported decision dated 18 December 1998, [130]; *Ward v Western Australia* (1998) 159 ALR 483 at 639.

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- <sup>11</sup> See *Smith v Western Australia* (2000) 104 FCR 494 at 500 [27].
- <sup>12</sup> Anderson on behalf of the Spinifex People v Western Australia [2000] FCA 1717 at [7]. See also Passi on behalf of the Meriam People v Queensland [2001] FCA 697 at [9]; Congo v State of Queensland [2001] FCA 868 at [17]; Ngalpil v Western Australia [2001] FCA 1140 at [33].
- <sup>13</sup> See *Fejo v Northern Territory* (1998) 195 CLR 96 at 139 [78]; 156 ALR 721 at 746-747 [78].
- <sup>14</sup> Madgwick J has described the objects of the Act as including ‘arriving at agreement if possible as to who are the appropriate native title claimants, or at least minimising the scope for such disputes’: *Eora People – Brown v NSW Minister for Land & Water Conservation* [2000] FCA 1238 [27]. Emmett J has stated ‘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 Court determination. Detailed procedures are set out in the Act to achieve those objects’: *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 119 at [28]. Branson J has noted that the Act ‘discloses an intention of encouraging and facilitating the resolution of native title claims by agreement.’: *Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* [2001] FCA 1479 at [23].
- <sup>15</sup> Native Title Act 1993 ss. 4, 43A, 44F, 44G, 79A, 86A, 86B, 86C, 86D, 86E, 108, 123, 131A, 131B, 136A, 136D, 136G, 136H, 183.
- <sup>16</sup> H Astor & C Chinkin, for example, note that debates about definitions are important because they convey crucial information about what the definer believes to be most significant about the process. In their view, any attempt to suggest a rigid, prescriptive definition of mediation is undesirable. It may stultify the development and diversification of mediation and may, in any case, be ineffective in the face of diverse practices which reflect both the creativity and flexibility of a developing field, as well as a response to the needs of different disputes and disputants. However, precision in describing what is meant by mediation in any particular application is important: Astor, H and Chinkin, C (2002) *Dispute resolution in Australia*, 2<sup>nd</sup> edition, Butterworths, Sydney pp. 135-6.
- NADRAC, for example, defines mediation as ‘a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement’: NADRAC (2002) *ADR Terminology: A Discussion Paper*, Commonwealth of Australia, Canberra, p. 34.
- <sup>17</sup> Depending on the mediation context, the mediator may be a Tribunal member or a presidential consultant or, in certain future act matters, a staff member.
- <sup>18</sup> This definition is adapted from that provided by Christopher Moore in Moore, C (1996) *The mediation process: Practical strategies for resolving conflict*, Jossey-Bass Inc., San Francisco, p.10. This definition is preferred to other definitions of mediation because of its focus on negotiation and because it is not necessarily premised on the existence of a dispute.
- <sup>19</sup> ‘Landscape’ is used in this paper to mean the contextual elements that interact to shape a party’s approach to the native title mediation process; a party’s comprehension of the process; and a party’s ability to engage in the process. Such contextual elements may include cultural and political factors. It is the value sets that a party brings to the process.
- <sup>20</sup> See the definition of ‘native title’ in Native Title Act 1993 s 223, and the various judicial decisions in relation to native title as defined, principally *Commonwealth v Yarmirr* (2001) 208 CLR 1, 184

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ALR 113; *Western Australia v Ward* (2002) 194 ALR 538; *Wilson v Anderson* (2002) 190 ALR 313; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.

