6.1 Introduction

This paper analyses the Yorta Yorta mediation process under the provisions of the NTA s. 107, which established the National Native Title Tribunal (NNTT). It argues that while the mediation process provided a forum for the Yorta Yorta to assert rights to land and resources, it proved to be a failure in mediating agreements. It highlights some of the barriers to land justice at mediation, and identifies the key obstacles to Yorta Yorta land justice within the claim area.

Yorta Yorta attempts to negotiate their way through the minefield of interests (over 470), in the YYNTC is contrasted with the experience of previous claims (Appendix. 4). The earlier 1984 claim is referred to in order to highlight the barriers to land rights, and to expose the underlying mindset that affects Indigenous groups within regional Australia. The 1984 claim provides the context for analysing the relative power position of the Yorta Yorta in the mediation process of the YYNTC. It is used to argue that the antipathy towards Indigenous rights continues to be a major obstacle preventing the Yorta Yorta from gaining racial equality and land justice within the claim area, despite the development of innovative procedures that dispensed with the formal requirements of a legal hearing.

6.2 Past Mindsets Revisited

The mindset which benefited from Native Title lands through past acts of dispossession and which had previously refused to acknowledge prior Indigenous rights was still deeply entrenched. The experience of the 1984 claim was still fresh in our minds, the opposition to which was driven through the local media by corporate and vested interest groups. Local government, farmers, councillors, the National Party, and the League of Rights, combined to undermine the Federal and Victorian governments' land rights proposals and the Yorta Yorta claim 1984 (Australian National Opinion Polls Report, 1984; McRae, Nettheim and Beacroft, 1997:196–200).

In regional newspapers, headed by the Numurkah Leader, racist comments and articles abounded once the 1984 claim became known, and before it was formally lodged. In one news item, under the provocative heading 'Land War', a senior local councillor equated
Yorta Yorta inheritance with the 'purity of his cattle'. Another councillor and schoolteacher from nearby Nathalia expressed his belief in his racial superiority over the Yorta Yorta by saying that 'Aborigines were a conquered race' whose 'rights depended on the humanness of the conqueror' (Numurkah Leader, 17 August 1983; 16 November 1993). The extremist League of Rights, which has had a stronghold in rural Australia for many years, supported these views. The League painted a sinister image of land rights being a 'threat to Australia's sovereignty inspired by Communist manipulations' (League of Rights 1983–1985).

Yorta Yorta elders responded. Speaking on our struggle, Frances Mathyssen said that 'nothing will ever stop us! It's our life we are talking about'. Margaret Wirripunda (Chairperson of the Yorta Yorta Tribal Council) explained our position, which was recorded in the Sun Herald under the heading 'A Nation Fights for Its Heritage'. 'The Yorta Yorta people have [been instrumental] in the land rights fight that had continued since the land was taken' (Sun Herald, 5 May 1994).

6.2.1 Anti-Land Rights Campaign 1980s

In preparing the 1984 Claim, I was witness to the hostility that was generated. The extent to which local attitudes were allowed to manifest themselves on the Yorta Yorta is evidenced from a public meeting in Nathalia (Land Rights Meeting, Nathalia, 1984). The meeting was organised by local councillors, farmers and politicians to discuss the land rights proposals of the Victorian Labor Government. Some 700 people, mostly from the local area and from within the traditional Yorta Yorta territories, attended. The meeting was chaired by the person who described Aborigines as a 'conquered race'. Speakers representing the issue of land rights were all non-Indigenous. The National Party spoke for local land interests and the Minister responsible for Aboriginal Affairs, Dr Ken Coghill, represented the Labor Party. Dr Coghill was part of the newly elected Labor Government that was under pressure to get some scores on the board in Aboriginal Affairs and particularly in relation to the Government's shameful record of land justice (see Chapter 4). The Land Claims Bill 1993 (Vic) was the essential legislation that needed to be passed and which required the support of the Liberal/National-dominated Legislative Council. Following the introduction, the speakers presented their views and the forum was opened for general discussion. The National Party speaker used negative stereotypical images of Indigenous society to inflame the meeting and to stir up old prejudices. He began by mounting an attack on Aboriginal people at Lake Tyers whom he claimed were 'behind in their rent'. He then attacked Aborigines generally for claiming land, which, he argued, they were not entitled to, and used government definitions of Aboriginality to create division and discord in the meeting. Local farmers were quick to roll out old sinister images that the Yorta Yorta had heard for
so long. The land was going to be 'locked up' and made inaccessible to others and the return of land to Indigenous groups implied the land was not going to be looked after. When Yorta Yorta attendants in the audience tried to partake in the debate, they faced the hostility that had already been inflamed. The Nathalia meeting demonstrates the climate of the land rights debate in the 1980s and the degree of anti-Aboriginal sentiment that had been created through misinformation (Shepparton News, 10 August 1994; Age 29–30 June 1984).

