

**NEGOTIATING CONSENT DETERMINATION  
CO-OPERATIVE MEDIATION – THE THALANYJI EXPERIENCE**

**By**

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**Paper delivered to the  
3<sup>rd</sup> Annual Negotiating Native Title Forum  
Melbourne, Victoria**

**19 February 2009**

## NEGOTIATING CONSENT DETERMINATIONS Co-operative Mediation – The Thalanyji Experience

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### INTRODUCTION

On 17 October 2008 the Commonwealth Attorney-General, The Hon Robert McClelland, announced that he proposed to introduce legislation to the Commonwealth Parliament to amend the *Native Title Act 1993* (the Act) to provide that the Federal Court of Australia would assume the central role in managing all native title claims, with a view to encouraging more negotiated settlement of those native title claims.<sup>1</sup> At the time of writing the precise amendments proposed to the Act have not as yet surfaced, but it appears that the intention is to give control of all native title claims, ‘from start to end’, to the Federal Court. It is said that having one body control the direction of each case means that the opportunities for resolution can be more readily identified. The proposals are explicitly based on the view that the Court is the best positioned and most experienced entity to undertake the sort of alternative dispute resolution that is required to resolve native title applications by negotiation. The Federal Court will determine how native title claims will be resolved in the future and the Court will have the discretion to involve the National Native Title Tribunal (NNTT) in that process or not. If the NNTT is involved it will be at the discretion and under the direction of the Court throughout the process.

Statutorily this represents a winding back of the 2007 amendments<sup>2</sup> made under the previous Attorney-General, The Hon Philip Ruddock, in which the roles of the Federal Court and the NNTT were defined in a way which ensured that the NNTT would be given the exclusive opportunity to mediate native title applications, at first instance and until such time as the NNTT came to the view that a negotiated resolution was not

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<sup>1</sup> Hon R McClelland, Press Release, 17/10/2009

<sup>2</sup> Native Title Amendment Act 2007

possible. The earlier practice of the possibility of parallel mediation processes taking place in the Federal Court and the NNTT was abandoned as counter-productive. It is notable that the current Chief Justice, Hon Robert French, commenting upon the impact of the 2007 amendments, observed:

‘The provisions are intended to enhance the powers and effectiveness of the Tribunal in the conduct of mediation proceedings. They were not intended to affect the constitutional distinction between its functions and those of the Court. They did not alter the essential character of native title proceedings as proceedings in the Court subject to its supervision and control. They did not overcome the inescapable burdens and costs associated with the application of the Mabo rules, as transmogrified by the Native Title Act’.<sup>3</sup>

The Ruddock amendments were largely based on the recommendations of the Hiley/Levy Report into the Native Title Act, albeit that the two authors made different recommendations about the question of who should have primacy in the mediation of claims. The proposed current amendments represent a reversal of the previous government’s decision to prefer the recommendations of Dr Levy over those of Mr Hiley. Mr Hiley’s views have now prevailed.<sup>4</sup>

The purpose of this paper is to argue that, irrespective of the statutory framework, ie pre 2007/post 2007 or post 2009 amendments, the experience of the NNTT and the Court is that native title claims are best and most expeditiously resolved by negotiation and consent when the NNTT and the Court work hand-in-glove, co-operatively and in a complementary fashion. The two institutions have different backgrounds, skills, perceptions of the task, reputations and standing. The best results are achieved when this is recognised and creatively utilised. Consequently, if this is borne in mind by both institutions, it is really of little consequence in practical terms who is ultimately in control of the process. Indeed, it is my view that even under the existing legislation, the Federal Court is firmly in control of the process ‘from start to end’. This is hardly

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<sup>3</sup> Rolling a Rock Uphill – Native Title and the Myth of Sisyphus. Paper at Judicial Conference of Australian National Colloquium, French CJ, 10/10/2008, p 26

<sup>4</sup> Hiley Levy Report and s 86B(6) of the Native Title Act

surprising. Since 1998 native title claims are Federal Court applications lodged there and decided there, by consent or otherwise. The role of the NNTT is to try to resolve by mediation or alert the Court as soon as possible to its view that such resolution is unlikely so as the Court may decide what next step it will take. In the brief time when the Court has, as a matter of course, been required to refer matters to the NNTT exclusively, the status quo or balance of power has changed little, if at all. Realistically, a matter cannot remain in mediation with the NNTT for any length of time without the approval and understanding of the Court.

I seek to illustrate this proposition by reference, in particular, to the case of the negotiation and resolution by consent of the Thalanyji claim. From time-to-time I will mention aspects of a number of other matters to reinforce some of the points I seek to make.

### **THALANYJI – THE STORY**

The Thalanyji claim (WAD6113/98) began its life as a series of polygon claims filed in 1995. The claim area covered area of in excess of 25,000 sq km in the western Pilbara centred around the coastal town of Onslow. By 2000 those claims had been amalgamated and amended into a form which then proceeded on its course towards resolution.

The claim largely covered pastoral country on which there were significant areas of mining activity and consequently pastoralists and miners were important respondents in the claim. There was a significant coastal portion of the claim and fishermen, pearlers and other users of the marine environment also became respondents. The State of Western Australia was the first respondent and the Commonwealth subsequently became a respondent. The claim, in the form in which it was amended in 1998, also involved a series of overlaps with adjoining claims to both the south and the east. It also

became apparent, that although there was no overlap with one other adjacent claim, it would be put by members of that claim that the Thalanyji claim had, in fact, intruded into areas of their traditional interest and consequently, if that territory was not surrendered, it was likely that an additional competing claim would be lodged over that part of the Thalanyji claim area.

