

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

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The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process.

This series of papers is designed to contribute to the information and discussion. The papers address the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.

This paper addresses a proposal by the President of the National Native Title Tribunal, Mr Justice French, to amend the Native Title Act 1993. The proposal raises the possibility of including a provision in the Act which would enable an inquiry to be held, on a discretionary basis, at any point after acceptance of an application to determine whether there is a prima facie case and, in that context, to allow for important points of law which may affect the negotiation process to be referred to the Federal Court. The writer of the paper, Michael Maurice QC, is a former judge in the Northern Territory Supreme Court, Aboriginal Land Commissioner from 1984-1989, and now practices in Sydney.

SOME THOUGHTS ON A PROPOSAL TO AMEND THE *NATIVE TITLE ACT 1993*

Michael Maurice QC

The suggestion has been made in a briefing paper by the National Native Title Tribunal

- that it is desirable to amend the *Native Title Act 1993* to invest the Tribunal with jurisdiction to determine whether a *prima facie* case exists in relation to contested applications for a determination of native title or compensation and
- that the Tribunal should have power to refer questions of law to the Federal Court for early determination.

Unfortunately, the briefing paper is apt to leave the reader with a wrong impression about the role of the Federal Court under the legislation as it stands, and the possibilities for mediation and other forms of dispute resolution once that Court becomes seized of a native title dispute.

Role of the Federal Court

At present, the resolution of contested applications is the exclusive province of the Federal Court.

No precise wording for the amendments has been put forward. The authors of the proposal suggest that:

There is merit in a provision which would enable an inquiry to be held, on a discretionary basis, at any point after acceptance of the application to determine whether there is a *prima facie* case and, in that context, to allow for important points of law which may affect the negotiation process to be referred to the Federal Court.

It is not proposed that this expanded jurisdiction, or the power to refer questions to the Federal Court, should depend upon the consent of the parties.

Two arguments have been advanced in support of the amendments:

- i) first, a determination that a *prima facie* case existed might facilitate the negotiation process;
- ii) second, the need for an exhaustive investigation of native title in particular cases could be avoided.

In anyone's language, both aims are laudable. But are the amendments necessary to achieve them, and might they not adversely impact on the Tribunal's role as mediator?

The proposal throws up a further question:

- can the power to determine that no *prima facie* case exists be given to the Tribunal without infringing the separation of powers doctrine embedded in the Constitution?

A powerful argument can be made that a determination of this kind necessarily involves an exercise of the judicial power of the Commonwealth.¹ Indeed, the same argument can be made about the power of a presidential member of the Tribunal to direct the Registrar to reject an application on the ground

- that it is frivolous or vexatious, or
- that a *prima facie* case cannot be made out.

Such determinations appear to be an exercise of judicial power. In effect, they finally dispose of an application.²

Once an application is accepted by the Registrar, persons who may wish to contest it have two months in which to make the fact of their opposition known. The President of the Tribunal is then required to set up a compulsory mediation conference at which a member of the Tribunal must preside. It is to be a conference of the parties or their representatives. Its purpose is to 'help in resolving the matter'. If the conference fails to produce a settlement, S74 says that the Registrar must lodge the application with the Federal Court for decision.

The proposed amendments appear to be based on the supposition that, once the Federal Court becomes seized of a contested claim, its powers are limited to conducting an exhaustive investigation of native title. That is not so.

S82 enjoins the Federal Court to pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt. The Court is not bound by technicalities, legal forms, or rules of evidence. It is beyond question that, in appropriate cases, the Court may direct the separate determination of questions of law or fact, in order to avoid the necessity of an exhaustive investigation of native title. The Court might also entertain applications for summary dismissal so that, if a *prima facie* case could not be shown to exist, an application would be determined by its dismissal there and then. No doubt some objections could be disposed of summarily as well.