- <sup>21</sup> The Agreement-Making Strategy Group comprises the President, some members and some senior staff of the Tribunal. Mr Neate and Professor Clark are members of the Group. Associate Professor Jones was, until September 2003, a senior case manager with the Tribunal. Each was involved in the writing and revision of the guide to the Tribunal's practice in mediating native title applications.
- <sup>22</sup> National Native Title Tribunal, (2003) *Mediating Native Title Applications: A guide to National Native Title Tribunal Practice*, NNTT, Perth. Mr Neate, Associate Professor Jones and Professor Clark acknowledge that the Commonwealth of Australia has copyright in the Guide. The writing of the Guide was a collaborative exercise. The first draft of each chapter was prepared by one or more members of the Agreement Making Strategy Group – Mr Neate, Professor Clark, Dr Mary Edmunds (until April 2003), Dr Gaye Sculthorpe, Mr Hugh Chevis, Mr Andrew Jagers and Ms Fiona Emmett – with contributions from Mr Craig Jones. The draft Guide was then revised and edited by Mr Neate and Ms Emmett, in light of comments received in relation to successive drafts from other members of the Group, other members and staff of the Tribunal and some people external to the Tribunal.
- <sup>23</sup> The first edition of the guide has been prepared for internal Tribunal purposes as a detailed guide to the mediation of native title applications and the basis for comprehensive, staged and specially tailored training for Tribunal members and staff.
- <sup>24</sup> Native Title Act 1993 s.225.
- <sup>25</sup> See *Western Australia v Ward* (2002) 191 ALR 1 at 21 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
- <sup>26</sup> Native Title Act 1993 s.223.
- <sup>27</sup> See e.g. *Western Australia v Ward* (2002) 191 ALR 1.
- <sup>28</sup> See e.g. *Western Australia v Ward* (2002) 191 ALR 1, *Wilson v Anderson* (2002) 190 ALR 313.
- <sup>29</sup> See e.g. *Risk v National Native Title Tribunal* [2002] FCA 1589, *Quall v Risk* [2001] FCA 378, *Tilmouth v Northern Territory of Australia* (2001) 109 FCR 240, *Dieri People v South Australia* [2003] FCA 187.
- <sup>30</sup> See e.g. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.
- <sup>31</sup> Each new or amended native title application is assessed by the Native Title Registrar (or delegate), to see whether the application meets all the statutory conditions for entry onto the Register of Native Title Claims: Native Title Act 1993 ss.184-190D. The Federal Court may review a decision to register or not register a claimant application. Where a claimant application is registered, the native title claim group has various procedural rights in relation to the claimed area (e.g. in relation to future acts on the land) before the claimant application is determined.
- <sup>32</sup> Dodson, P. (1987) *The Age newspaper*, Melbourne, 3 November 1987, reprinted in Torre, S. (ed) (1990) *The Macquarie Dictionary of Australian Quotations*, The Macquarie Library Pty Ltd., p. 5.
- <sup>33</sup> Rose, D. B. (1996) *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness*, Australian Heritage Commission, p. 7. See also Stanner, W.E.H. (1969) *After the Dreaming*, 1968 Boyer Lectures, ABC, pp. 44-45 reprinted in Stanner, W.E.H. (1979) *White Man Got No Dreaming*, p 230.
- <sup>34</sup> See e.g. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 per Blackburn J, *The Queen v Toohey; ex parte Meneling Station* (1982) 158 CLR 327 per Brennan J.

