Native Title Mediation[1]

Native title is often referred to as a bundle of rights and interests held by Aboriginal or Torres Strait Islander peoples, in relation to a particular area. The Federal Court of Australia and the National Native Title Tribunal (the Tribunal) both have responsibilities under the *Native Title Act 1993* (Cth) (NTA) for mediation of parts of the native title process.

In broad terms, the NTA allows for a) mediation assistance to be provided through the Federal Court to reach agreement in claimant and compensation applications, and b) for mediation assistance to be provided by the Tribunal:

- to assist with 'future act'[2] negotiations;
- to assist with the negotiation of Indigenous Land Use Agreements, and.
- at the request of a representative Aboriginal or Torres Strait Islander body.

This paper explains the framework of the native title process, and then provides some context to how mediation is used within that process.

Federal Court mediation

Under the NTA, traditional owners can apply to the Federal Court for a determination that native title exists in a particular area.

The purpose of native title litigation in the Federal Court is to discover whether a particular bundle of rights and interests can be proven to exist.[3] Anthropological evidence can be used to show that the native title claim group has maintained a connection to their land and waters according to their traditional laws and customs in a

[1] This wiki paper was prepared and settled jointly by the members of ADRAC. It is adapted from sections of Helen Shurven, Multiple party mediation: Complexities and strategies (2014) 25 ADRJ 166, with additional assistance from Ashleigh Freeman, Senior Member's Advisor, National Native Title Tribunal and Natalie Gosper, Senior Legal Officer, Department of Defence.

[2] 'Future act' is defined in s 233 of the *Native Title Act 1993* (Cth) – the definition is a complex one, but in summary, it can be thought of as any act carried out after 1 January 1994 (or in some cases after 23 December 1996) that extinguish or impair native title in relation to land or waters to any extent (such as the grant of a mining lease or the construction of a public work etc).

[3] See s 223 of the *Native Title Act 1993* (Cth).

substantially uninterrupted fashion from sovereignty in the relevant area to the present time. In a native title context, the traditional laws and customs under which the rights and interests are said to be held must be shown to:

- arise out of 'and in important respects, go to define a particular society';[4]
- derive from a body of norms or a normative system (that is, a system of laws or rules) which has had a substantially continuous existence and vitality since sovereignty was asserted;
- originate in the body of law and custom acknowledged and observed by the claimant's ancestors as at the time sovereignty was asserted; and
- regulate and define the rights and interests that the native title holders have and can exercise in relation to the claim area.

If it is determined that native title exists, then the court must also make a determination[5] as to:

- who holds the native title rights and interests;
- the nature and extent of those rights and interests;
- the nature and extent of any other rights and interests in the area;
- the relationship between native title and non-native title rights and interests in the area; and
- whether there are any native title rights conferring exclusive rights against other persons.

Native title rights range from exclusive to non-exclusive. 'Exclusive' native title means that the holder exercises a degree of control over an area, for example the ability to restrict access to other users. 'Non-exclusive' rights include the right to access areas for hunting, camping and to perform ceremonial and cultural activities.

Native title can be partially extinguished, supressed or permanently extinguished depending upon the type of act occurring on the land. Acts that can extinguish or impair native title include:

- compulsory acquisition of land by the Commonwealth or a State or Territory
- the construction of a 'public work' for example a building, fixtures, road, railway, bridge, bore or major earthworks; or
- land alienated by the Crown, for example the grant of freehold or leasehold title to a third party.

In some instances, exclusive native title rights will be extinguished but non-exclusive rights remain intact.

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[4] See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [49] (Gleeson CJ, Gummow and Hayne JJ).

[5] See s 225 of the *Native Title Act 1993* (Cth).

Following a determination, traditional owners may also be entitled to compensation on just terms (s 51(1) of the NTA) if their native title rights have been extinguished or impaired in some way.[6]

Amendments to the NTA in 2009 placed responsibility on the Federal Court to manage all aspects of native title applications including the referral of claims to mediation, as needed. In 2012 all mediation functions associated with native title claim applications were transferred to the Court.[7] The NTA allows for mediation assistance to be provided to reach agreement in claimant and compensation applications.

The Court may refer matters to the Tribunal, or to an appropriate body or person for mediation in relation to claim applications.[8] The Court also maintains a list of appropriately qualified professionals that is periodically reviewed.[9]

The purpose of mediation in this context is to assist parties to reach agreement on matters including: whether native title exists/existed; who holds/held the native title; the nature and extent of the exercise of native title rights and other interests in the area; and compensation.[10] Mediation can also assist parties to clarify the issues in dispute and explore different options for settlement.

Section 86B of the NTA sets out the process and considerations for referring claimant and compensation applications to mediation. Unless an order is made under subsection (3) that there be no mediation under the NTA, the Federal Court must refer each application for mediation as soon as practicable after the application has been properly notified.[11]

Section 86B(4) of the NTA sets out the factors that the Federal Court may consider in deciding if a referral to mediation is not necessary or appropriate including the number of parties involved, the size of the claimed area and the nature and extent of other non-native title interests in the area. The mediation may be conducted by a native title registrar, a member of the Tribunal or a private mediator.[12]

In claim and compensation matters, mediations may have many parties and their

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[6] The most recent compensation case to date being *Griffiths v Northern Territory* [2019] HCA 7, known as 'Timber Creek'.

[7] Australian Government, Federal Court of Australia, https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/native-title/mediators

[8] Tribunal website, Mediation of claims http://www.nntt.gov.au/nativetitleclaims/Pages/Mediation-of-claims.aspx.

