What to expect in a future act mediation

Information sheet

Future act unit, February 2005

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Table of contents

Relevant sections of the Act 3
What is mediation? 3
Should you be involved in mediation? 3
The role of the mediator 3
Starting the mediation process 4
What happens at mediation conferences? 4
Progress of mediation 5
What happens if parties reach agreement? 6
What happens if parties do not reach agreement? 6
List of terms 7
Further information 8

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Relevant sections of the Act

Relevant sections of the *Native Title Act 1993* (Cwlth):

- s. 31(3): if any of the negotiation parties requests the Tribunal to do so, the Tribunal must mediate among the parties to assist in obtaining their agreement
- s. 41(A): negotiation parties must give a copy of the agreement to the Tribunal.

What is mediation?

Mediation is a way of bringing together parties who have an interest in an area covered by a proposed future act. If you are involved in a future act, which attracts the right to negotiate, then you may request assistance from the Tribunal. The Tribunal manages a mediation process which allows negotiation parties, with the assistance of a mediator, to discuss their interests in the area, identify the issues, consider alternatives and explore ways to reach agreement.

Should you be involved in mediation?

If you are any of the following negotiation parties, you may benefit from being involved in mediation:

- the state or territory government representative (the government party)
- a person with a native title application lodged over the area of the proposed future act who has the right to negotiate (a registered native title claimant or native title party)
- the beneficiary (grantee party) of the future act, for example, the person or company applying for the tenement, or the person or company for whom the land is being compulsorily acquired.

The people who attend mediation conferences should have the authority to make decisions relating to any proposed agreement.

The role of the mediator

The President of the Tribunal (or his delegate) will appoint a person to mediate among the parties.
The mediator will usually be a Tribunal member or experienced officer of the Tribunal, or a consultant appointed by the Tribunal.

The mediator's role is to:

- establish a framework for mediation and how long it should take
- help parties identify the issues that need to be negotiated, such as site protection, employment opportunities, site rehabilitation and compensation
- keep parties focussed on the main issues and limit side disagreements
- guide the process in an impartial way, and

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- if requested, assist parties with preparing a document setting out the basic terms of a proposed agreement.

A mediator does not decide issues or give legal advice.

Starting the mediation process

Any party involved in the negotiations can ask the Tribunal to mediate and should make their request in writing. The Tribunal will list the matter for mediation within two weeks of receiving the request.

The Tribunal will advise parties in writing of the date, time and place of the first conference, and the name of the mediator. The Tribunal will also send copies of the relevant guidelines to those parties who have not previously received them.

Mediation conferences take place at times and in places that are reasonably convenient to everyone involved. However, often the first conference is held at an office of the Tribunal. Parties and/or their representatives are encouraged to attend in person where possible. The Tribunal can arrange telephone conferences if necessary.

At the first mediation conference, all parties should be able to give details of:

- the background to negotiations and any areas of continuing disagreement
- the main issues which require mediation, and
- their willingness to continue with mediation.

Once the Tribunal has scheduled the first mediation conference and notified all parties, the conference will go ahead even if one party does not attend. A Tribunal officer will follow up by letter and/or telephone to find out why that person did not attend or participate.

The first mediation conference usually includes a general discussion between the mediator and the parties to establish how mediation will be conducted. The discussion may include:

- representation of each party in the mediation process
- how participants communicate with each other
- confidentiality and negotiating without prejudice, and
- arrangements for future conferences.

Once parties agree on these matters, mediation can continue.

What happens at mediation conferences?

Mediation conferences are informal and the mediator encourages participants to speak for themselves. Parties can appoint lawyers or other representatives to provide advice and/or speak on their behalf.

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During mediation, parties may break off to talk among themselves, consult advisers or speak privately with the mediator.

Parties do not have to present formal evidence at mediation conferences; however, the mediator encourages people to speak openly about their rights and interests and to allow others to do the same without interruption. The possibility of reaching agreement is more likely if there is an open exchange of information.

All parties should negotiate in good faith; that is, they should make a genuine attempt to reach agreement during mediation. Conferences are held in private and their content is generally confidential and without prejudice.

Unless parties otherwise agree, matters discussed at mediation cannot normally be brought up in any subsequent court or Tribunal proceedings (except in a Tribunal hearing to decide whether good faith negotiations have occurred).

After each mediation conference, the Tribunal will send a letter to the parties recording:

- a list of participants
- the duration of the conference
- the agreed outcomes of the conference, and
- the date, time and place for the next conference.