This was the most hostile meeting that I have ever attended and one in which Yorta Yorta identity and inheritance was put up against the wall. On reflection, it is the first time that I ever felt like an alien in my own land. It exposed a mindset that was driven by race politics and the underlying fear and insecurity that emanated from theft of Indigenous land. It brought home the barriers that our ancestors were up against when they challenged Anglo systems of justice and equality before the law. Notions of racial superiority in contemporary circumstances have become institutionalised. This racism has be championed by extremist groups like the League of Rights which has attacked Indigenous rights and undermined those policies aimed at addressing land injustice and inequality (League of Rights, Aborigines Land Rights Campaign Publication, 1984; Numurkah Leader, 17 August 1983; 16 November 1983; Sun Herald, 5 May 1984; Atkinson and Bailey, 1984).

Any apprehensions that the Yorta Yorta may have had before agreeing to partake in mediation were based on prior experience particularly that which surrounded the 1984 claim. Without adequate empowerment and the support of a counter public awareness campaign, our position is best exemplified by Yorta Yorta elder, Elizabeth Hoffman, who explains: 'we were fighting from our old position of nowhere'. The relative power position of claimants and the extent to which the Yorta Yorta have to justify their very being as a people is relevant to the Mediation process (Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:94–105; ATSIC Report, 1999:129–30; Horrigan and Young, 1997:39).

### 6.3 Preparing for Mediation

Before choosing mediation under the NTA there are some basic processes that need to be followed (French, 1997:33–4; MacDonald, 1997:74–5). An application has to be lodged with the National Native Title Registrar, and if accepted the Registrar must give notice to all persons who may have an interest in the area subject to the claim (NTA ss. 62, 63). Respondents are required to notify the Tribunal that they want to become a party to the application. The Native Title Registrar accepted the Yorta Yorta application in May 1994.
and the date for the commencement of the mediation process was set for September 1994 (Alford, 1999:68–9; Glanz, 1999:24–7).

The Yorta Yorta chose mediation on the advice of their legal counsel in preference to the Courts, although the option of going straight to the High Court following the success of \textit{Mabo} was an option. To have the matter heard on its legal merits before the High Court rather than attempting to negotiate through a minefield of prejudice, ignorance and entrenched interests was a tempting alternative. There was optimism that the new procedures under the NTA offered a positive way forward. After all, the procedures were untried at this stage and the Yorta Yorta case was to be the first.

In preparation, the Yorta Yorta formed its own mediation committees to represent their interests in the traditional land and waters. The committees consisted of Yorta Yorta members who were experienced in cattle, forestry, water, recreation and cultural heritage. A policy document was drafted as a guideline for the future management and control of the claimed lands and waters. The proposed management structure was similar to joint management arrangements being practised in other parts of Australia, such as Kakadu, Uluru and Nitmulik in the Northern Territory (Correspondence between Arnold Bloch Leibler and Yorta Yorta, 1995–99, in author's possession; 10 October 1994:3; Policy Document on Yorta Yorta Claimed Lands and Waters, 1994, in Appendix. 2).