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- 35 The current Prime Minister, Hon John Howard, encouraged Australian voters to amend the Australian Constitution to include a preamble with a statement “honouring Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands and continuing cultures which enrich the life of our country”. The proposals for a new preamble and other amendments to the Constitution were rejected by a majority of voters.
- 36 Native Title Act 1993 s.61(1). See s.251B which states what it means for a person or persons to be authorised by all the persons in the native title claim group.
- 37 Native Title Act 1993 s.62(1)(a)( iv) and (v).
- 38 Native Title Act 1993 s.109(2).
- 39 See the preamble to the Native Title Act 1993.
- 40 See e.g. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, *De Rose v South Australia* [2002] FCA 1342, *Daniel v Western Australia* [2003] FCA 666.
- 41 See e.g. Choo, C. and Hollbach, S. (eds) (2003) *History and Native Title, Studies in Western Australian History No. 23* Centre for Western Australian History, The University of Western Australia, Perth. and Neate, G (1997) “Proof of Native Title” in Horrigan, B and Young, S (eds), *Commercial Implications of Native Title*, Federation Press, pp 240-319.
- 42 See e.g. Windschuttle, K. (2002) *The Fabrication of Aboriginal History, Vol.1 Van Diemen’s Land 1803-1847*, Macleay Press, Sydney and Manne, R. (ed) (2003) *Whitewash: On Keith Windschuttle’s Fabrication of Australian History*, Schwartz Publishing, Melbourne.
- 43 See e.g. Kidd, R (1997) *The Way We Civilise*, University of Queensland Press, Brisbane.
- 44 Native Title Act 1993 ss.201A-203AI.
- 45 Native Title Act 1993 ss.203B-203BK.
- 46 See e.g. Altman, J and Smith, D (1995) *Funding Aboriginal and Torres Strait Islander Representative Bodies under the Native Title Act 1993 Issues Paper No.8*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra; Kleeberg, K (1997) “**ATSIC Concerned Over Native Title Funding**”, *Law Society of South Australia Bulletin*; Ritter, D. (2001) “**You Get What You Pay For**”, *Indigenous Law Bulletin*, Volume 5 Issue 9; p.14 : Office of Evaluation and Audit, (1999) “**Evaluation of the Native Title Program Final Report 2000**”ATSIC, Canberra; Human Rights and Equal Opportunity Commission (2000) *Native Title Report 1999* Report No. 1/2000; Love and Rashid, (1999) *Review of Native Title Representatives Bodies (Chapter 5)*, ATSIC Canberra.
- 47 Female Aboriginal elder commenting on the benefits of making a land use and access agreement with a pastoral party (Craig Jones’ notebook 2001).
- 48 Determined by the Federal Court of Australia on 28 September 1998 (Federal Court No QG6002/96).
- 49 Jones, C (2003) *The Western Yalanji Native Title Determination: A Case Study in Agreement-making between pastoralists and Aboriginal peoples*. Unpublished Seminar Paper, Aboriginal Environments Research Centre, University of Queensland, Brisbane; Howes, C. (2002) “Western Yalanji Land Returned” *Koori Mail Wednesday February 6, 2002*. p.13.
- 50 (1992) 175 CLR 1.

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- 51 Native Title Act 1993 s.3.
- 52 Native Title Act 1993 Preamble.
- 53 Native Title Act 1993 ss.4(7)(b)(ii), 108(1B), 123(1)(b), 131A, 131B, 136H, 183, 203BB, 203BD, 203BF, 207A.
- 54 Native Title Act 1993 ss. 79A, 86A-86E, 108(1A), 136A-136G.
- 55 Native Title Act 1993 ss.44F, 44G.
- 56 Native Title Act 1993 ss.31(3), 43(2)(c), 43A(4)(d), 181(4).
- 57 Native Title Act 1993 ss.86A, 86B, 86D(2), 86F, 87, 136C(b), 136D(1), 136G(4).
- 58 See Native Title Act 1993 ss.24MD, 25, 26D(2), 28(1)(f), 31(1)(b), 36(4), 37, 38(1A), 39(4), 40, 41(1)(b), 41A(1), see also ss.34, 35(1)(b), 36A(1)(b).
- 59 Native Title Act 1993 s.44B.
- 60 Native Title Act 1993 s.24EC.
- 61 Native Title Act 1993 ss.183, 203B(1)(e), 203BD(b)(iii), 203BE(3)(a), (5), (6), 203BF(1)(a), 203BH, 203BK(3), 108(1B) (b).
- 62 Native Title Act 1993 ss.24BA-24EBA, 69(1), 77A, 139(d), 141(4), 151(2), 169(2), 183, 199A-199F, 251A.
- 63 Native Title Act 1993 s.107.
- 64 See Native Title Act 1993 ss.78, 108-109, 136A-136H.
- 65 See principally *Commonwealth v Yarmirr* (2001) 208 CLR 1, 184 ALR 113, *Western Australia v Ward* (2002) 194 ALR 538, *Wilson v Anderson* (2002) 190 ALR 313, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.
- 66 Native Title Act 1993 s.223.
- 67 For a detailed discussion of the judgments on those and other issues see Wright, L. (2003) "Themes emerging from the High Court's recent native title decisions", *National Native Title Tribunal Occasional Papers Series*, No.1/2003.
- 68 Native Title Act 1993 s.86A(1).
- 69 Native Title Act 1993 s.225.
- 70 See Native Title Act 1993 s.86F(1), (2).
- 71 See Native Title Act 1993 s.86F(1).
- 72 See *Frazer v Western Australia* (2003) 198 ALR 303 at [24].
- 73 For examples of various agreements see *Talking Native Title*, a periodical magazine published by the Tribunal and accessible on its website [www.nntt.gov.au](http://www.nntt.gov.au).
- 74 Native Title Act 1993 ss.24BA-24EC, 199A-199F.