In accordance with the practice which had developed in Western Australia in the late 1990s and early part of this century the applicants were given an opportunity by the Western Australian Government to provide anthropological materials which would attempt to satisfy the State that the applicants were indeed the appropriate group to be determined as the native title holders for the area on the basis of their continuing association through their traditional laws and customs. A report by the anthropologist, Dr Kim Barber, was submitted to the State in mid 2000. The report was assessed by the State and in their view, of itself was insufficient to found a determination by native title by consent. The applicants were invited to provide additional information which might address some of those issues.

It is also worth noting in relation to the background of the claim that it passed the registration test in February 2000 and was therefore a registered native title claim attracting the right to negotiate. This, of course, meant that in addition to dealing with the claim itself, there was a significant workload on the applicants and their representatives in dealing with future acts which occurred abundantly in that area of the Pilbara between 2000 and now. Further, it is worth noting that the Thalanyji claim was at no time represented by the designated native title representative body for the area. When the claims were originally lodged it fell within the representative body area of the West Pilbara Land Council (which ceased to be a native title representative body in 1997) and (under the global arrangements that then existed) the Aboriginal Legal Service of Western Australia. Subsequently the Pilbara Land Council became the representative body for the area and after the amendments of 1998 and from 1999 onwards the Yamatji

Marlpa Aboriginal Corporation became the representative body for the Geraldton and Pilbara areas through the Pilbara Native Title Service. For various reasons the Thalanyji native title claim was not represented by any of those entities at any point, albeit that on a number of occasions it made applications to the various entities seeking assistance and the funding of their claim. However, they maintained throughout that they were not prepared to surrender their own advisers as the price of that assistance and consequently they were not funded from the public purse. This, of course, presented significant problems for the prosecution of the native title claim, bearing in mind the resources which are necessary from both the legal, anthropological and logistical perspective.

From 2000 to mid 2004 it would appear that not a great deal of progress was made in the matter, apart from initial steps by the NNTT to address the overlaps. While it remained in mediation with the NNTT, further anthropological information was not provided to the State and neither the applicants nor any of the respondents requested the NNTT to progress the matter. In conformity with the practice which had developed between the judges of the Western Australian division of the Court and the NNTT, the matter was given low priority and not dealt with in a substantive fashion during that period as other cases in that particular region were occupying the time and resources of the various parties concerned, including the trial relating to the Ngaluma/Yindjibarndi matter, the negotiations for the resolution of the Eastern Guruma and Ngarla matters. In mid 2004 the representatives of the applicants made an application to the Federal Court for the hearing of preservation evidence. A number of the senior members of the claim group, who were also the applicants to the claim, were both old and frail and it was deemed appropriate by the applicants and, subsequently the Court, that their evidence should be heard and preserved in order to ensure that such evidence would not be lost to the applicants should the matter need to proceed to trial.

The issue of the timing and use of preservation evidence in native title claims has been somewhat problematic. Representatives for the applicants are often reluctant to seek to adduce that evidence in circumstances where the final materials and an expert report are not in a state of completion. Similarly, in other cases, variations on preservation evidence have been used, often where the evidence is more of the character of limited or early evidence rather than preservation evidence in the true sense, ie where there is a real prospect that witnesses may pass away prior to the commencement of a trial. In the Thalanyji matter the evidence was sought to be adduced firmly on the basis of what might be traditionally understood to be preservation evidence.

The judge assigned to hear this evidence was Justice Tony North, a Federal Court judge based in Melbourne. His Honour determined that the evidence would be led by the applicants and the respondents would be given an opportunity to cross examine those witnesses. The evidence was heard in Onslow and its surrounds on 14 to 18 September 2004.

By this stage the applicants had engaged a new anthropologist, Dr Edward McDonald who, unfortunately, due to personal difficulties, was unable to attend the hearings on those days. This caused initial difficulties in affectively adducing the evidence from the witnesses who were both elderly, frail, inexpert in English and unaccustomed to the court environment. At the conclusion of the hearing of the evidence and while still in Onslow, Justice North gave a clear indication that while he was not expressing a concluded view and indeed, while it was not clear that, in fact, he would be the trial judge in this matter, he was of the opinion that the evidence given by the applicants was highly probative. He noted that:

‘the fundamental policy of the Native Title Act is that these sorts of applications, if at all possible, be resolved by mediation’.<sup>5</sup>

He was aware that the NNTT had allocated members to advance the mediation and he wished to direct some of his remarks to those members. He averted to the fact that

counsel had indicated that, should the matter go to trial, it was likely that it would take approximately a further 50 hearing days to complete. He reiterated that any views he expressed were:

‘of necessity extremely tentative and they are designed to assist the mediation as best they can’.<sup>5</sup>

He indicated that from the evidence he had heard he believed that there was:

‘a foundation already observable of those two factors of connection and continuance’.<sup>5</sup>

He acknowledged that the State of Western Australia required to be satisfied about those factors from the evidence before it was prepared to move towards an agreement and in his view there was a foundation upon which the State could now move in a justified fashion to some degree of satisfaction on those issues of connection and continuance. He acknowledged that there may be outstanding matters that needed to be addressed in relation to those factors and that there were difficulties with the precise boundaries of the claim and the description of the entirety of the claimant group. However, he expressed the view that there was a firm basis for a potential agreement. He concluded by saying:

‘and without seeking to raise matters in terrorem, I think I ought to mention that these comments will stand on the record. If the matter goes to trial and if it is found that one or the other of the parties in progressing the matter to trial did so in a manner that might be regarded in the light of these comments as unreasonable, there are processes under the Native Title Act whereby costs might be visited upon such a party. That approach has never been used so far, but there will always be the opportunity for a first time.