The Tribunal does not provide copies of any notes it takes during mediation conferences. Parties who want detailed records of discussions should take their own notes.

Progress of mediation

The mediation process may involve more than one conference, and conferences can include either:

- the mediator and all negotiation parties
- the mediator and one or more of the negotiation parties or
- the negotiation parties without the mediator.

Parties should aim to reach an agreement within three months. The mediator and parties should also try to ensure that each mediation conference advances the process and encourages further progress. The mediation process does allow time for traditional methods of decision making by Indigenous Australians in relation to any proposed agreement.

The Tribunal continues to monitor progress and will remain in touch with the parties by telephone and in writing.

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What happens if parties reach agreement?

If parties reach agreement about a proposed future act, they prepare a document setting out the basic terms of the agreement. Entering into agreements is voluntary and parties can take time to think about the agreement and seek advice before signing it.

In practice, the agreement is often formed in two parts:

a) a standard form State (or Territory) Deed, which is signed by the native title party, the grantee party, and the state or territory government
b) an ancillary agreement, which is signed by the native title party and grantee party.

The ancillary agreement deals with matters relating to the future act, and may regulate any ongoing relationship between the parties.

Once an agreement has been reached, and a copy of the standard form agreement has been lodged with the Tribunal, the future act may proceed. Parties are not required to provide the Tribunal with copies of ancillary agreements.

What happens if parties do not reach agreement?

If parties do not reach agreement, they can make a future act determination application. The Tribunal will then conduct an inquiry (arbitrate) and make a determination as to whether the future act should go ahead, and if so whether any conditions should apply.

If the parties have resolved some issues during mediation, then these issues do not have to be decided by the member conducting the inquiry.

Parties should be aware that:

- they cannot make a future act determination application within six months from the notification
- date of a future act notice
- the government party and the grantee party may need to show that they have negotiated in good faith before the Tribunal starts arbitration.

The mediator does not participate in the inquiry unless all parties agree that he or she should take part.

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List of terms

Future act

The granting of the right to conduct a proposed activity or development on land and/or waters that affects native title rights and interests. Generally, rights to be informed and consulted about the future act are given to native title claimants. In the case of some future acts including the grant of mining or exploration rights and some compulsory acquisitions of native title, the future act cannot validly be done unless the right to negotiate process in the Native Title Act is followed.

Future act determination application

An application made by any negotiation party to the Tribunal for it to determine whether a future act may proceed, and if so what conditions should apply.

Future act determination

A decision by the Tribunal that a future act may proceed and whether any conditions apply.

Mediation (future act)

A process which allows negotiation parties, with the assistance of a mediator, to discuss their interests in the area, identify the issues, consider alternatives and explore ways to reach agreement. Mediation processes are useful where negotiation is not progressing.

Member

A person who has been appointed by the Governor-General as a member of the Tribunal under the Native Title Act. Members are classified as presidential or non-presidential. Some members are full-time and others are part-time appointees.

Native title application

An application for the legal recognition of the native title rights and interests held by Indigenous Australians over a particular area of land or waters, according to traditional laws and customs.

Negotiation party

An individual, group or organisation that may participate as a party to proceedings in a right to negotiate inquiry, namely the government party (usually a State or Territory government who propose to do the future act); the grantee party (the person who has requested the future act to be done) and the native title party (the registered native title claimants).

Notification (future act)

The publishing of a notice in major newspapers by the state or territory government stating that it intends to do certain future acts, such as granting a mining lease, in an area. This is called a 'section 29 notice', because section 29 of the Native Title Act sets out how notice must be given.

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Notification date

The 'notification date' is identified in the published notice. Starting from the notification date parties have specific periods of time in which to lodge applications. Periods of time vary, depending on the type of application.

Right to negotiate

The right of native title claimants (whose application has satisfied the registration test) to be involved in discussions about — but not veto — proposed developments (such as mining) on areas of land or waters where native title exists. Where the right to negotiate applies, negotiations with native title claimants must occur before the grant for the proposed development can go ahead.

The right to negotiate process is managed by the state or territory government, but the Tribunal may be requested to mediate.

Without prejudice

A condition applying to discussions during negotiations, which prevents them being used as evidence in any subsequent court action.

Further information

More details about future act processes can be found in the Tribunal's *Procedures under the right to negotiate scheme* which are available from the Tribunal or can be found on the Tribunal's website at www.nntt.gov.au .

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