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Australian Institute of Aboriginal
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Native Title Research Unit
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Worldwide knowledge and understanding of Australian Indigenous cultures, past and present

Ms Tamsyn Harvey
A/g Assistant Secretary
Robert Garran Offices
National Circuit
Barton ACT 2600.
20 August 2007.

Dear Ms Harvey

Enclosed please find the NTRU's response to the draft mediation guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal.

If necessary, we would be pleased to discuss these comments further with you.

Yours sincerely

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(Manager NTRU)

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‘Draft Mediation Guidelines: Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal’

**Comments from the Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
August 2007**

Introduction

The document, ‘Draft Mediation Guidelines: Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal’ has been prepared by the Classification, Legal Services and Native Title Division of the Attorney-General’s Department. The document has been prepared in response to a recommendation of the Claims Resolution Review that the *Native Title Act 1993* (NTA) be amended to provide that all parties and their representatives be obliged to act in good faith and that a corresponding code of conduct be developed. The NTA was amended accordingly in April 2007.

These comments on the draft guidelines have been prepared by Toni Bauman for the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). They are informed by the research findings of the Indigenous Facilitation and Mediation Project (2003-2006) (IFaMP) into best practice native title mediation. More detailed information about native title mediation best practice is provided on the NTRU web pages (<http://ntru.aiatsis.gov.au/>). Three reports are of particular relevance including reports of native title mediator best practice workshops and are listed at the end of this document.

General Comments

Clarity of the guidelines

The draft guidelines are at times repetitive and unclear particularly in relation to the decision-making and reporting processes relevant to good faith. This can be rectified in any redraft.

Native Title Mediator Code of Conduct

Any guidelines for parties and their representatives to act in good faith are dependent on the NNTT mediator also acting in good faith and upon his/her skills and professional approaches to mediation. A number of the requirements of parties listed in the document as indications of good faith are actually the responsibilities of the mediator – to ensure effective participation, communication, and preparation, to identify parties’ concerns, and to incorporate technical information into the process in a manner in which it’s understood, for example.

The issue is one of what parties can expect of the mediator and the need for mediator guidelines in relation to not only good faith, but native title mediator practice in

general. For a number of reasons, including the fact that mediators themselves may not act in good faith, these guidelines should be accompanied by a code of conduct for native title mediators where the relationship between the two codes as they relate to good faith are clearly understood. Whilst there are moves afoot to develop a national generic code of conduct for mediators, there is a need for similar code specifically related to the native title context. National Native Title Tribunal members have a number of directive and interventionist powers under the NTA which are difficult to reconcile with any received wisdom about mediator conduct and to reflect in any generic code.

Ultimately, the effectiveness of these guidelines in managing bad faith is dependent upon the effectiveness of mediators and upon the mediator acting appropriately and professionally.

Legal Representatives

There is a need to be specific about the responsibilities of legal representatives in mediation. Lawyers acting adversarially (and perhaps not in good faith) were repeatedly identified at IFaMP mediator workshops as the main cause of failures in native title agreement-making. It was also identified in the workshops that lawyers need specific training in effective participation in mediation.

Some examples of the kinds of existing compliance requirements and potential reporting of bad faith processes for legal practitioners (reporting to Law Councils for example) might be useful. It might also be the case that a party may wish to report his/her own legal representative for not acting in good faith.

Decision-making and representativeness

Acting in good faith also means that the decision-making authority of parties in the mediation including that of Government representatives and the decision-making processes to be employed in any mediation should be transparent and clearly understood by all parties. There are many examples of parties acting in good faith to advance native title agreement-making processes only to find that agreements or understandings are overturned by others in higher positions of authority. This is especially the case when Governments are parties to mediation. Representatives must be transparent about who holds ultimate decision-making authority in any agreement-making process and it is the mediator's responsibility to ensure that this occurs.

The force of the guidelines

The usefulness of the guidelines in ensuring good faith seems to be undermined by the statement that NNTT members are not bound to take them into account. That is, if a party acts without integrity, does not co-operate, is discourteous, does not respect the 'without prejudice' qualification and discloses information against the terms agreed, the guidelines currently read as if they are not necessarily acting in bad faith.