In closing, I want to encourage all the parties to move now to strong efforts at mediation. I intend to myself contact the Native Title Tribunal and request that early and vigorous attention be given and direct the Tribunal’s attention to the fact that these comments appear on transcript and might be of use in the next phase’.<sup>6</sup>

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<sup>5</sup> Transcript of WAD6113/98, 18/9/2004, at 358

<sup>6</sup> Transcript of WAD6113/98, 15/9/2004, at 360

In other words, His Honour made it abundantly clear that in his view there was no significant barrier in this matter for it to be resolved by consent in a short period of time thereafter. This view generally, I believe it fair to say, caused some consternation both amongst the applicants and the respondents. The applicants, while of course grateful for His Honour's comments, perceived a potential prejudice should it be the case that the expeditious resolution that His Honour wished for could not be achieved, either because of their own inability to meet the requirements and provide the resources necessary to facilitate that resolution or indeed, in circumstances where the other respondents were not prepared to embrace His Honour's view of the proceedings, in that there was a potential for the matter to be taken into trial sooner than they might be ready.

From the respondent's perspective, particularly the applicants, the view was taken that it was still necessary for the applicants to address significant and weighty matters related to connection evidence which could only properly be dealt with by the provision of an expert report which, at that point, did not currently exist. The NNTT, while appreciative of His Honour's expression of his views, was somewhat concerned that should things go awry and the matter end up in trial sooner rather than later because of the failure of the parties to reach a mediated outcome, it might serve as a disincentive in the future to the already reluctant representatives of applicants to make application for the hearing of preservation evidence, even in circumstances where it was sorely needed, because of the fear that once started the process might be difficult to contain.

Within a month His Honour convened a further directions hearing in the matter. Prior to that hearing His Honour's associate requested the parties, the applicants in particular, to advise as to whether or not they were prepared to agree to the hearing of further limited evidence in order to advance the mediation.

An affidavit was sworn by the applicants' solicitor indicating that their preference would be to defer any hearing of any further evidence until such time as they had

completed the preparation and submission of their connection report to the State. They did so on the basis that they believed that they would be in the best position to proceed with further evidence, if necessary, at that point, rather than in the immediate future and they requested a significant period of time in which that report could be prepared.

At the hearing on 21 October 2004, His Honour made it clear, in no uncertain terms, that he was not prepared to countenance the periods of time which had been requested in order to prepare the report. He also made it clear that from his perspective the requirement that a connection report be prepared and provided to the State before the matter could be further progressed was not acceptable. He did recognise and give priority to the resolution of both the overlaps and the disagreements about the geographical extent of the Thalanyji claim as matters that needed to be addressed as soon as possible. The State made it clear to him that while they did have firm policy directions as to the sorts of matters about which they needed to be satisfied before they could agree to a consent determination, they were quite flexible about the manner in which that material could be presented and that they would work with the applicants to ensure that those matters were addressed in as practical and expeditious way as possible. His Honour indicated that he was quite sceptical as to the need for a connection report. He expressed the view that such a prerequisite appeared to be a usurpation of the Court's prerogatives by a respondent in order to conduct a mini trial. The Pastoralists and Graziers Association, WAFIC and some miners, indicated that they did not require the provision of a full connection report prior to the commencement of mediation in relation to a consent determination albeit that they may require the provision of some specific information from the applicants prior to a final agreement. His Honour proceeded to enquire of the NNTT whether it was able to facilitate meetings relating to overlaps, between the pastoralists and the applicants and a meeting of all parties with a view to narrowing the issues before it be brought back before the Court. The NNTT confirmed its capacity to do so and to report, in detail, to His Honour prior to

the next directions hearing. Consequently the matter was adjourned for approximately six weeks in order for these meetings to be conducted.

I think it reasonable to indicate that most parties believed that it was unlikely that a great deal could be achieved in that time. Nevertheless, most of the meetings scheduled under the orders made on 21 October were, in fact, met and those activities were reported to the Court in an extensive s 136G(3) mediation report from the NNTT dated 8 December. The recommendation of the NNTT was that the matter be adjourned until May 2005, ie for approximately six months, in order that further meetings could take place and that delays which might be caused by law business or the wet season could be accommodated. His Honour was disappointed that the meeting with the pastoralists had not taken place and he indicated that he was not prepared to allow the adjournment sought and needed to bring it back in early February in order to understand what the plan was for the resolution of the matter. His Honour further expressed his scepticism about the utility of connection reports, emphasising that the native titles rights determinable on pastoral lease land were well known and that from his experience when people met on the ground, a great deal of the heat dissipated from the dispute. He said:

‘you can keep doing the connection stuff as you have to, but I am inclined to think that a lot of the heat will go out of the connection debate once you have worked out what it is the applicants want in tangible form and what the respondents are prepared to agree to’.<sup>7</sup>

He concluded the directions hearing by acknowledging that work had been done but by indicating that he wanted to make the next directions hearing set down for 24 February 2005:

‘a real mile stone in the further disposition of the claim’.<sup>8</sup>

Prior to the February hearing the NNTT reported that the parties were unanimously in favour of the adjourning of the directions hearing until May in order to complete

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<sup>7</sup> Transcript of WAD6113/98, 10/12/2004, at 7

<sup>8</sup> Transcript of WAD6113/98, 10/12/2004, at 12

essential steps in the provision of further connection material by the applicants and to allow the State to make an assessment of it. At the hearing on 24 February 2005, His Honour indicated that he was dissatisfied with a further delay of three months with little clarity as to precisely what could be resolved in relation to connection in the interim. His Honour indicated that, in his view, if such delays were to occur, it may be better that the matter be set down for trial within a short period of time and he indicated that in his view he would utilise the Deputy District Registrars of the Federal Court to bring the matter to a head. As indicated in the previous directions hearing, His Honour took the view that once it was clear what the applicants sought and what the respondents were prepared to give, the mediation would be able to progress far more effectively. In consequence, His Honour ordered all the parties, and in particular, the State and the applicants, to attend before a Deputy District Registrar within two weeks where each party was to provide a sealed envelope containing a statement of what they were prepared to agree to by way of a consent determination in the application. His Honour indicated that the NNTT was invited and encouraged to attend, that the Deputy District Registrar would, at his or her discretion, open and read the document, and after the mediation meeting that Registrar would report back to the Court as to whether, in their view, it was likely or possible that the matter could be mediated to a successful conclusion or not. His Honour further indicated that the documents provided to the Registrar would not be used except in circumstances where the question of costs was being considered following the conclusion of a trial in relation to the matter. In other words, His Honour was putting the parties in peril of their costs should they prove to not negotiate reasonably.