\textbf{6.3.1 Claim Statement}

The Yorta Yorta felt it was necessary to present a 'Claim Statement' for the attention of the media, which outlined the history of the struggle for land and water. Being aware of the pitfalls of media misrepresentation, the Yorta Yorta adopted some rigid procedures. These were aimed at minimising misrepresentation and maximising the accuracy of information. Representation is a crucial issue in the coverage of Indigenous issues by the media which often portrays distorted images of Aboriginality and Indigenous issues, including land justice (Conning, 2000:2–4). The Yorta Yorta developed a statement of protocols to be observed in the mediation process. Meetings were to be confidential and only between relevant parties. They were to be held without prejudice and could not be used by other parties should the claim proceed to the Federal Court. Most importantly, the meetings were to be held on the land in question and parties with interests in the land were obliged to provide a copy of the relevant document of their interests when requested. Other protocols concerned the need for both parties to draw up a list of questions detailing the respective concerns of each party prior to the meeting, and their position towards the recognition of Yorta Yorta Native Title at the outset. The right to hold conferences without legal
representatives and to ascertain whether parties were willing to continue discussions with a view to reaching agreement in the future were included (Yorta Yorta Native Title Claim Statement, 1994; Yorta Yorta Mediation Document, September 1994).

The preparation of the mediation materials is an indication of the level of efficiency that the Yorta Yorta has attained in the land claims process. We learned from our forebears that the power of the pen and the ability to articulate our concerns in the written and spoken word were important tools. Indeed, many of us believed that we were capable of representing our interests, with the assistance of outside interests if required.

6.4 The Mediation Process

The mediation process ran for nine months – September 1994 until May 1995. This time was spent in numerous meetings with various parties in the townships of Shepparton, Mathoura, Wangaratta, Corowa and Echuca. The distance travelled throughout the claim area of some 20,000 square kilometres was a huge burden. Some distances were more than two-and-a-half hours drive and sometimes longer for those travelling from outer Melbourne. It was apparent from the outset that with limited resources to get people to the mediation meetings, to feed and accommodate them, and report to the community, the process would impose a major drain on the community (Neate, 1997:243–6). Added to these was the proof requirement that falls heavily on Indigenous applicants. The non-Indigenous parties who have usually been the prime beneficiaries of Indigenous land and resources are not required to prove their identity. Nor are they required to prove their connections or consent to the occupation and use of land that is underwritten by Native Title interests (see Chapter 3; Alford, 1999:69–71; Harvey, 1999:21–8). Yorta Yorta elder Margaret Wirripunda expressed her indignation about the unjust weight of proof placed on claimants. She questioned ‘why others are not made to prove by what authority they are on our land’. Other impediments to equality before the law for claimants relate to the power imbalance between claimants and parties and the NNTT (Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:94–103).

The inequality imposed on the Yorta Yorta by the Native Title process is examined by the Aboriginal and Torres Strait Islander Social Justice Commissioner. This inequality could be rectified by the allocation of adequate time and resources for claimants and the whole thing could be resolved by whites being more willing to ‘achieve reconciliation and not simply continuing to profit from the historical and economic oppression of Aboriginal people’. These ideals of mediation, however, are hampered by the NNTT’s lack of judicial powers. As the Commissioner noted:
According to the structure of the system and the perceptions of the non-Indigenous participants, the claimants come to the table without recognised rights. Whereas all the other parties have rights that are already sanctioned by law. The claimants are told they should provide evidence of the plausibility of their claim to be taken seriously by the other parties to the mediation. Claimants feel the injustice of this situation very keenly. Contrary to the perception of the non-Indigenous parties, the claimants will often believe that they are the only people at the table justified to speak about or for the land (Dodson, M., 1996:8–11).

The Tribunal hearings exposed the hurdles that Indigenous claimants are up against and the inadequacies that have restricted the mediation process.

6.4.1 Limitations of Tribunals

The NNTT's powers are not 'exclusive', and like other tribunals they are alternative modes of dispute resolution that rely on reaching negotiated agreements between parties (see North Ganalanja Aboriginal Corporation v Queensland (1995), Jenkinson J. at 565–74; NTA s. 71; Thornton, 1989:733). Tribunal powers are further limited by Brandy v Human Rights and Equal Opportunity Commission (1995), a case that found the judicial powers of tribunals, characterised as administrative bodies, were limited under ss. 71 and 72 of the Constitution. This restriction is exacerbated by Native Title determinations at mediation being subject to the 'overruling rights' of State or Territory Ministers in accordance with NTA s. 42(1). In the Yorta Yorta case, the Victorian and New South Wales governments took the position from the outset that Native Title did not exist (Horrigan and Young, 1997:35; MacDonald, 1997:74; French, 1997:41–2). The restrictions imposed on Native Title are perhaps the reason why there has been such a dismal success rate of agreements being reached at mediation.