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- <sup>75</sup> Native Title Act 1993 ss.13, 61.
- <sup>76</sup> Native Title Act 1993 s.86B. See *Bropho v Western Australia* (2000) 96 FCR 543 at 445, 456, 461-462; 169 ALR 365 at 368, 373 per French J.
- <sup>77</sup> Native Title Act 1993 s.86B(1).
- <sup>78</sup> Native Title Act 1993 ss.86E, 136G(2).
- <sup>79</sup> Native Title Act 1993 s.86B.
- <sup>80</sup> Native Title Act 1993 s.86F.
- <sup>81</sup> Native Title Act 1993 s.86B.
- <sup>82</sup> Native Title Act 1993 ss.136A (2), 123(1) (b).
- <sup>83</sup> See *Frazer v Western Australia* (2003) 198 ALR 303 at [27], [28].
- <sup>84</sup> See *ibid.*, at [26]. The approach taken by French J in *Frazer v Western Australia* has been followed by him subsequently (see e.g. *Anderson v Western Australia* [2003] FCA 1058) and by some other Federal Court judges (see e.g. Mansfield J in *Jones v South Australia* [2003] FCA 538 at [36]-[37] and Stone J in *Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2003] FCA 981 at [13] and [17]).
- <sup>85</sup> See *Frazer v Western Australia* (2003) 198 ALR 303, at [28].
- <sup>86</sup> Native Title Act 1993 s.86A (1).
- <sup>87</sup> Native Title Act 1993 s.87 (1).
- <sup>88</sup> Native Title Act 1993 s.87 (1), (2).
- <sup>89</sup> Native Title Act 1993 s.86F.
- <sup>90</sup> See e.g. *Frazer v Western Australia* (2003) 198 ALR 303.
- <sup>91</sup> Native Title Act 1993 s.109.
- <sup>92</sup> The first President of the National Native Title Tribunal, Justice Robert French of the Federal Court served in that role from 1994 to 1999. Graeme Neate (1999 to the present) is the current President of the Tribunal.
- <sup>93</sup> National Native Title Tribunal (1999) *Annual Report 1998-99*, AGPS, Canberra, p.11.
- <sup>94</sup> *North Gananja Aboriginal Corporation v Queensland* (1966) 185 CLR 595 at 657, 135 ALR at 269.
- <sup>95</sup> *Munn v Queensland* (2001) 115 FCR 109 at [28], per Emmett J.
- <sup>96</sup> *Birri Gubba v Queensland* [2003] FCA 276 per Drummond J.
- <sup>97</sup> *North Gananja Aboriginal Corporation v Queensland* (1995) 61 FCR 1 at 17, 132 ALR 565 at 580 per Lee J.

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<sup>98</sup> For example, the Wotjobaluk people's application originally involved 447 parties organised into 17 groups according to their interests. As at 2 August 2002, 243 of the 296 active claims in mediation had 50 or fewer parties, 40 had between 51 and 150 parties, and 13 had in excess of 150 parties.

<sup>99</sup> Native Title Act 1993. s.109(2).

