SHIFTING LINES IN THE SAND: MEETING THE CHALLENGES OF NATIVE TITLE MEDIATION

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4. Distinctive features of native title mediation

Distinctive features: Native title mediation is quite distinct from most other types of mediation.[75]

- Most mediation (eg, commercial or matrimonial) involves a small number of parties. In contradistinction, native title mediation often involves scores if not hundreds of parties. As at 14 November 2005, most of the 336 claims referred to the Tribunal for mediation had fewer than 50 parties, but 42 had between 51 and 150 parties and 17 had in excess of 150 parties. The Wotjobaluk People's native

title determination application originally involved 447 parties and was resolved by agreement of all the parties.[76]

- Most mediations involve people who know each other or at least have had some form of commercial or personal relationship. Native title proceedings usually involve people and/or institutions who have never met, and consequently the Tribunal is involved in developing relationships for the purposes of mediation.
- Most mediation is supported by a common understanding of the background of the matters in issue. Native title, on the other hand, constantly involves reconciling culturally different views of land and waters.
- Most mediation is a form of alternative dispute resolution, however native title mediation does not necessarily commence because of a dispute but by an application for the determination of pre-existing rights that may affect the rights and interests of others.[77] Paradoxically, as Professor Boulle has noted, mediation in these circumstances can precipitate disputes between the native title claim group and others whose rights and interests could be affected by a determination of native title. [78]
- Native title mediation usually takes years before the issues are resolved.

The mediation of native title issues by the Tribunal is the management of a negotiation or conflict by one or more impartial persons who have limited or no alternative decision-making power but who assist the involved parties in voluntarily reaching a mutually acceptable settlement of those issues.[79]

Consequently the Tribunal has developed an interest-based model for the multi-party and cross-cultural mediation of native title applications in a rights-based context.[80]

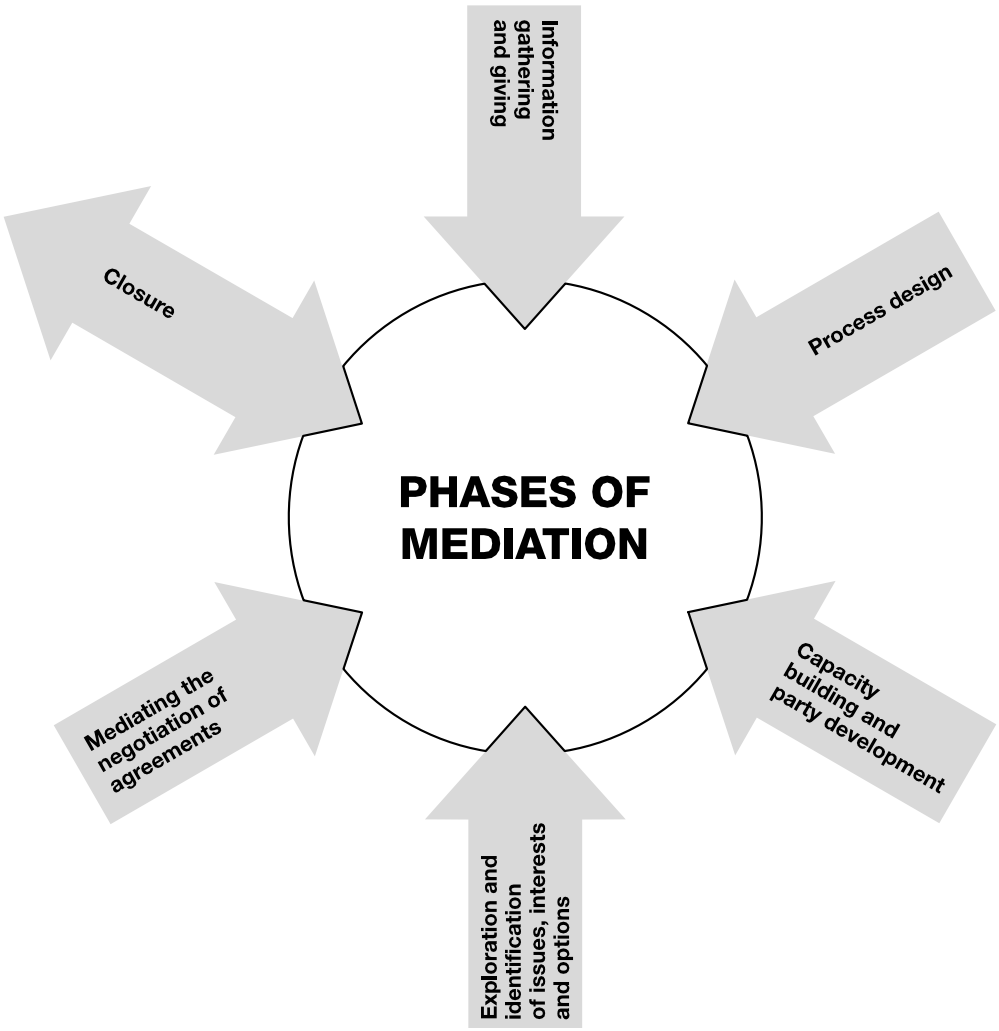
The phases of mediation: The interest-based mediation approach that the Tribunal seeks to practice, primarily in the mediation of claimant applications, provides the foundation for a mediation process with six main phases. These phases involve activity by members and employees of the Tribunal. In summary, the phases involve:

- *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

- *process design*—in which the framework for the mediation of the application is established initially
- *capacity-building and party development*—in which parties are assisted to prepare to participate in the later phases of the process
- *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
- *mediating the negotiation of agreements*—the 'mediation proper' or formal mediation phase in which parties negotiate about the issues, interests and options they have explored and identified, and reach agreement in principle
- *closure*—in which agreements are documented and other formal steps taken.

Figure 1: Phases of mediation



These phases are not discrete or necessarily sequential and the mediation of an application may move backwards and forwards between phases as it progresses towards closure. As Boulle has written, 'there is no linear sequence and the mediation process becomes unpredictable and iterative'.[81]

***Project management of native title mediation*:** The Tribunal adopts a project management approach in managing mediations. This approach has a number of key elements including establishing an agreement-making team.

To some extent, the composition of this team is determined by the relevant statutory provisions. The Native Title Act requires that a mediation conference in relation to a native title application referred to the Tribunal by the Federal Court must be presided over by a member of the Tribunal or a consultant engaged by the President of the Tribunal in relation to a particular matter.[82] The President (or his or her delegate) gives directions about the persons who are to conduct mediation in a particular proceeding.[83] The Act provides that the member (or consultant) presiding at a mediation conference may be assisted by another member of the Tribunal or by employees of the Tribunal.[84]

The size and composition of an agreement-making team will vary from case to case, and within or between the phases of the mediation of an application. Sometimes two or more members are allocated to mediate a claimant application (with one member being designated as the lead member). Teams are formed in response to the specific needs of parties and to ensure parties are able to effectively participate in agreement-making processes. Researchers, lawyers and geospatial specialists from the Tribunal's staff may be involved at various stages. The number and skills of people within a team will depend on the requirements needed to support a particular individual agreement or related matter. This team approach may require members and employees to work across State, Territory or regional boundaries.

Conduct of native title mediation by the Tribunal: The Tribunal provides a comprehensive native title mediation service that is tailored to the circumstances of individual applications (or clusters of applications) and the parties to them. The Tribunal can design a mediation program that, for example:

- seeks to address any information and other needs of parties before they can participate fully in mediation (eg, pre-mediation capacity building)
- sets out the order in which issues are addressed (eg, by dealing first with threshold issues such as disputed overlapping claims)
- identifies which parties are significantly concerned about connection issues, and the ways for appropriate amounts of information to be provided to parties as required (most parties do not require a great amount of connection material and some will be content to accept the assessment of the relevant State or Territory government)

- includes a staged approach to resolving issues (eg, by dealing with issues that are of concern to some parties with common interests, separately from other issues of concern to a different party or parties)
- relates the progress of mediation of one application in a region to the mediation of one or more other applications in that region
- includes providing assistance to parties who wish to negotiate Indigenous land use agreements (ILUAs) in relation to consent determinations of native title, or other non-native title components of a settlement.

The Tribunal can adjust the mediation program as required (including as required by the Federal Court) and can follow-up parties as process or substantive agreements are reached 'in principle' to ensure that they are completed.

Tribunal members and employees engaged in mediation are trained in that work, and can draw on more than a decade of Tribunal experience to meet the many challenges of native title mediation.

It is important to stress, however, that native title agreement-making is a dynamic process which need not proceed in a strictly sequential manner. How it proceeds is heavily dependent upon the attitudes and needs of the parties and the policy framework within which stakeholders are operating. As will be apparent to all, any native title agreement-making process needs to be flexible and, from time to time, innovative and creative.

Depending on the number of parties and their capacity to engage fully in mediation, the Tribunal may provide research, geospatial and other forms of assistance at relevant stages of the process to native title applicants and respondents.

Interventions by the mediator to assist and progress the negotiations are contemplated under various provisions of the Native Title Act.[85] A number of services may require prior agreement between the parties or can only be delivered under special conditions.

It should be noted that not all of these services are provided, or could be made available, in relation to every claim. In some cases the services may not be necessary. In other

cases, resource constraints or availability of the required material, such as land tenure records, may mean that not every request will be met. The Tribunal decides which (if any) forms of assistance are appropriate and whether they are likely to assist in the mediation of the application.

The process of native title mediation by the Tribunal: The proper role of the Tribunal is to mediate in accordance with the provisions of the Native Title Act. The Act does not define 'mediation' but confers on the Tribunal wide discretionary powers in relation to the mediation of each application referred to it by the Court. Consequently, the member of the Tribunal who the President directs to conduct mediation in a particular proceeding[86] has considerable scope in establishing and managing a timetable for the mediation of the application. For example:

- the Tribunal may hold such conferences of the parties or their representatives as the Tribunal considers will help them in resolving the matter[87]
- the presiding member may, for example, organise a mediation conference of all of the parties, but[88] need not do so
- the presiding member may direct that only one or some of the parties may attend, and be represented, at a mediation conference[89]
- the presiding member may, with the consent of all of the parties present at a conference, direct that other persons be permitted to attend as observers or participate in a mediation conference[90]
- the presiding member may allow a person to participate by telephone, closed-circuit television, or any other means of communication[91]
- if the presiding member considers that it would expedite reaching agreement on a matter that is the subject of mediation, the member may refer a question of fact or law to the Federal Court for determination[92]
- the presiding member may restrict or prohibit the disclosure of information given, statements made or documents produced at a mediation conference.[93]

As a general rule, mediation conferences are conducted on a 'without prejudice' basis and must be held in private.[94]

Given the numbers of parties and issues, and the range of factors involved in native title mediation, Tribunal members need to use the procedural tools available to them to design an effective mediation program in relation to each application. That involves answering such questions as:

- Who should meet?
- In what order should parties meet?
- Where should parties meet?
- When should parties meet?
- How often should parties meet?

Although hundreds of applications have been referred to the Tribunal for mediation, there has been relatively little judicial comment on the role of Tribunal mediation or the respective roles of the Court and the Tribunal in relation to the mediation of claimant applications. The most detailed judicial exposition of the role of the Tribunal in the mediation of claimant applications, and the most expansive characterisation of that role, is found in the judgment of Justice French in *Frazer v Western Australia*.[95]

5. Factors that affect the pace and progress of native title mediation

Apart from difficulties inherent in recognising the relationship between native title based on traditional laws and customs and other interests under a statutory regime which recognises and protects them, the Tribunal faces a range of issues which impact on the nature and ultimate success (or otherwise) of the mediation services it provides.

The pace and progress of mediation on a case-by-case basis will be influenced by factors which may vary in the course of mediation, particularly when mediation extends over many years. Some factors will affect merely the timing and pace of mediation. Others will go to the heart of what is being mediated. They could be described as 'line in the sand' factors. As they shift, so do the prospects of whether, when and how an application might be resolved by agreement.