Of the 745 claims lodged between 1994–98, the Tribunal accepted 495, but only two mediated agreements were reached. The low success rate is partly because of the NNTT's lack of judicial powers and the unwillingness of parties to recognise the existence of Native Title. The first successful agreement, Crescent Head (Dhungutti) Agreement, was made between the State of NSW, Mary Lou Buck (Dunghutti People) and the NSW Land Council in October 1996. The total area subject to the determination was 12.5 hectares. The second successful agreement (the Hopevale Agreement, Cape York, Queensland, December 1997) involved 110,000 hectares, making the total amount of Native Title land gained by Indigenous people on mainland Australia approximately 110,013 hectares. Such a record is hardly encouraging (NNTT in Australian Indigenous Law Reporter, 1999:117–42; National Native Title Tribunal, 1998, <www.nntt.gov.au>; Age, 10 October 1996).
The NNTT offers some positive incentives. The provision of a more flexible style not totally bound by legal conventions, and one that takes account of the cultural concerns of Indigenous people are worthy innovations. Sensitising the legal system to Indigenous concerns is an interesting innovation in the administration of Native Title. When measured against the Yorta Yorta experience, however, it will be useful to examine whether or not these provisions proved to be of value (see NTA s. 109(1)(2)(3)). The Tribunal's control over the disclosure of evidence under NTA s. 155 and the manner in which meditations took place did at least create a less hostile environment. A greater awareness of the *Racial Discrimination Act, 1975* (Cwlth) and its powers to protect groups from racial vilification were another factor that assisted the Tribunal's sense of control over the process. The downside, however, was the degree of scrutiny that claimants were subjected to in order to justify their existence and to prove connections, not to mention the amount of energy and resources required to deal with the number of introduced interests. The number and interests of the various parties, many of which are compatible with Native Title, attracts critical analysis.

### 6.4.2 The Parties

The lands and waters claimed by the Yorta Yorta lie in the heartland of a populous region of northern Victorian and southern New South Wales. The claim was contested by a large and powerful array of non-Indigenous vested interests. The 470 registered interests in the claim gives an indication of the formidable task that confronted the NNTT and the Yorta Yorta. Indeed the formidable number of parties, that the Yorta Yorta had to deal with, was an unprecedented experiment in the power dynamics of mediation (see Parties to the Claim in Appendix. 5; Alford, 1999a: 68; Finlayson, 1997a: 8–9; Atkinson, W., 1999). The number of parties also exposed other deficiencies in the NNTT.

Because the definition of a party is ambiguous, it allows limited interests like short-term licence and permit holders to become parties. This significantly increased the number of parties in mediation (and subsequent court) proceedings and overloaded the system. Whether intentional or not it means that much of the mediation time is absorbed in allowing due process to the multitude of interests. The entourage of lawyers, bureaucrats, academics and other experts was an additional weight confronting the Yorta Yorta. They placed enormous strain and pressure on the claimants' time, energy and resources. Members of the Yorta Yorta Mediation Committee were drawn from those who were available to attend the scheduled meetings during the day, which restricted attendance to those who could afford time away from paid employment. This meant that the load fell on aged pensioners, students and on those whose employment was related to land and heritage management,
namely Cultural Officers, Site Officers, and Land Council employees. Claimants therefore confront a multitude of obstacles and opposing forces before and during the mediation process.

The other factor that needs to be examined is the industry that has emerged from the Native Title process: the ‘Native Title Industry’ employing a multitude of people. Regrettably, the process marginalised those people on whose interests the industry owes its very existence. Native Titleholders felt that their inherent rights had been usurped by members of the industry who arrogated to themselves the right to articulate what these interest rights were. Yorta Yorta members were confined to the status of the ‘other’ by the industry members who represented the voices of the dominant. That is, the dominant could be heard while the voices of others could not within the discourses of law and power. The concept of ‘othering’ (Said, 1995) is used to describe the way the industry has assumed the power, expertise and resources in Native Title matters over and above the key stakeholders (Atkinson, W., 1999:5–6). This matter will be returned to in my reflections on the mediation process.

6.4.3 The Process

The NNTT opened the mediation conferences in the Shepparton Town Hall in September 1995. The mediation was presided over by Justice Grey. Being a new mechanism for dealing with land claims it involved a steep learning curve for all parties, including the Judge. This was most obvious at the opening where considerable reliance was placed on directions from the parties and lawyers.

The Tribunal opening was one of great expectations. Mabo still occupied the central stage and was being acted out on the home front. The Town Hall was packed with local people: those who had come to explain their interest in the land, and those who had come to test Mabo images that had taken on new and often sinister dimensions. The Yorta Yorta and our lawyers sat along tables at right angles to the Judge's bench. Opposite us were men and women we would be up against for the next five years but whom we would never really get to know. These were the lawyers representing the non-Yorta Yorta parties. There were two long rows of them, mostly men dressed in suits. They fitted the stereotypical image that lawyers seem to attract even without the wigs. At the beginning there was a fair degree of interaction between the key players but this was to change with increased polarising intensity as the level of scrutiny was applied to us over the ensuing period (Atkinson, 1995b).

After an introduction to the proceedings by Justice Grey, the barrister (now QC) for the Yorta Yorta, Brian Keon-Cohen, rose to open the Yorta Yorta case. He was followed by a
small group of Yorta Yorta representatives and I was the first of these. For a moment in history the Yorta Yorta were given an opportunity, space, time, a silent audience, a respectful Judge – to say who they are and what they wanted, to define in their own words their identity and their aspirations for their land and community. The Yorta Yorta presentations went to the heart of what it is to be Yorta Yorta. They raised the big issues about land care and management and spoke of the degrading treatment of the waterways, and the loss of plant and animal life. Some of the elders spoke of the land, and of the ancient forests looking tired and in need of a rest. They needed to recover from the onslaught and degradation of introduced land practices. In hindsight, it felt as though the tide of history was at last turning in our favour. It felt as though we were on the edge of a new start (Atkinson, W., 1995b).

The Yorta Yorta spoke with the same air of conviction and compassion that their ancestors had before them: pride, dignity, diplomacy, forbearance and passion for the land. To most of the audience this was a new story, an unknown aspect of the Aboriginal community beside whom they had lived for generations without ever really knowing them. It challenged their sense of reality. Are these people making up this story? Why have we not heard it before? We went to school with them but who are these people to be suddenly making demands that threaten our livelihood, our enjoyment of life? These thoughts would be echoed repeatedly by witnesses opposing the claim in the course of the legal proceedings (Atkinson, W., 1995b).

When the Yorta Yorta finished speaking, the Judge turned to the opposite tables and invited them to speak. Then it was the turn of the local people to explain their positions. These were the cattlemen, the water users, the timber millers, the politicians, the recreational fishermen, and the beekeepers. We braced ourselves. What racism and prejudice would we have to face this time? Would any show or spirit of Reconciliation shine through in respect of the justice of our claim? Had they really heard our heartfelt statement about the land and did it make any difference to their entrenched positions? (Atkinson, W., 1995b).

6.4.4 Hearing the Multitude of Parties

Hearing the number (over 400) of parties went on for nearly three days. They lined up, in front of the microphone, each one waiting for their turn to speak. Many of the racist stereotypes emerged again as parties expressed concerns about the land being locked up, the effects of Native Title on local wildlife, and their fears about Yorta Yorta involvement in land and water management. These issues dominated the mediation sessions and distracted from the main issue of the original land title and its recognition within the
introduced land scheme. At the end of the first day, the enormous challenge we had taken on came home to us. It was patently obvious that the locals wanted to maintain the status quo. It would not be easy to reach an agreement. On the other hand, at least we had the opportunity to put our case and we were acquiring confidence in our ability to do this. The struggle seemed to be gaining momentum and there was absolutely no turning back.

Between September 1994 and April 1995, there were about twenty mediation conferences. The aim of the conferences was to bring all parties to the table to discuss the issue of Native Title and to negotiate a resolution that Native Title exists. In attempting to reach agreements with parties, the Yorta Yorta bent over backwards. They had reluctantly conceded those lands that were under exclusive possession, and were only claiming a small percentage (less than 10 percent) of the original lands (see Preface). The conciliatory approach adopted by the Yorta Yorta is difficult to reconcile when one revisits past experiences. The Yorta Yorta took the position that persistence would inevitably lead to justice and, in the spirit of Reconciliation, some good must shine through at the end of day. The idea of having a legal mechanism in place to at least hear the entitlements being sought was the added incentive (NTA s. 74).

The process continued as we attempted to negotiate with parties but no substantive agreements were achieved. Most of the time was absorbed dispelling misconceptions about Native Title rather than addressing the reality of its existence. As there was no sign of any meeting point or inkling of a way to bridge the gulf, the application was referred to the Federal Court in May 1995 under s. 74 of the NTA (NTA ss. 62, 63, 74; Mirimbiak Yarmbler, 1998:18).

6.5 Mediation Outcomes

The main barrier to agreement at mediation was the entrenched position of the opposing parties. Most were not even prepared to recognise the Yorta Yorta as a cultural group, let alone acknowledge that their Native Title rights still exist. While the mediation process created a more amicable environment in which the Yorta Yorta felt free to express their views openly and without the hostility as indicated in the past, the irony is that it seemed to have produced the reverse effect. When the Yorta Yorta documented and presented their policies on the traditional land and waters, the vested interest groups dug their heels in deeper. This resulted in a stalemate, which subverted the process left no legal option but to hand the matter over to the Federal Court (see Appendix. 2).

The process was not helped by deficiencies in the Tribunal’s statutory powers. Because the definition of a party requires something more specific than a public interest, the system
became bogged down with procedural matters in identifying the characteristics of 'a party'. Most of the opposing interests were capable of co-existing with Native Title. Because they decided to follow the negative position of State Governments and the advice of lawyers who took the view that Native Title was extinguished, they closed ranks with other parties. This meant that the possibility of negotiating agreements with those interests that may have been compatible with Native Title was not given the opportunity. When the system closes ranks and locks itself around the status quo, it becomes impossible to mediate agreements.

The Yorta Yorta experience may assist other Native Title claimants to decide whether mediation is worth pursuing. Although it is an early case, the signs are not particularly favourable (Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:94–105; Horrigan and Young, 1997:39).

6.6 Mediation: An 'Experimental Exercise'

A key question arising from this experience is the issue of empowerment under the Native Title process. Are the Native Titleholders being adequately empowered to pursue their grievances over land justice or has the industry usurped this right and empowered itself under the Native Title process? Alternatively, is it ultimately a procedural smokescreen which merely legitimised the Anglo-legal requirement that justice must be seen to be done? In light of the extent to which the industry has prospered, these have remained contentious issues for both Indigenous and non-Indigenous people (Horrigan and Young, 1997:46–7; Dodson, M., 1996:8–11).

The Yorta Yorta being one of the first to go before the newly formed NNTT, often felt as if they were guinea pigs in an 'experimental exercise'. The NNTT needed to legitimise itself as a newly created land dispute mechanism in Australia. The Yorta Yorta made a major contribution to its foundation, but its ability to deliver Native Title, as an alternative to common law litigation, is still to be seen.

It is true that the NNTT is a relatively new structure within Australia. Similar processes operating in other jurisdictions are worthy of mention. In Canada, comprehensive regional settlements have been achieved after decades of negotiation and work (Crary, 1999). Indigenous people took time to imagine, formulate and debate options. Community decision-making processes were developed which allowed for participation adapted to Indigenous needs. The United States established the Indian Claims Commission in 1946 to deal with land matters. In New Zealand, the Labour Government in 1975 established the Waitangi Tribunal that was set up to deal with land claims and to investigate and recommend redress for breaches of the Waitangi Treaty (Walker, 1999:116–18; Djerrkura,
1999:4; *Mabo* Papers, Department of the Parliamentary Library, 1994:77–83; Boast, 1993:223–44). Significantly, overseas tribunals have had considerable experience in Native Title matters and include Indigenous representatives on the Tribunal bench. By contrast, white legal professionals have largely dominated the NNTT in Australia. As earlier noted, the Native Title industry has delivered little to its Indigenous clients, but has become a successful career path for many non-Indigenous people.

### 6.7 Control over Process

It was obvious to the Yorta Yorta that a loggerhead situation would be hard to avoid. When the substantive issues were bought out in the open, familiar tensions and hostilities arose. Old prejudices such as 'We've never seen an Aborigine around here' re-emerged. Ironically, some of these came from tourist operators who often used Yorta Yorta heritage to promote tourism. Yorta Yorta Cultural Officer, Neville Atkinson, responded to these prejudices by saying that 'we are still not at the stage where we can say who we are and not be insulted' (Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:100).

While the Tribunal has some control over 'evidence and the content of any documents produced', it could not control media and politicians' misuse of reports of confidential mediation sessions. Prominent among these was the McPherson-owned network of regional newspapers, including the *Shepparton News*. Its proprietor was a party to the claim and an opponent of Native Title. In one article in the *Shepparton News* entitled 'Native title Fears', the local press beat up the fear by presenting ludicrous and biased accounts of the mediation sessions, and reported inaccurate descriptions of the claimants' policy document. Someone from within the mediation meetings leaked the document to the media. The misconceptions inevitably rebounded on the Aboriginal community who had to counter the tide of regional racism that such reports promoted (*Shepparton News*, 29 September 1994:1; Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:100; NTA, s. 155).

In the background, both prior to and throughout these extended legal proceedings, regional conservative politicians regularly challenged the validity of the Yorta Yorta's heritage in regional newspapers. A climate of fear and racial hostility was again fostered. Dairy, timber, tourist and recreational interests were portrayed as under attack. Forests and rivers would be taken over. Aborigines might even claim the 'main street' or Mr and Ms Average's back yards, and their children's school grounds, according to the more extreme voices (Finlayson, 1997b; *Shepparton News*, 1997–98; Victorian Government *Hansard*, 12 November 1998:10–25).
This antagonistic climate may not have influenced the due processes of the law. But it certainly had seismic effects in the region. Among these was a rising tide of racism directed at Aborigines. As this rose the chances of negotiation and mediation faded. The potential of a consensus-based regional agreement between Indigenous and non-Indigenous land users was successfully stonewalled (Finlayson, 1997b). The Tribunal's powers to 'direct the disclosure of evidence' under section 155 proved to be ineffective. The Tribunal can request that evidence be treated as confidential, but it has no power to prevent any party from making public statements about what is said in mediation. The Tribunal's inability to prevent damaging public statements was seen as a flaw in the Act that caused damage to claimants and the mediation process. The Aboriginal and Torres Strait Islander Social Justice Commissioner addressed this matter in his 1995 report:

Ignorance produces and fuels hostility and racism which is expressed in the local media, in mediation sessions and which is felt in the daily lives of Native Title claimants. Racist hostility undermines claimants' negotiating positions and wears down their stamina. It further dis-empowers claimants in dealing with non-claimant parties. Lack of understanding of Native Title and NTA processes also directly slows down mediation meetings because, instead of using meetings to discuss ways of accommodating each other's interests, parties need to take time to get a basic education in the legal principles and their consequences (Aboriginal and Torres Strait Islander Social Justice Commissioner Report, 1995:121).

These criticisms are further supported by Justice Robert French. In stepping down as inaugural Judge of the Native Title Tribunal, French J. urged State and Federal governments, as well as schools, to take a greater role in educating the public about Native Title, so that mediation could provide an effective method of resolution.