<sup>100</sup> For example:

- a) a native title determination application, revised native title application, or compensation application is made to the Federal Court and the court makes orders (whether by consent of the parties or otherwise): Native Title Act ss.13, 61, 81, 87
- b) a determination that native title exists in relation to a particular area is, among other things, a determination of the nature and extent of the native title rights and interests in relation to the determination area; the nature and extent of any other interests in relation to the determination area; and the relationship between the various rights and interests: Native Title Act 1993 s.225, see also the definition of 'interest' in relation to land or waters: s.253
- c) a determination of native title is a determination of rights *in rem*, not just the rights of the parties to the proceeding (see *Wik Peoples v Queensland* (1994) 49 FCR 1 at 6-8; 120 ALR 465 at 470-472 per Drummond J; *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151 at 175 per Drummond J; *Western Australia v Ward* (2000) 99 FCR 316 at 368-369, 375; 170 ALR 159 at 208-209, 214-215 per Beaumont and von Doussa JJ; *Mitakoodi/Juhnjar People v Queensland* [2000] FCA 156 at [12], [21] per Spender J); in other words, it 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* (*Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109 at 114 [22], quoted with approval by Sackville J in *Kennedy v Queensland* (2002) 190 ALR 707 at 714 [30]) and it has an indefinite character which distinguishes it from a declaration of legal rights as ordinarily understood (*Western Australia v Ward* (2002) 191 ALR 1 at 21 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ).
- d) a registered ILUA has effect, in addition to any effect that it might have apart from the Native Title Act, as if: (1) it were a contract among the parties to the agreement; and (2) all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be: Native Title Act 1993 s.24EA(1).

<sup>101</sup> See *Frazer v Western Australia* (2003) 198 ALR 303 at [28].

<sup>102</sup> Native Title Act 1993 s.35.

<sup>103</sup> See 2.1 Legal context.

<sup>104</sup> As noted earlier, (see 1.2 Mediation of native title issues), the Tribunal has adopted a working definition of mediation that contemplates, but is not necessarily premised on, the existence of a dispute. However, the mediation of native title issues may (and often does) involve dealing with disputes or conflicts between at least some of the parties.

<sup>105</sup> Native Title Act 1993 s.109(1).

<sup>106</sup> Native Title Act 1993 s.86C(1)(b). The order may be made in relation to the whole or a part of the proceeding.

<sup>107</sup> Native Title Act 1993 s.86C(2).

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- <sup>108</sup> Native Title Act 1993 ss.87, 94A, 225.
- <sup>109</sup> See G Clark, *Reconciling landscapes: The mediation of native title in Australia: Towards a structural approach*, Paper presented to the Australian/Canadian Oceans Research Network Conference, 30 May – 2 June 2002, Canberra, Australia.
- <sup>110</sup> Native Title Act 1993, ss.123, 131A, 136A.
- <sup>111</sup> Applicants are usually assisted by representative bodies that are funded primarily by the Commonwealth for this purpose. Where a representative body has decided not to provide assistance to an applicant, an application may also be made to the Aboriginal and Torres Strait Islander Commission for financial assistance or a review of that decision: Native Title Act 1993 s.203FB. Any other person who is a party, or who intends to apply to be a party, to a mediation related to native title may apply to the Commonwealth Attorney-General for assistance: Native Title Act 1993 s.183. Such applications from parties or their representatives are assessed by reference to the Act and published guidelines: see [http://www.law.gov.au/aghome/commaff/lafs/legal\\_aid/ntguide.html](http://www.law.gov.au/aghome/commaff/lafs/legal_aid/ntguide.html).
- <sup>112</sup> For example, the Principle Development Process, the One Text technique, caucusing, and best alternative to a negotiated agreement (BATNA) exploration.
- <sup>113</sup> Native Title Act 1993 s.225.
- <sup>114</sup> Native Title Act 1993 s.86F.
- <sup>115</sup> Native Title Act 1993 Preamble.
- <sup>116</sup> The Key Success Areas are:
- 1. Taking a leadership role on native title issues**
    - 1.1: Engage with clients and stakeholders to develop, promote and facilitate comprehensive approaches to reach native title and related outcomes.
    - 1.2: Ensure that our strategic vision and common purpose are cultivated across the Tribunal and reflected in our work.
  - 2. Providing excellence in native title services**
    - 2.1: Develop and implement systems and processes to assist parties to reach native title and related outcomes.
    - 2.2: Develop, promote and deliver targeted services and products that meet identified client needs.
  - 3. Enhancing our organisational capability to anticipate and respond to change**
    - 3.1: Develop and implement an organisational framework (structure, systems and processes) to ensure that, consistent with statutory requirements, our service delivery meets client needs.
    - 3.2: Ensure that the Tribunal’s people have the skills, knowledge and motivation to meet current and future challenges.
    - 3.3: Improve the effectiveness of communication internally and externally.
  - 4. Ongoing improvement in our performance**
    - 4.1: Develop and implement a framework that integrates the management of our internal and external performance.
    - 4.2: Review and improve our organisational processes and service delivery in response to information about our performance.

