

Plus ca change, plus c'est la meme chose?
- The 2007 Amendments to the Native Title Act

Justice Robert French*

1 It is not always easy to detect progress in Australia's dealings with its indigenous people. It requires a long view back and a long view forward. Sometimes the view is not clear.

2 Forty years ago, in 1967, the Australian people amended the Constitution. Today almost every media outlet and many commentators mistake what that amendment did. It did not confer a single right on, nor lift a single burden from indigenous people. It simply expanded the power that the Commonwealth Parliament already had, under s 51(xxxvi) of the Constitution, to make laws for the people of any race so it would cover Aboriginal people and Torres Strait Islanders. The great triumph of the referendum was that its purpose was beneficial and that it elicited from the people of Australia a powerful expression of goodwill directed to its first inhabitants. But despite the purpose of the amendment, the expanded power it seems can be exercised to the advantage or disadvantage of its subjects.¹

3 Thirty six years separated the 1967 amendment from the enactment of the *Native Title Act 1993* (Cth). That 36 years saw the failure of the Milirrpum Peoples' claim for recognition of their traditional ownership in the Supreme Court in the Northern Territory.² It saw the reaction to that failure in the establishment of the Woodward Royal Commission and the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976*. It saw numerous cases taken to the High Court as the Northern Territory and traditional owners litigated over land rights claims under that Act.³ Through that litigation the High Court was repeatedly exposed to concepts of traditional ownership and the essential elements of the relationship between indigenous peoples and their country described by Brennan J in one such case as

* A revised version of an address given at the Native Title Representative Bodies Conference in Cairns, 8 June 2007.

¹ Native Title Act Case (1995) 183 CLR 373 at 461

² *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141

³ See French R, *The Role of the High Court in the Recognition of Native Title* (2002), UWA Law Rev 129 at 136-138.

“primarily a spiritual affair rather than a bundle of rights”.⁴

4 `In that 36 years Eddie Mabo began his epic litigation in 1982 and ten years later, on a day he did not live to see, the High Court held that the common law of Australia could recognise native title.⁵

5 The 36 years that elapsed between the 1967 referendum and the enactment of the *Native Title Act* saw a failure to enact comprehensive national land rights legislation. It also saw a failure to enact such legislation in Western Australia despite the recommendations of a Land Rights Inquiry which the State Government had commissioned. Had a national land rights scheme, based upon the expanded race power, been enacted the common law of native title might well have been relegated, beneficially, to a far less significant role in the recognition of traditional ownership of country. The *Mabo* decision did not unveil a judge-made comprehensive land rights scheme of the kind that the Commonwealth Parliament could have enacted. The rules for the recognition of native title set out in the judgment were conditional, uncertain and difficult to satisfy. They laid a heavy burden on those who invoked them and on all who were involved in their application. It was clear from the day the decision was given that native title litigation would impose such human and other costs that some alternative mechanism for the resolution of claims would be necessary.

6 Thirty six years after the 1967 amendment the *Native Title Act* was enacted in reliance upon the race power. It provided, among other things, for a pathway to recognition less difficult than that which Eddie Mabo had had to follow. The Preamble to the Act made that clear:

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 ...

Government should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

(a) claims to land, or aspirations in relation to land, by Aboriginal people

⁴ *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 327 at 358

⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1

and Torres Strait Islanders;

- (b) proposals for the use of such land for economic purposes.

The Act provided for mediation by the National Native Title Tribunal (the Tribunal) as a first and primary process for the resolution of native title claims. It provided also for a litigious pathway to determine claims which could not be resolved by negotiation.

7 Since the *Native Title Act* was enacted there have been 67 determinations that native title exists. Twenty of those have resulted from litigation. Around Australia there are 538 applications for native title determinations pending in the Federal Court. There are 11 compensation applications and 36 applications for determinations that native title does not exist.

8 The period of operation of the *Native Title Act* between 1993 and 1998 was affected by general uncertainty over important legal issues, resistance to the whole idea of native title by some governments and industry groups and difficulties between and within some indigenous groups reflected in numerous overlapping claims. The future act process which provides for negotiation and arbitration of proposals by governments to grant mining tenements over areas covered by registered native title claims or otherwise to acquire native title rights and interests for the benefit of third parties, imposed additional pressures on applicants for native title determinations. While their applications were pending such applicants were involved in negotiations and arbitral processes concerning what they said was their country, as they tried to protect its cultural values and to derive what they saw as just benefits from its use by others.

9 Since the *Native Title Act* was enacted there have been a number of significant cases in the High Court and in the Federal Court which have elaborated upon the *Mabo* principles and provisions of the Act which have affected their application. The essential nature of the process created by those first rules and the burdens and costs they impose have not been greatly ameliorated over the years. There are an increasing number of mediated determinations but they still involve long and costly investigations and negotiation. Absent a national land rights statute, the rules for the determination and definition of native title rights set out in the *Native Title Act* cannot shake off the difficulties of their origins in a common law judgment.

10 Between 1993 and 1998 the Tribunal was the exclusive custodian of the mediation process for which the Act provided. In 1998 the Act was amended so that all applications which until then had been commenced in the Tribunal were commenced in the Federal Court. All applications pending in the Tribunal became proceedings in the Court. The Court was required, unless it ordered otherwise, to refer every matter to the Tribunal for mediation.⁶ The Court could also order that mediation cease.⁷ It could conduct its own alternative dispute resolution processes under powers conferred by the *Federal Court of Australia Act 1976* and the rules under that Act. In some cases it did so. But the *Native Title Act* made it clear that Tribunal-based mediation was the primary dispute resolution mechanism contemplated by the Parliament. An attempt by Western Australia at one time to argue that the acquisition of connection evidence was a pre-condition to mediation was rejected by the Court.⁸ The exchange of information was seen as an essential part of mediation. There was no principled basis upon which information exchange could be quarantined out of the Tribunal mediation process.

11 The transformation of native title applications in the Tribunal to court proceedings, referred to the Tribunal but subject to Court supervision, was necessary for constitutional reasons. A Tribunal consent determination of native title for which the 1993 Act provided could not validly be registered as a judgment of the Court.⁹ The transfer of all native title claims into the Court was also desirable because it made clear that Tribunal mediation had the authority of the Court behind it and, to some degree, could be supported by orders of the Court.¹⁰ There was also the capacity for the Tribunal or the parties to ask the Court to determine questions of fact or law important to the mediation process although this never happened.

12 Importantly a system evolved in the Court of placing all matters in mediation in a particular State or part of a State under the supervision of a Provisional Docket Judge who would review them from time to time and receive reports from the Tribunal about their

⁶ *Native Title Act* s 86B

⁷ *Native Title Act* s 86C

⁸ *Frazer v Western Australia* (2003) 128 FCR 458

⁹ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 followed in *Fourmile v Selpam Pty Ltd* (1997) 80 FCR 151 at 155-156 (Burchett J) and 176 (Drummond J) and 187 (Cooper J).

¹⁰ *Arnold Franks v State of Western Australia* [2006] FCA 1811; *Arnold Franks v State of Western Australia (No 2)* [2007] FCA 45

prospects. Where mediation was not making any progress and was not likely to, the matter could be referred to a “substantive docket judge”, the idea being that he or she would see the matter through to trial. The practice was not uniform across Australia. In New South Wales, for a time all cases were allocated to substantive docket judges from shortly after filing.

13 Another practice that evolved was the development of regional management of claims. Groups of claims from the same region in a State were reviewed at the same time, in the light of work plans and priorities proposed by the applicants, their representative body and the State Government. The Tribunal began to produce regional reports so that the judge, on a regional case management review, could adopt and support by Court orders appropriate timetables. In some places it took a more active role in the development of some of its own ADR procedures using case conferences presided over by a Registrar. These practices, while they were more sophisticated than those which had existed previously, could not escape the labour intensive character of native title proceedings even when entirely focussed on mediation. In each case there was a need for an authorisation process by the native title claimant group, the gathering of connection information, the limited number of anthropologists available to do the work and the resource limitations of representative bodies.

14 The amendments to the *Native Title Act* effected by the *Native Title Amendment Act 2007* relevant to claims resolution can be viewed in this historical context. They represent the government and the parliament’s response to the report of the Claims Resolution Review which was undertaken by Mr Graham Hiley QC and Mr Ken Levy in 2005. They are intended to speed up the resolution of claims by conferring on the Tribunal more authority and legal tools in relation to mediation. Important features of the amendments relevant to mediation are:

1. **Section 86B(6)** which provides that while a matter is in mediation by the Tribunal no aspect of the proceedings is to be mediated under the *Federal Court of Australia Act*.
2. **Section 86BA** which gives the Tribunal a right of appearance in the Court at a hearing that relates to any matter currently before the Tribunal for mediation. The right of appearance is for the purpose of assisting the Court.
3. **Section 86E(2)** which authorises the Court to request the Tribunal to provide, for particular areas, a regional mediation progress report and a regional work plan.
4. **Section 87A** which facilitates determinations over part of an area.

5. **Section 94B** which requires the Court to take into account mediation reports, regional mediation progress reports and regional work plans provided to it.
6. **Section 136B(1)** under which the Tribunal's presiding member may direct a person to attend at a conference.
7. **Section 136B(4)** which requires parties and their representatives to act in good faith in relation to the conduct of the mediation.
8. **Section 136CA** which allows a presiding member of the Tribunal to direct that a party produce a document in its possession, custody or control.
9. **Section 136DA** under which a question about whether a party should be dismissed can be referred to the Court on the basis that the person no longer has a relevant interest.
10. **Section 136GA** under which the Tribunal can report the failure of a person to act in good faith to a variety of persons including to the funding bodies and the Federal Court. The Act is silent on what the Court is to do with such a report.
11. **Section 136GB** where the Tribunal considers that a Government party or its representative did not act in good faith it may include that failure in its annual report.
12. **Section 136GC to 136GE** authorise a Tribunal member to conduct a review on whether a native title claim group holds native title rights and interests in the relevant areas. This is a kind of early neutral evaluation process. It does not involve determinations by the Tribunal of native title rights and interests.
13. **Section 138A-138G**. These provide a much broader power to the Tribunal to conduct an inquiry "in relation to a matter or an issue relevant to the determination of native title under s 225".