[9] Australian Government, Federal Court of Australia, https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/native-title/mediators/list

[10] *Native Title Act 1993* (Cth) s 86A.

[11] *Native Title Act 1993* (Cth) s 86B(1).

[12] Federal Court Practice Note (NT-1) https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/nt-1.

representatives. For example, native title claimants; individuals or companies with mining, exploration or prospecting interests; governments; public servants from various Government departments; local Governments; pastoralists; conservation groups; and those with fisheries interests.

Mediation at the National Native Title Tribunal

The future acts regime in the NTA[13] establishes procedures to be followed so that future acts can be validly done.[14]

Indigenous Land Use Agreements (ILUAs) are one type of validating mechanism, and other validating provisions are described in section 24AA(4) of the NTA and include acts relating to agriculture and pastoral leases, acts in relation to public housing, the management of water and airspace, acts involving services or facilities for the public, low impact future acts, acts that pass the freehold test and acts affecting offshore places.

The 'right to negotiate' provisions in the NTA form part of the future act regime.[15] The right to negotiate gives native title parties a chance to discuss the effect of the proposed future act, with the aim of reaching agreement about the act.

Registered claimants and determined native title holders are entitled to a right to negotiate when the Commonwealth or a State or Territory intends to do certain future acts on the claimed or determined area. Generally speaking, this right to negotiate applies to some exploration tenements, some compulsory acquisitions of native title, and the grant of mining or petroleum tenements.

States and territories may legislate for alternative procedures to the 'right to negotiate' which will be effective if the relevant Commonwealth Minister makes a determination under s 43 of the NTA that the state and territory procedures comply with the Act.[16]

There may be more than one claim group registered over an area of land, leading to multiple claim groups having the right to negotiate with the relevant Government and parties in relation to the future act.

Section 31(1) of the NTA provides that, unless the Government party asserts the future act attracts the expedited procedure the:

- Government must give all native title parties an opportunity to make submissions

[13] *Native Title Act 1993* (Cth) s 24AA(2).
[14] Australian Government, Attorney General's Department, https://www.ag.gov.au/legal-system/native-title/future-acts-regime
[15] *Native Title Act 1993* (Cth) s 25.
[16] See South Australia 1995 Determination under section 43, https://www.legislation.gov.au/Series/F2001B00211.

to it regarding the act; and

- negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act with or without conditions.

If any of the negotiation parties requests the Tribunal provide mediation assistance, it must mediate among the parties to assist in obtaining their agreement to the doing of the act.[17] The negotiation parties in future act mediation are the Government party, the grantee party[18] or parties and the relevant native title parties.[19]

Mediation provided by the Tribunal to assist with future act negotiations is confidential and without prejudice. If the Tribunal is the arbitral body in a matter which cannot reach a mediated agreement, it must not use or disclose information obtained during mediation for any purpose other than:

(a) providing that assistance; or
(b) establishing whether a negotiation party has negotiated in good faith;

without the prior consent of the person who provided the Tribunal with the information.

Mediation conferences can be conducted by a Tribunal Member, the Registrar or a trained staff member who assists the parties explore issues and develop options for agreement. Mediation can be conducted with parties attending by phone, by audio-visual technology (such as Zoom or Microsoft Teams), or in person, or a combination of these methods.[20]

The Tribunal may also offer assistance during a future act arbitral inquiry by convening a conference under s 150 of the NTA. Section 150 conferences can be convened to assist parties to resolve any matter relevant to the inquiry. This can be a final opportunity for parties to explore options for resolving a matter by agreement before a determination is made.

Indigenous Land Use Agreements (ILUAs) are voluntary agreements between native title holders, claimants and others about the use of land and waters. ILUAs can cover a wide range of topics and once registered, bind all parties including native title holders. Parties wishing to make an ILUA may request assistance from the Tribunal or a recognised State/Territory body in negotiating the ILUA.[21]

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[17] *Native Title Act 1993* (Cth) s 31(3).
[18] The person who requested or applied for the act to be done (s 29(2)(c))
[19] *Native Title Act 1993* (Cth) s 30A.
[20] Tribunal website, Future Act mediation http://www.nntt.gov.au/futureacts/Pages/Future-act-mediation.aspx.
[21] *Native Title Act 1993* (Cth) s 24BF(1) body corporate agreements; s 24CF(1) area agreements; s 24DG(1) alternative procedure agreements.

Assistance can also be provided to the ILUA parties where an objection has been lodged to the registration of the ILUA. The Tribunal or a recognised State/Territory body can assist parties to negotiate with the objector, with a view to having the objection withdrawn.[22]

Native Title Representative Bodies (NTRBs) are appointed under the NTA to assist registered native title bodies corporate, native title holders and persons who may hold native title with native title applications, claims, ILUAs, future acts and other matters.[23] NTRBs are appointed by the Department of Prime Minister and Cabinet to cover regions in Australia.

The NTRB may request assistance from the Tribunal in performing dispute resolution functions. This type of assistance can only be provided where the NTRB and the Tribunal have entered into an agreement under which the NTRB is liable to pay the Commonwealth for the assistance.[24]

[22] *Native Title Act 1993* (Cth) s 24CI(2) area agreements; s 24DJ(2) alternative procedure agreements.
[23] *Native Title Act 1993* (Cth) s 203BB(1)(b).
[24] *Native Title Act 1993* (Cth) s 203BK(3).