Subsequently this meeting took place and the directions hearing was reconvened on 25 March where His Honour indicated that the Registrar had strongly recommended to him that the matter should continue in mediation and that there was a strong prospect that it could be resolved by mediation. His Honour reiterated his concern about the length of time native title cases had taken, saying:

‘this tradition that’s grown up in native title litigation of letting years go by I’m afraid is really sapping the jurisdiction of credibility and so I do feel the need of bringing the time-line in some degree’.<sup>9</sup>

In consequence, His Honour made orders to the effect that a report of some description was to be provided by Dr McDonald within a month and that it was to be assessed within two months. After that the NNTT was to convene meetings to discuss the matter and report to the Court before the next directions hearing on 27 July. It would have to be said, given the fact that it was apparent at the time that the connection materials being prepared by the anthropologist had yet to be completed, that it seemed doubtful that that particular timeframe could be met. Indeed, it soon became apparent that it was not possible for that material to be provided and amendments to the orders were sought with a consequence that the time for reporting back to the Court was extended from July to the end of September. The NNTT reported to His Honour on 22 September that although Dr McDonald had provided the initial report on time and provided subsequent material on two occasions, the State indicated that they still required further material before they were able to reach a conclusion as to whether they would agree to a consent determination. The parties had agreed to seek four months for the further connection material to be provided, two months for it to be assessed by the parties, subsequent to which a meeting would be conducted by the NNTT with a report being made to the Court. The report also indicated that the NNTT had convened a series of meetings including on-country visits which had resulted in the resolution of all overlaps. Amendments were now being prepared to both overlapping applications with a view to regularising those arrangements and consequently removing a significant obstacle to the resolution of the matter, should connection be resolved. The NNTT also reported that substantive negotiations between the pastoralists and the applicants had commenced and they had exchanged documents relating to collateral agreements dealing with questions of access to pastoral lease in a post-determination environment.

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<sup>9</sup> Transcript of WAD6113/98, 25/3/2005, at 3

At this hearing, although not happy about the situation, His Honour agreed to allow the adjournment sought. Subsequently, in December 2005, the applicants' solicitors again wrote to the Court indicating that because of the illness of their anthropologist and of the failure of the representative body to provide any assistance in paying for the provision of this assistance, they were not going to be able to meeting the timetables indicated in the plan presented to the Court in September.

In March 2006 the NNTT reported to the Court immediately preceding the directions hearing on 15 March. That report indicated that despite numerous meetings conducted by the NNTT and the advancement of the issues in relation to pastoral leases and overlaps, that due to the ill health of Dr McDonald and the lack of financial capacity of the native title party, the timetables had not been met. The applicants had now engaged the services of other senior anthropologists, including Prof David Trigger, to assist Dr McDonald to complete his work. The anthropological team had proposed a comprehensive program for the production of a full connection report. It was emphasised that the proposed production of the comprehensive report was not a matter which had been insisted upon by the State, but had been undertaken on the advice of the applicants' expert team. This report was provided to the Court with some trepidation, but on the basis that all parties had agreed with it. Crucially it involved an eight month period of research, through to the end of November 2006, a four month process of discussion and assessment by the other parties before a directions hearing in April 2007. In other words, an additional 13 months before the matter could be finalised. The reaction of the Court was predictable. At the directions hearing His Honour indicated that the proposed Minute of Orders for the extension of time would be disregarded by the Court on the basis that he was completely dissatisfied with the proposed timetable and progress made to date and that the request for an additional 12 months verged on an 'outrage'.

His Honour again decided to utilise the services of the Registrars of the Federal Court and ordered that a case management conference be convened between the applicants and the respondents together with their anthropologists with the attendance of the NNTT. His Honour indicated that he was seeking to have negotiated a far shorter program and in the event that he was unable to obtain one, he would set the application down for trial in a matter of months. His Honour ordered that the meeting take place in under a fortnight and that a further directions hearing be held on 3 April 2006. At the meeting with the Registrar, which was held on 24 March, the State and the applicants' anthropologist agreed to meet to clarify the outstanding issues and develop a means of efficiently dealing with them. They also agreed that the State and its anthropologists would meet with the applicants and their anthropologists in Onslow in May 2006 for an informal exchange of information on the outstanding issues and that the matter would otherwise be adjourned to May. That date was subsequently varied until July at which point His Honour made further orders. On the basis of the reports of the NNTT and other documents provided to the Court by the other parties, His Honour made orders in terms of the proposal for an extension of a further three months, in which time intensive negotiations were to be conducted both on a bilateral basis and with the NNTT. His Honour was prepared to do this on the basis that the documents and the plan were comprehensive and enabled him to draw the conclusion that the request for a lengthy period of delay was justified.

At the 25 November 2006 directions hearing His Honour was informed that progress was steadily being made towards the resolution of matters as between the pastoralists and the State on connection and he agreed to adjourn the matter to April 2007 on the basis that he would expect finalisation at that time. His Honour also made an order to the effect that the NNTT was to resume its position as controller of the mediation process after the period from March to November of that year in which he had been fundamentally reliant upon the advice he had been receiving from the Deputy District Registrar. Notably, throughout this period the matter remained formally referred to the

NNTT for mediation and the NNTT continued to conduct meetings and report to the Court as necessary.

Immediately subsequent to the November 2006 mediation meeting the State made an offer to the applicants in relation to a consent determination but the applicants were unable to obtain instructions from their clients ostensibly due to the unavailability of some of their clients, but also, possibly, due to some dissension within the ranks of those clients as to the nature of the proposal. Over that period, the NNTT was able to report that in-principle agreements had been reached in relations to access ILUAs between the pastoralists and applicants' representatives although some drafting issues had yet to be settled. The NNTT further reported to the Court in June 2007 to the effect that Thalanyji People had accepted the State's proposition and that they were in an advanced stage of negotiating and discussing a draft determination which had been circulated by the State on 21 May 2007. Further, the constitution of the PBC was in advanced stage of drafting documents. The State's position paper relating to connection and setting out the grounds upon which it accepted connection would be available to all parties by August and that subject to the consultation period sought by the respondents in order to obtain final instructions from their clients, a consent determination in the matter could proceed in November 2007.

At the next directions hearing on 16 July 2007, the Court had been in receipt of a report from the NNTT indicating that matters were likely to progress in an orderly fashion with a view that the determination be made in November 2007. His Honour indicated that he was reluctant to bring the parties back to Court unnecessarily. Given the receipt of regular reports from the NNTT and open communication between the Court, the NNTT and the parties, he was satisfied the matter could continue on the basis which was currently projected towards November. His Honour did, however, warn that from his perspective, should the matter not be resolved by that time, that there would be an immediate listing for trial. In essence, the Court took the view that given that there was

a firm program in place and there was a capacity for the NNTT to report candidly to the Court on the adherence to that program, it would be unnecessary to bring the matter back before the Court until such time as it was ready for determination or alternatively that some crisis or departure from the program had occurred.

It is important to understand that at this point, while there were a number of in-principle agreements in place and a much tinkered with final determination of native title circulating amongst the parties, there were still issues of detail which needed to be addressed. They were issues of detail, but substantial nonetheless and short of their resolution, it may have been the case that some of the parties would not have been able to agree to the consent determination. It is difficult, given the confidential nature of mediation, to delve too deeply into the precise matters that are concerned. However, an example was the preparedness of WAFIC to agree to aspects of the determination in relation to traditional fishing on condition that certain information about traditional and contemporary fishing practices was provided to them for their consideration. There was no dispute between WAFIC and the applicants as to the appropriateness of the provision of this information. However, there were difficulties in obtaining the information, verified by affidavit, which were largely logistical. These issues, in themselves, contributed to ongoing and frustrating delays.

It is also important to recognise that while the applicants' negotiating committee and their representatives had negotiated detailed in-principle agreements and resolved the difficult issues relating to overlaps of claims and contraction of the claim area in order to accommodate the perceived overreach of the original application, these were all matters which needed to be taken back to the full Thalanyji community for their final authorisation. The various proposals represented extremely important and difficult decisions for that community to make and amounted, in essence, to a compromise of their original aspirations. In consequence, those authorisation meetings needed to be planned carefully, information needed to be provided and discussion needed to be

complete before a fully informed decision could be made by the applicants. Some of the issues which may have concerned the broader applicant group, related to the fact that there was no recognition of exclusive rights within the area, that their claim to offshore islands and areas below the low watermark were not to be recognised and that they were surrendering a significant proportion of the claim area on the eastern boundary of the original claim. Understandably enough this presented the applicants with a difficult choice.

In line with the orders of the Court made on 16 July 2007, I reported on 31 August that while progress had been made, there were outstanding issues which needed to be settled in relation to the draft consent determination and the pastoral ILUAs. Also, the rules of the PBC had not yet been completed and the corporation not incorporated, largely as a result of the fact that there had been amendments to the CATSI Act which had complicated that incorporation. Further, the impending Federal election meant that it was unlikely that the Commonwealth would be able to obtain instructions in order to facilitate a determination in November. I noted that a further mediation meeting was due to take place on 14 September 2007. In response to that report, His Honour's associate wrote to me indicating that His Honour continued to be hopeful about meeting the November target and requested that I report to him after the meeting in September in order to indicate whether, in my view, November was achievable. In my September report to the Court I indicated that the additional information required by WAFIC had still not been provided. There had not been a full response by the applicants to either the State in relation to the draft consent determination, or the PGA in relation to the ILUA. I indicated a further mediation conference was scheduled for 22 October and that I would report to the Court immediately after that. On the basis of those conclusions, it was highly unlikely that the determination of the matter would be made in November.

Subsequently, a further directions hearing was convened on 12 November 2007, by which time of course the Federal election had, indeed, taken place. At that directions

hearing His Honour commented that he was becoming frustrated again at the length of time this matter was taking. I indicated to the Court that there had been a good deal of slippage in meeting the program that had been set. I think it was fairly clear that that slippage was largely in the court of the applicant and was not attributable to any dereliction on any respondent behalf. All the parties indicated in their submissions to the Court that they believed the matter could reach finalisation early in 2008. His Honour indicated that he had heard these optimistic expressions before and they had amounted to nothing so that while he was prepared to grant further time, he indicated that if the issues were not resolved, that the parties should get ready for trial - 'February is crunch time'.

In my report to the Court prior to the February directions hearing, I was able to inform the court that progress had been made, although matters still remained outstanding in relation to the provision of additional fishing information and the PBC had not been finally incorporated. The draft ILUA with the pastoralists was close to finalisation, but not yet finalised. There was a further mediation conference scheduled for early March 2008 and that it was now anticipated that a determination could be made in May 2008.

At the directions hearing on 25 February the parties outlined the various slippages which had occurred and their expectation as to when those matters could be resolved, essentially confirming the proposition that it was possible that the matter could be dealt with in May 2008. His Honour indicated that there seemed to have been some progress although he was again somewhat disappointed that it had not been as timely as he might have hoped. He indicated that he did not believe it would be useful to bring it back for further directions hearings unless necessary and that, in his words:

'I will utilise the NNTT as the link to keep me up-to-date'.<sup>10</sup>

and on that basis the NNTT was required to report to the Court on a specified basis as required and that, again in His Honour's words:

‘I would rather leave that last run in your hands’.<sup>10</sup>

In other words that the NNTT could advise him as to when, in its view, it would be necessary for the matter to be brought back on to Court and that otherwise the NNTT would liaise with the Court in order to finalise a date for the consent determination on country.

The NNTT conducted full mediation meetings in both March and April and on 10 April reported to the Court that the parties hoped to have an in-principle agreement to consent determination by the end of April, and in consequence would be looking to file all the necessary documentation with the Court by June 2008 with a view to a hearing on country in July 2008. A further mediation meeting was held in May and a report was sent to Court on 26 May. In that report I indicated that while the parties still believed that it was possible that a July determination could take place, the applicants’ legal representatives had still, as yet, not provided the additional information sought by WAFIC and that this was an obstacle. By 17 June the material due from the applicant had still not been provided. At that point I wrote to the applicants’ solicitor indicating to him that unless he was able to advise me of the imminent arrival of that material, I would have to report to the Court that a prospect of a July determination was now unlikely. A further mediation conference was held on 20 June 2008 and I reported to the Court after the meeting on 24 June 2008. In that report I indicated that, on the strength of the advice received from the applicants’ solicitors about the provision of the information in the next few weeks, it was now not possible for the determination to proceed on 22 July and the best option would be for the date of 26 August to be set.

At about this time a mining company that had interests in the area but was not a party, sought to become a party and indicated in its application that it would not consent to the determination of native title on the basis that it had insufficient information before it to

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<sup>10</sup> Transcript of WAD6113/98, 25/2/2008

reach a conclusion that such a determination was justified. An associated entity was a party but its interest had been transferred some years before. The application was supported with a paucity of information and there was difficulty in the company's solicitors attending. In short, His Honour, refused the application and, indeed, awarded costs against the company.

The outstanding fishing information was provided by the applicant on 29 July 2008 in an affidavit sworn on 21 July 2008. On 11 August 2008 I reported to the Court that there had been an in-principle agreement reached and all parties expected to be able to notify the NNTT of their final instructions from their clients by 25 August 2008. I also advised that a logistic conference had been held with the Registrar of the Federal Court on 16 July and that, consequently, the minute of proposed consent determination of native title and associated orders would be filed with the Court before 25 August with a view to an on-country hearing on 18 September 2008.

On 18 September 2008 His Honour did hand down his determination and findings in relation to the Thalanyji application in the Onslow Town Hall, 4 years to the day after he had concluded his preservation evidence proceedings in the same hall! In his reasons for judgement, His Honour made some pertinent and useful observations about the circumstances in which it will be appropriate for the Court to make such orders.<sup>11</sup> In particular, he examined the material that had been provided to him and the obligations on the parties, in particular the State as the first respondent, in coming to a conclusion as to the adequacy of the evidence relating to connection. In the event he was satisfied that the information put before him by the applicants and the manner of its assessment by the State was wholly adequate to justify determination as requested in the consent orders. He congratulated all the parties for the way in which they had gone about dealing with the matter and acknowledged that the NNTT, who oversaw the mediation,

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<sup>11</sup> See under s 87 of the Native Title Act which deals with the capacity of the Federal Court to determine the existence of native title.

was central to the positive outcome. It was notable that five out of six of the witnesses who had given evidence at the preservation evidence hearings were present in the Court on 18 September 2008 to see that historic determination.

### **THALANYJI – THE LESSONS**

As you will see, I have laboriously set out the lengthy procedural processes which were taken by the Court and the NNTT in advancing this matter, subsequent to the hearing of the preservation evidence. I hope that the ordeal of wading through that narrative rewards the reader with an authentic understanding of the legal, logistical and procedural complexity of native title resolution.

In the Thalanyji matter there were 37 formal NNTT mediation meetings, 28 Federal Court directions hearings and 19 mediation reports by the NNTT to the Federal Court. There were also innumerable other meetings which took place between the parties with and without the presence of the NNTT. The overwhelming majority of those meetings and directions hearings were held subsequent to the hearing of the preservation evidence in September 2004. I have gone into some detail to describe the procedural history of this matter and the interaction between the NNTT and the Court in order to illustrate the point that I made at the beginning of this paper. I have not descended into any great detail of the subject matter and nature of the issues which required such intensive discussion, mediation and direction from the Court because of the confidential nature of that mediation, but I can outline the sort of issues which invariably absorbed the parties and determined their capacity to advance the application in a timely fashion.

One point needs to be made firmly and clearly at the outset. There appears to be a view amongst parties to native title claims that there are only two, mutually exclusive, pathways to resolution of native title matters. ie: mediation (whether it be with the Court or the Tribunal), or litigation – in the Court. The history of those matters that

have been resolved by consent is illustrative of the fact that this is a misconception. The majority of matters that have reached consent determination, have been the subject of Court orders, which are preliminary to the conduct of a trial. In other words, interlocutory orders of some form or another have been made, usually in circumstances where the Court or an applicant has become dissatisfied with the capacity of the parties to resolve the matter by agreement. Such interlocutory orders may be orders short of listing a matter for trial but have included that step. The first nine consent determinations in Western Australia were all subject, to one degree or another, of interlocutory orders requiring the filing of materials in Court in preparation for trial.<sup>12</sup> In some cases that amounted to a listing for trial, a partially heard trial or the resolution of a matter on the doorstep of the Court. In others, initial steps had been taken relating to the filing of material with the Court or the provision of contentions relating to the cases of the parties. In more recent times, as the capacity of the parties to negotiate an agreement has grown with experience, there has been less need for resort to such orders in order to ensure that a resolution occurs in a timely fashion. On the other hand, perhaps as a result of the Thalanyji experience, parties appear, particularly in Western Australia, to be less reluctant to use preservation of evidence techniques. This may, of course, also be simply a consequence of the effluxion of time in native title applications, meaning that everyone is getting older as the years pass by. The point is, as in any other litigation, sometimes it is necessary to bring to bear the discipline of the court upon the

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<sup>12</sup> Nharnuwangga, Wajarri and Ngarla People  
*Clarrie Smith v Western Australia and Ors* [2000] FCA 1249 (29 August 2000)  
Spinifex People  
*Mark Anderson v State of Western Australia and Ors* [2000] FCA 1717 (28 November 2000)  
Kiwirrkurra People  
*Brown v State of Western Australia and Ors* [2001] FCA 1462 (19 October 2001)  
Tjurabalan People  
*Ngalpil v State of Western Australia and Ors* [2001] FCA 1140 (20 August 2001)  
Martu  
*James v State of Western Australia and Ors* [2002] FCA 1208 (27 September 2002)  
Karajarri People  
*Nangkiriny v State of Western Australia and Ors* [2002] FCA 660 (12 February 2002)  
*Nangkiriny v State of Western Australia and Ors* [2004] FCA 1156 (8 September 2004)  
Ngaanyatjarra Lands  
*Stanley Mervyn, Adrian Young and Livingston West and Ors on behalf of People of Ngaanyatjarra Lands v State of Western Australia* [2005] FCA 831 (29 June 2005)

parties in order that their minds are properly focussed on resolving a matter, short of having to make their case. It has been expressed repeatedly by all parties to native title claims and the judges of the Court, that the determination of the comprehensive outcome that a native title application requires by a judge, rather than by agreement, is not in the interests of any party.

It is clearly apparent from my discussion in relation to the procedural aspects of the Thalanyji case, that the resources and capacity of the applicant to pursue the matter is of central significance. I think it fair to say that many of the delays which occurred in this matter, subsequent to the hearing of preservation evidence, were attributable to the incapacity of the applicant to undertake all the tasks necessary to reach agreement by free and informed consent.

There are obvious issues with resources for native title parties, particularly when they are not represented by the local representative body, because in those circumstances they are required to essentially fend for themselves. The cost of lawyers to represent them legally and anthropologists to prepare connection material required by the State is heavy. Even in situations such as the Pilbara where significant large scale mining activity takes place and a registered native title claim claimant has a capacity to gather resources from the future act process, it is difficult to sustain the cost that is demanded of an applicant party in a native title application. It is also the case that those very future act negotiations are time-consuming, frustrating and intellectually and emotionally draining, which may paradoxically reduce the capacity of a native title party to focus on the consent determination process. Further, the process of negotiation and mediation itself is taxing. It usually will require the native title party to retreat in one way or another from what has been claimed in the application. That may not be difficult in some instances because the claim may have been cast as an ambit of the legally possible, however, when it comes to the surrender of areas of land or the inclusion or exclusion of individual people from the claim group, it does become a matter which is highly

complex, emotional and confronting for native title applicants. It is very difficult for them to make some of the decisions they are required to make in order to bring the matter to finality. Such decisions will often not only involve conflict or disagreement amongst the group, but require time and discussion within a group to consider the complex matters before proper decisions can be made. The Thalanyji case is an illustration of the fact that these things need to be worked through internally, carefully and, consequently, slowly. It is extremely difficult to articulate such genuine difficulties before the Court, or indeed, the NNTT, without allowing it to be construed as a sign of weakness or confusion or lack of traditional authenticity.

Once those sorts of issues have been addressed and factored in, there is, of course, also a large number of complex and difficult, practical and theoretical problems which have to be resolved one way or another before a determination can be made. There was a necessity to resolve overlapping native title claims and issues of contention with neighbouring claim groups which, left unresolved, were likely to attract new responsive overlapping claims. It is imperative to resolve intra indigenous issues as soon as practicable. This is because, if they remain outstanding, they will be, or become, an obstacle to final resolution and because their existence, or the rumour of their existence, renders full-blooded negotiations with other respondents problematic. The resolution of these intra indigenous issues is not easy. Meetings are logistically difficult and expensive to organise and they can become the focus of ferocious dissension and acrimony. If they can't be resolved on agreed terms, the best outcome an applicant can hope for is the partial determination of the unoverlapped area and then a contested hearing over the balance. Even when agreement can be reached, translating that agreement into amended application is time consuming, costly and risky from applicants' perspective. If the authorisation of such amendments is not implemented swiftly, experience dictates that agreements can unravel quickly. The 2007 amendments to the Native Title Act, which allowed for certain amendments to a native title application to be made without the need for the re-application of the registration test,

have made this process less fraught.<sup>13</sup> Although there were significant delays in the implementation of the resolution of intra indigenous issues in the Thalanyji claim, they eventually came to pass without incident.

During the course of the discussions between indigenous groups about the exact position of boundaries between them, it is critical that they can visualise the landscape they are discussing. The NNTT's Geospatial unit is able to provide detailed maps of any appropriate scale, if necessary. They can alter the boundaries on the maps while in the field, thus allowing the groups to visualise an agreed resolution of the overlaps. These techniques are equally useful if the discussions take place at the physical location of the boundary itself, or elsewhere. Mapping techniques of this kind were used very effectively in the resolution of the Thalanyji overlaps.

The NNTT can, and did, in the Thalanyji matter, assist the parties with targeted research projects, usually of an ethnographic nature. In the Thalanyji matter, research assistance was provided in relation to traditional fishing practices, occupation of the islands and the anthropological literature on boundary location.

There is a need, prior to the final resolution of a claim, for a comprehensive tenure analysis in order to work out the relationships between those tenures that exist, the level of their extinguishing effect and how they are going to coexist with the native title, however determined, within the area.

In relation to the Thalanyji claim, the State, in its assessment of connection, came to the conclusion that the Thalanyji People had maintained a connection to the area sufficient to have found a determination of non-exclusive native title. Presumably, this conclusion was reached on the basis that the evidence concerning the laws and customs, that the Thalanyji People had traditionally exercised over the area, did not amount to a capacity

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<sup>13</sup> s 190A(6A)(d) of the Native Title Act

to exclude others. The great majority of the area of the claim was pastoral lease and therefore exclusive possession was not possible in any event. However, this decision meant that investigation of issues raised by ss 47, 47A and 47B of the Native Title Act, which allow exclusive possession in circumstances where past extinguishment could be disregarded, was not necessary. This, in itself, simplified the tenure analysis which needed to be undertaken by the parties before a concluded view as to the extent of native title could be determined.

The State also indicated that it was not prepared to accept that the Thalanyji People could establish the traditional connection to islands off the coast of the claim area or the sea bed below the low water mark and therefore it was necessary for Thalanyji to come to a view as to whether it was prepared to accept, in effect, the exclusion of those areas from their native title determination. This, in itself, was a difficult task for the Thalanyji People, on the basis that they had a long history of fishing in the area and believed that they had, at the very least, spiritual connections with some of those islands. As I understand it, it took some time for the group to come to the view that they were prepared to forgo these claims in order to have the balance of their claim determined in their favour.

In most native title claims there is a considerable number of parties other than the applicants. A significant factor in resolving the Thalanyji matter expeditiously was the question of the involvement and consent of all the parties or otherwise their withdrawal. The Thalanyji application had 174 parties, including government and local government interests, mining, pastoral, fishing, pearling and shell collecting interests, tourism, recreational users, petroleum interests, telecommunication interests, indigenous interests and others. Not all of those parties had actively participated, or participated at all, in the negotiation of the consent determination, despite being repeatedly informed of the conduct of the proceedings. Naturally, the State, Commonwealth and local government had participated, along with pastoral interests and fishing and pearling interests, often

assisted by the representative bodies, WAFIC and the PGA. However, not all of those parties had participated. In the case of the mining industry, most of the larger companies were represented and participated. However, given the fact that many of the mining parties had become involved in the proceedings in the mid 90s and, as a result of the passage of time, often their interests had either lapsed or, alternatively, for various reasons, they did not object to the proceedings moving forward, they had chosen not to participate or even to respond to requests to do so. Bearing in mind that the State goes to great lengths to ensure that all extant interests are listed in schedules to all determinations and that those interests will prevail over the native title interests to the extent of any inconsistency, it is arguable there is no real need for current holders to actively participate. However, the Native Title Act requires that before the Court can make a determination by consent, all the parties to those proceedings need to agree to that determination.<sup>14</sup> Consequently, it has been NNTT policy for a significant period of time to do all in its power to alert all parties to the progress being made in proceedings and gives them the opportunity, either to participate fully or to withdraw as a party from the proceedings. Because of the length of native title proceedings, it is frequently the case that the addresses for service of these parties are out of date and it is very difficult to contact them. During the course of the Thalanyji consent determination, the NNTT adopted a policy which involved a co-operative approach with the Court. At first instance, the NNTT wrote to the parties seeking their advice as to whether they wished to participate in the proceedings or withdraw as a party. As a result of those approaches, a number of parties withdrew formally from the proceedings. In circumstances where there was no response to that correspondence, the NNTT, in co-operation with the registrars of the Federal Court, sought the making of orders by His Honour, essentially in the character of a springing order, which required all parties, except specified parties who were actively participating, to notify the Court of their intention to remain a party within a specified time. Failure to do this would lead to those parties losing that status. Due to the number of parties, the process involved a

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<sup>14</sup> See s 87A of the Native Title Act

great deal of correspondence and telephone communication and was extremely time-consuming. However, in the end, in the Thalanyji matter, a significant number of parties (approximately one third) chose to withdraw voluntarily and, subsequent to the springing orders being made, all the remaining parties consented to the determination in the form proposed to the Court.

## CONCLUSION

It has been the intention of this paper to attempt to demonstrate that the resolution of native title application lodged in the Federal Court, mediated by the NNTT and, perhaps, the Federal Court, and determined in the Federal Court, must and always will be a collaborative process, irrespective of the finer points of the statutory environment in which that process takes place.

Of course, in accordance with the new amendments being proposed, in future it may be the case that the Federal Court will have no resort to the services of the NNTT. That is a matter for its discretion. However, to the extent that the Court will choose to utilise the services of the NNTT in assisting it in the resolution of native title claims by consent, that process, I think, will continue along the lines of the model that has been expounded in this paper. I think it fair to say that, as a result of the example that was made by His Honour in the Thalanyji proceedings, that subsequent negotiations towards consent determinations, which have proceeded in parallel to the Thalanyji determination, have moved forward without the need for the sort of intensive supervision that His Honour provided in the Thalanyji proceedings. In any event, it stands to reason, that in proceedings as complex, convoluted, time-consuming, and baffling to the participants as native title proceedings, a collaborative approach by the two major institutions charged with dealing with such matters, is the only practical way in moving towards a more streamline delivery of equitable outcomes.