The Federal Court and mediation

The proposed amendment seems to assume that resolution through mediation, indeed, settlement as a result of direct negotiation between the parties, is not available once an application has been referred to the Federal Court. On the contrary, S87 clothes the Court with express power to give effect to an agreement reached between the parties. This may be contrasted with the position under the Land Rights Act in the Northern Territory. There, a Land Commissioner has no power to give effect to agreements concerning traditional land claims.³

- There is absolutely nothing to prevent the Federal Court from requiring parties to a native title dispute to attend further mediation conferences or from encouraging them to participate in other forms of dispute resolution such as neutral evaluation.
- It should not be thought that members of the Tribunal are the only persons equipped to perform the role of mediator or conciliator. However, if members of the Tribunal

¹ See the article by Anthony J.H. Morris QC, *Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation*, (1994) 68 ALJR 193.

² Note that S169(2) gives a right of appeal to the Court from a decision of a presidential member not to accept an application.

³ Except, perhaps, by withdrawal of the claim so as to allow some form of Territory title to be given in place of title under the *Land Rights Act*.

are willing to take the job on, then they may do so. They do not need statutory authorisation to perform such a function. From the mediator's point of view, it does not involve the exercise of any power or jurisdiction.

- For this reason, there can be no legal objection to members of the Tribunal continuing to perform that function in a personal capacity, after a contested application has been referred to the Federal Court. On the other hand, an amendment to the Act to expressly authorise the President of the Tribunal to make members available to mediate in claims before the Federal Court might be worthy of consideration.

Mediation

There is no magic to mediation. It is simply a process whereby a disinterested third person encourages persons in dispute to compromise their differences. This writer believes that there is an important objection to judges and ex-judges performing the role of mediator: parties often expect of such distinguished lawyers that they will make an evaluation of the merits of their cases and use that in the mediation process. Why else have lawyers as mediators? However, that is not the way mediation works in practice. In fact, some might see as an inherent weakness of mediation, particularly in complex matters like native title disputes, that it does not involve even a provisional evaluation of the merits of each party's case by the mediator. But, like oil and water, adjudication and mediation do not mix.

Many people prefer to have their claims and objections decided by reference to their merits. Dispute resolution on the merits tends to satisfy basic expectations of justice as a philosophical concept.

In a recent paper,⁴ Justice French has described the process of mediation in these terms:

It requires that the parties should identify their own and others' real interests and objectives, consider a variety of options to accommodate those interests, develop criteria of legitimacy to test the fairness of agreements which might emerge from the process and consider what are the likely best alternatives to a negotiated outcome. In the context of a native title application, there would be either litigation or abandonment of the application.

The last sentence ought not to be taken too literally. Experience proves that litigation usually leads to a settlement of disputes by the parties, on the advice of their lawyers with a well-developed sense of the strengths and weaknesses of their case and that of the opposition. Often it takes a hearing to commence and proceed part way before a settlement can be struck.

A more light-hearted but nonetheless insightful description of the mediation process comes from a recent article by MAJ Slattery QC,⁵ following involvement in the successful mediation of the Spedley litigation by Sir Laurence Street:

What though is mediation? It looks like the latest of a long series of games developed by societies for the safe discharge of their internal tensions. Our institutions of Parliaments and the Courts utilise game

⁴ *The Role of the Native Title Tribunal*, June 1994.

⁵ *Bar News* 1993 Edition.

theory with roughly agreed rules, teams, a referee, and an audience to appreciate the contest. To play any of the games offered by these institutions involves a commitment to achieve a result according to the rules and thereby an acceptance of the outcome. Mediation uses the same theory. Players participate to win the best outcome for themselves, but a result is achieved because the participants begin to believe that the game has a purpose of its own.

Shortcomings of the mediation process

There are a number of problems associated with a mediation approach in relation to native title, for example:

- Experienced litigation lawyers know how damaging it can be to a client's interests to allow a settlement mentality to develop before the case is properly prepared and the time ripe to begin negotiations. This is of special importance in native title disputes - the deals done today will affect the interests of unborn generations. The thought of compromising those interests for the sake of what today may seem to be pressing considerations will be anathema to some people, and compromises born of expediency are likely to prove unacceptable to the descendants of the deal makers.
- It is a matter of elementary human psychology that people only agree to compromise their differences out of self-interest.
- One of the most important spurs to settlement in mediation is anxiety about having to pay legal costs, an anxiety upon which mediators play in ordinary litigation when trying to broker a settlement. In native title disputes, this element is likely to be missing, on one side of the record at least.
- More important than the inutility of the proposed amendments is the criticism that they are likely to delay engagement of the most powerful incentives to dispute resolution in the legal armoury: effective case management, with the certainty of an early, fixed hearing date when claimant and objector are required to either put up or shut up. Experience proves that nothing is more conducive to settlement than the approach of a hearing date and a final, possibly adverse, determination after which there can be no more posturing, no more tactics - just the day of judgement.