The reader is also left to consider upon what other principles the President might base directions to members and employees about good faith?

Termination of mediation

It is assumed that a member can terminate mediation if parties are seen to be acting in bad faith as is the general situation in mediation providing the mediator give careful reasons. If this is not the case, does the mediation continue while the process of reporting bad faith actions sees its course and what processes would be required to arrive at such a termination?

Reporting and decision-making

The distinction between decision-making and reporting in relation to good faith is not clear in the draft guidelines. Neither is it clear as to how and by whom a decision would be made in any of the range of instances of reporting. It might be useful to carefully separate out the two elements of reporting of bad faith and associated decision-making processes. In the current version, under the heading, 'Who decides?' the text refers to a member reporting to the Court or a party (presumably?) reporting to the presiding member but there is little guidance as to what happens then.

The following section then notes that the presiding member can actually report bad faith to a number of agencies depending upon the identity of the offending party, and it appears that it is only in relation to parties other than an NTRB/NTSP, the State/Territory or Commonwealth or a third party funded by the Attorney-General that the member would report to the Court. Yet the latter are also parties to the mediation.

Is it also possible for a party to report to the President of the NNTT? Is the reporting of good faith different from the reporting of other complaints that might be made about mediation processes?

The processes to be invoked in deciding whether a transgression has occurred following such reporting are not spelt out which raises questions of transparency and conflict of interest particularly where reports are made to the employers of parties such as Government Departments. The guidelines eventually note that it's up to the discretion of the bodies to which the Report is made to decide what they'll do. It may be useful to include a requirement in the guidelines for those bodies to which reports are made to have clearly identified and transparent complaints processing procedures.

Can all parties be reported to the Court? What are the powers of the Court in this regard? Which Judge would hear issues of bad faith? How would the court process such complaints? To whom would a complaint be addressed? Can complaints about the mediator also be referred to the Court?

The section, '*When will the Tribunal make a report?*' notes that it's up to the Member to decide whether someone is acting in bad faith and whether to report it. But what if a party considers that the mediator has been ineffective, unprofessional or acting in bad faith? What if a party absents him or herself from mediation because the process is so poor that it is seen as a waste of time? The mediator might easily interpret this as bad faith.

Are the guidelines legally binding?

It may be useful to give some examples of the other kinds of legal obligations parties and their representatives may have under the NTA. How do these relate to good faith?

Effective Resolution Principles

The wording 'raising issues which are not central' could be seen as contrary to mediation principles in that moving through the past, present and future is an integral aspect of mediation. In this process, Indigenous people often wish to express historical injustices and seek recognition of past wrongs. This may appear to be irrelevant to other parties but for Indigenous parties could be crucial; it could equally apply to other parties.

Cultural Awareness principles

Perhaps the guidelines could note that parties accept the need for interpreters if requested, and that Indigenous parties may have a particular cultural view about time. Parties might be encouraged to recognise the complexity of native title matters, that processes may take some time and that they may require interpreters. Parties might also be encouraged to recognise and understand cultural factors in Indigenous decision-making processes and the possible need for Indigenous groups to consider issues outside the mediation process with other members of the group they represent. Other representatives may also have similar needs.

Potentially useful reading

- Kingham, F. and Bauman, T. 2006. *Native title mediation: issues identified, lessons learnt: proceedings and findings of IFaMP workshops with native title Indigenous and non-Indigenous mediators, February and March 2005*. Report No 5. Indigenous Facilitation and Mediation Project. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra
(http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_5.pdf).
- Kingham, F. T. Bauman and M. Black. 2005. Report on Proceedings of Workshop of Native Title Mediators 15 and 16 March 2005. Indigenous Facilitation and Mediation Project. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
(http://ntru.aiatsis.gov.au/ifamp/research/pdfs/nativetitlemediators_workshopreport.pdf)
- Bauman, T. 2006. *Final Report of the Indigenous Facilitation & Mediation Project July 2003/04 – June 2006: research findings, recommendations and implementation*. Indigenous Facilitation and Mediation Project. Native Title

Research Unit, Australian Institute of Aboriginal and Torres Strait Islander
Studies, Canberra
(http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf).