

mediators and facilitators. This will make a significant difference in addressing what is seen to be a power imbalance created by Indigenous people having to deal with imposed 'whitefella' processes, which are highly complex and place Indigenous people at a significant disadvantage.

Survey of Native Title Mediation Practitioners

Rhiân Williams reported on the recent survey of native title mediation practitioners in the mediation session at the Native Title Conference Adelaide on 3 June 2004 (see last newsletter for further details about the survey).

Major findings include that:

- There is wide diversity in the practice and approach of mediators surveyed, for example, those surveyed saw lawyers taking highly adversarial stances as having the most negative impact on the mediation process; and
- The majority of mediators surveyed were supportive of national standards for mediation and some form of national regulation of mediators.

The rich and comprehensive data obtained from the survey is being further analysed and revisions will also take into account comments from the recent NTRB workshops. A final report is being prepared and will be publicly available when completed.

The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia [2004] FCA 472

Summary by Grace Koch

The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia [2004] FCA 472 was handed down by Mansfield J. in Alice Springs on 23 April. The claim was first lodged on 20 November 1995 with the National Native Title Tribunal and was accepted by the Tribunal on 31 May 1996. The application was not lodged with the Federal Court until 20 May 1998 because it had been opposed. After a number of further stops and starts, the application was amended

and finally accepted for registration with the Federal Court on 17 January 2000. For ease of reference in this article, the claim shall be referred to as the Davenport Murchison Claim.

The claim area comprises two separate areas of land lying to the east of the Stuart Highway and south-east of Tennant Creek. The principal claim area consists of the land in Northern Territory Portions 4386 (1,120 sq. kilometres) and 4387 (5 hectares 7800 sq. metres). The latter Portion includes the proposed town site of Hatches Creek which was once an active wolfram mining centre from 1919 up until the end of World War II. A large part of the claim is included in the proposed Davenport Ranges National Park for camping and tourism purposes.

Several interesting aspects to the Davenport Murchison Claim make the determination worth reading in its entirety. First, of the seven land holding groups, six had been recognised as traditional owners of nearby areas of land in four claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* ('NT Land Rights Act').¹ Some of the claimants were also involved in additional successful claims under that Act to estates to the west of this area. In the Davenport Murchison Claim, Mansfield J recognised the strength of the 'site specific' nature of the spiritual beliefs and practises as held by the claimants, citing a number of their compelling testimonies.

Next, the composition of the native title holding group comprises not only members having the usual descent criteria from grandparents on both sides and/or by adoption or birthplace affiliation, but also their spouses. This finding takes into account the strongly-knit community of claimants whose spouses are often knowledgeable leaders from

¹ See reports for *Alyawarr and Kaititja Land Claim Report* (Report No 30 November 1978) of the Aboriginal Land Commissioner, Justice Toohey; *Warumungu Land Claim* (Report No 31, 8 July 1998) of the Aboriginal Land Commissioner, Justice Maurice; *McLaren Creek Land Claim* (Report No 32, 28 February 1990) of the Aboriginal Land Commissioner, Justice Olney, and *Wakaya/Alyawarre Land Claim* (Report No 34, 8 May 1990) of the Aboriginal Land Commissioner, Justice Olney.

neighbouring estates who know and participate in the songs, dances and ceremonies for the claim area.

Furthermore, the geographical position of the claim is of interest. It surrounds the Annurete Aboriginal Land Trust (ALT), which was established after the previously-mentioned Wākaya/Alyawarre Claim. Also the claim area is bounded by four pastoral stations, each of which contains land grants made by the NT Land Rights Act. Because of the strong evidence of traditional ownership by these groups, the claim could have been registered either as under that Act or as a native title claim, as the application was first made in 1995 before the close of lodgement for claims under the NT Land Rights Act.

Since 1881, the land under this claim had been part of 20 different pastoral leases, all of which had preserved certain rights to Aboriginal people. These include the statutory rights to enter and to be on the land, to have access to water sources, to erect shelters and to live on the land, and the right to obtain food. Therefore, the claimants and their ancestors had not been excluded from the claim area at any time and had maintained their knowledge of sites and the beliefs associated with them to the present day. Such knowledge was strongly demonstrated even though most claimants did not reside on the land under claim.

The position of the Town of Hatches Creek within the claim area raises some significant issues. Mansfield J found that for Hatches Creek, native title rights and interests were found to be exclusive of the rights and interests of others, except for certain rights of access as specified by Northern Territory or Commonwealth law.

This decision follows on from several earlier findings. First of all, Olney J stated in the Wākaya/Alyawarr claim that, although there was a strong case for including Hatches Creek in the Annurete ALT, it could not be claimed under the NT Land Rights Act because that Act excluded any land considered to be alienated. Towns were alienated Crown land; therefore Hatches Creek could not be claimed

at that time in spite of the strong connection evidence given by the claimants. Under the Native Title Act, however, native title rights of the claimants could be recognised. Secondly, Mansfield J found evidence that the claimants occupied Hatches Creek at the time the application was lodged in the sense that they engaged in hunting and other activities consistent with cultural practices. Finally, Hatches Creek is the only part of the claim that is not within the proposed Davenport Ranges National Park. For the rest of the claim, native title rights were not found to be exclusive of the rights of others, such as those held by the Conservation Land Corporation and the Parks and Wildlife Commission (NT).

This finding of non-exclusive rights for the land outside Hatches Creek rested upon the granting of Crown Lease Perpetual No 1117 which covers the area of the proposed Davenport Ranges National Park. The judgement held that the rights and interests conferred by or arising from that lease prevail over native title rights, but native title itself has not been extinguished. Mansfield J recognised that a number of public works such as roads, barbecues and interpretive panels and shelters had been established on the lease area and discussed the status of each at length.

The findings of native title rights over the claim area are most encouraging to all who worked to prepare the claim; however, the Aboriginal Corporation to be set up by this coming August will have much work to do in dealing with issues arising concerning the proposed Davenport Ranges National Park. It is a tragedy that so many of the most important traditional owners have died and cannot impart their wisdom when it is much needed.