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- <sup>117</sup> Native Title Act 1993 s.133.
- <sup>118</sup> The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: Native Title Act 1993 s.204.
- <sup>119</sup> Native Title Act 1993 s.206(c).
- <sup>120</sup> Native Title Act 1993 s.206(b), (d)(i).
- <sup>121</sup> Native Title Act s.209. The Commissioner is appointed under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
- <sup>122</sup> These included native title representative bodies, unrepresented claimants, state and territory governments, the Australian Government, local governments, peak bodies or organizations, legal practitioners, and individual parties.
- <sup>123</sup> Native Title Act 1993 s.3(a), (c), see also ss.4(1), 10-13.
- <sup>124</sup> The Tribunal's *Annual Report 2001-2002* (National Native Title Tribunal (2002) *Annual Report 2001-2002*, AGPS, Canberra. Pp. 40-43) recorded that the determinations of native title registered that year included determinations that native title existed for the Nharnuwangga Wajarri and Ngarla people of Western Australia over an area of about 50,000 square kilometres near Meekatharra, the Bar-Barrum people in Queensland over an area of approximately 357 square kilometres of land near Herberton, the Tjurabalan people of Western Australia over approximately 26,000 square kilometres of land in the Tanami Desert region near Halls Creek, the Kiwikurra people of Western Australia over approximately 42,900 square kilometres in the Gibson Desert west of Lake Mackay, the Yawuru community of Broome over a 300 hectare reserve and a traditional law ground, the Ngalakan people of the Northern Territory over Crown land in Urapunga township by the Roper River, and the Karajarri people of Western Australia over a 24,725 square kilometres area in the Kimberley region. Updated information about determinations of native title can be found on the Tribunal's website at [www.nntt.gov.au](http://www.nntt.gov.au)
- <sup>125</sup> Native Title Act 1993 ss.24BA-24EC, 199A-199F.
- <sup>126</sup> Updated information about Indigenous Land Use Agreements can be found on the Tribunal's website at [www.nntt.gov.au](http://www.nntt.gov.au)
- <sup>127</sup> Examples of various agreements in relation to native title and other areas of Aboriginal land can be found at [www.atns.net.au](http://www.atns.net.au)
- <sup>128</sup> For example, in June 2003 a major pastoral company, Australian Agricultural Co ("AACo") announced its commitment to working with Indigenous groups to establish access agreements and, where appropriate, Indigenous Land Use Agreements. According to its media statement on 10 June 2003, AACo regards positive engagement with Aboriginal groups as an essential part of its business. This reflects the reality of coexistence of AACo's widespread operations with Indigenous communities. AACo owns or leases 19 properties in Queensland and the Northern Territory covering some 6.5 million hectares. All but two of the Queensland properties have native title claims over them while all the Northern Territory properties are subject to claims.
- <sup>129</sup> At 8 October 2003 there were 621 active claimant applications, 21 compensation applications and 20 non-claimant applications. Of those applications, 351 were formally in mediation. Others were at the pre-mediation stage.
- <sup>130</sup> National Native Title Tribunal, (2003) *Strategic Plan 2003-2005: Our Vision*, NNTT, Perth.

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