These new provisions may all be regarded as intended to enhance the powers and effectiveness of the Tribunal in the conduct of mediation proceedings. They do not affect the constitutional distinction between the functions of the Court and those of the Tribunal. They do not alter the essential character of the native title proceedings as proceedings in the Court and subject to its supervision and control. Nor do they overcome the inescapable burdens and costs associated with the application of the *Mabo* rules as transmogrified by the *Native Title Act*. In their effect upon the role of the Tribunal and the Court the amendments represent a partial return to the pre 1998 Native Title Act in that the Tribunal is again given exclusive authority in relation to mediation while mediation is on foot.

15 Reference should also be made to two important new provisions which, while not relating specifically to the mediation process, have an impact on the disposition of certain classes of application. Section 94C mandates dismissal by the Court of certain classes of

application for native title determinations which are lodged in response to future act notices when the question whether the future act can be done is resolved in some way. The obligation to dismiss however becomes an obligation not to dismiss where there are compelling reasons not to do so. There is also a new provision for dismissal of claims by the Court under s 190D where the Registrar of Native Title refuses their registration on merit grounds under s 190B.

16 How some of these powers and obligations will be interpreted and applied by the Court will be a matter for particular judges in particular cases. The Court has, however, recently reviewed its management of native title proceedings having regard to the effect of the amendments on the institutional relationship between the Court and the Tribunal.

17 The Chief Justice of the Court, on 8 June 2007, issued a Notice to Practitioners relating to the conduct of native title proceedings in the Federal Court. The Notice reflects a change in the provisional docket/substantive docket system to one in which cases in mediation will generally be managed by a designated Native Title List Judge assigned to a particular region. Matters referred for trial after mediation has been terminated will be assigned to a trial judge. In each Registry one or more judges, designated Native Title List Judges, will manage first instance native title matters. They will be assisted by existing Native Title Registrars. The Native Title List Judge for Western Australia is French J; for South Australia and the Northern Territory, Mansfield J; for Victoria and Tasmania, North J; for New South Wales and the ACT, Moore J and for Queensland, Dowsett, Spender, Kiefel and Greenwood JJ. Dowsett J also acts as a co-ordinating judge of the Native Title List in Queensland.

18 There will be greater emphasis on the regional management of native title cases with a view to allowing their progress to be coordinated and streamlined across a region or regions. The Native Title List Judge may conduct regional case management conferences in conjunction with any trial judge's allocated native title cases in the region. The object of the management of the list by the Native Title List Judge is to ensure that groups of applications within a particular region can be reviewed together regularly and that there is a specific and credible mediation timetable on a case specific and/or regional basis prepared and complied with. The objective of the Native Title List Judge will also be to pursue the timely resolution of cases which are in mediation.

19 The Native Title List Judges and Native Title Registrars may conduct case management conferences with the Tribunal and the parties to applications within a particular region to identify cases that should proceed to trial with priority. Cases may be given priority if they can function as lead cases within a group of claims or for a region. By resolving legal or factual questions of general application, such matters may provide a basis for consent determinations or negotiated agreements in other matters within the region. As a general rule a case will be allocated to a trial judge only once it has actively progressed into trial.

20 When mediation before the Tribunal has ceased, a trial judge may give consideration to case management measures to assist in the progress of the case. These may include the appointment of an expert to assist the Court, the referral of a case to a form of ADR such as mediation or a compulsory conference of experts.

21 In those cases which have been previously allocated to substantive docket judges and on which there is little prospect of progress to trial within the foreseeable future, the judges will be invited to review the case in order to identify whether it is better to have it sent back to the relevant Native Title List Judge. That decision will be a matter for each judge after hearing submissions from the parties.

22 From the point of view of many practitioners, not a great deal will change so far as the management of the native title list is concerned. Native title claims which are in mediation are regularly reviewed in regional groups. Recently the Tribunal has been submitting regional reports and proposed work plans to the Court with a view to obtaining directions from the Court to ensure that ensuing mediation is able to occur within a structured and Court supported timetable.

23 The essential character of native title litigation is such that it imposes burdens in terms of both financial and human resources on many of the parties involved. To that extent there is a limit upon the degree to which expeditious resolution is possible. However, with the amendments there are some new legal tools available to the Tribunal and, indeed, to the parties. Creatively and appropriately applied, these should be able to assist a more efficient and logical approach to mediation of claims.