Problems of mediation for native title claimants

The most important purpose of the Act is to enable persons who hold native title under the existing law, as expounded by the High Court in *Mabo*, to have their title formally recognised and authoritatively defined. Anyone who found a resonance between their own beliefs and values and those of the majority in *Mabo* would agree that persons claiming to be holders of native title ought not be pressured into compromising what they perceive to be their rights. The history of the treatment of indigenous peoples in modern times is replete with examples of compromises later seen to be unfair.

Justice delayed is justice denied. It is a source of disquiet to this writer that the Tribunal is reported to be taking an expansive view of when it is required to refer a contested application to the Federal Court. It has been claimed by the President that the Tribunal might more accurately and appropriately have been called the 'National Native Title

Dispute Resolution Service'. That, certainly, is one of its roles, but it has no charter to apply pressure to parties who do not wish to compromise what they see to be their legal rights by insisting that they continue to participate in mediation processes when they wish to have their case referred to the Federal Court for decision.

To delay due process is a form of pressure. This is especially so in native title claims, when it can be predicted with confidence that, in the majority of cases, there will be revered elders reaching the end of their lives on whose knowledge and authority the claim will be focussed. On their passing, years may go by before new elders emerge with the authority and confidence to speak for their group. The preparation, timing and conduct of every land claim in which the writer has been involved has been affected by such considerations.

These are early days in the aftermath of *Mabo*, a decision which leaves unanswered many questions relating to native title. As a result, there is a wide range of expectations about who will be able to prove native title, when it will be found to have been extinguished, and so on.

- Until some of the more important questions have been dealt with by the courts, it is unrealistic to expect that many applications will be resolved in mediation.

One of the fundamental values embraced by Australian culture is the right to have legal rights vindicated. To those seeking to have their native title formally recognised against opposition by others, and to those seeking to oppose native title applications, it is a denial of a fundamental right to have their case heard to refuse to send it to a Court for determination on the merits, if they do not wish to participate in the mediation process.

- People are entitled to have their cases determined according to law.
- They are also entitled to have them determined without undue delay.

It would be unfair to require parties to contested applications before the Tribunal, against their will, to prepare their cases and undertake the usual pre-hearing processes, before the Tribunal will even consider performing its duty under S74 of the Act, namely, to refer cases which are not settled to the Federal Court for decision.⁶

In every case, there is a time when it is ripe to enter into settlement negotiations. When that time comes is a matter for the judgement of the parties and their legal advisers. Often it does not come until the case is ready for trial and, sometimes, not until the trial is well under way. A pro-active Tribunal, pressuring parties to engage in settlement negotiations for which they do not feel ready or in which they do not wish to participate, is not something envisaged by the Act or the Parliamentary speeches.

Some experience in native title disputes in the Northern Territory leads this writer to think that many contested applications under the *Native Title Act* will not be amenable to early resolution by agreement between the parties. Moreover, as the contests are shaping up, differences are arising between, or within, Aboriginal groups themselves. (Despite dogma to the contrary, one must be wary of making romantic assumptions about the nature of Aboriginal culture and society. Indigenous peoples suffer the same frailties of the human condition as the rest of us.) Many disputes will have to go through to the

⁶ Actually, this is a duty which falls upon the Registrar, not the Tribunal.

umpire. Many others will probably not settle until well into a hearing. Arm twisting by mediators at an early stage, no matter how skilful, is unlikely to change this situation.

I have saved the most important question for the end.

- Is not a person who has the power to apply pressure of any kind on parties to a dispute automatically disqualified from mediating their differences?

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