**6.8 Implications for Regional Agreements**

The Yorta Yorta experience is a case study in trying to steer a course through a minefield of regional biases and bigotry fuelled by a rural conservative elite. Because of these powerful opposing interests damaging the prospects of mediation leading to a regional agreement, the Commissioner urged governments to take a more constructive role. Public education and awareness programs in Aboriginal history and culture were recommended. This 'would not eliminate all racism and ignorance but it might make a dent' the Commissioner noted. He also recommended 'that the Native title Act be amended to render punishable breaches of confidentiality harmful to the mediation process' (Aboriginal and Torres Strait Islander Social Justice Commissioner Report, 1995:121; Aboriginal Law Bulletin, 1996:8–11; Alford, 1999a: 75–83).
The Yorta Yorta were very wary of the situation in southeastern Australia, and the approach of State governments toward land justice (see Chapter 4). The claim was always likely to raise the ire of the New South Wales and Victorian Governments because it does not conform to the stereotype that Native Title claims will only affect 'remote' Australia. Contrary to this perception, while the Yorta Yorta claim is in an intensive non-Indigenous farming district, the Yorta Yorta have maintained their connections with the claim area, which is recognised in the Crown land management reports (see Chapters 2–4). If the claim ultimately succeeds it will hopefully obliterate this dichotomy and the underlying myth that only Indigenous groups from the north of Australia have the requisite connection with their traditional land (Gray, 1999:19–20; Department of Conservation Forests and Land, 1992:39; Department of Conservation Forests and Land, 1993:96; Forest Commission of New South Wales, 1985:64–5; McRae, Nettheim and Beacroft, 1997:253; Libesman, 1996:2; McNeil, 1996:220; Age, 14 February 1994).

6.9 The Native Title Industry

The Yorta Yorta have acquired an efficient level of expertise in the land struggle and are capable of representing themselves. There are limitations placed on what can be achieved, however, when our capabilities and interests are usurped and represented by others. In estimating the costs of a case of this magnitude, the following approximations give some indication of exactly whom the Native Title process is empowering. The funding for the YYNTC was mostly absorbed in legal and administrative costs. The $4,000,000 provided by the Victorian Kennett Government would have gone mostly into the coffers of lawyers and other experts engaged by the State to oppose the YYNTC. Daily costs for QCs average around $3000 to $5000. Barrister’s get about $800–$1500, followed by solicitors at about $500–550. Researchers cost around $350 to $1000 per day for providing research materials and Court reporters, who are responsible for recording and transcription maybe $1500 or more per day. The Judge gets about $1000 and the Court staff get about $500. Other associated costs for accommodation, transport, food and incidentals are additional. Calculated on a daily basis and projecting these figures over the duration (1994–98), the costs involved in a case of this magnitude at mediation and in the courts may have been as high as $50,000–60,000 per day.

In computing these figures over the duration and extent of the claim, including the hearings and mediation process, we are looking at a multi million-dollar enterprise. Exploiting the key human source within this Native Title industry, namely the Native Titleholders, has generated the enterprise. Most of the resources empowered and enriched what has become a 'burgeoning Native Title industry'. Native Titleholders, on whose interests the industry
owed its very existence, were the least likely to benefit and, unless called on to give advice or evidence, were represented by others. The concept of 'othering' is very applicable to the Native Title process. If anyone had a chance to visit the Mediation and Court proceedings, they would have seen the stark reality of the claimants' position. They sat at the back of the court patiently waiting and hoping that justice would prevail, while their rights and interests were spirited away by the industry (Atkinson, 1999:5–8).

The task of organising the community and attending the meditations fell on the shoulders of individuals, some of whom had to pay out of their own pockets to get to meetings and to attend the mediation conferences. Because of their commitment to the claim, many of the Yorta Yorta worked on a voluntary basis. This anomaly was bought home in the Social Justice Commissioner's Report which highlighted some of the discrepancies in land claim funding and the need for claimants to be adequately resourced (Aboriginal and Torres Strait Islander Social Justice Commissioner Report, 1995:100–1).

Lack of financial support leads to difficulties in preparing for mediation. Where there are inadequate resources people are ill-prepared for the ensuing battles. Many Yorta Yorta felt disadvantaged by the lack of information, background briefings and adequate discussion prior to the case. They also felt excluded. Some of the claimants felt the issues that arose and caused tension during the mediation could have been quickly resolved through proper explanation and discussion. Because the group was under pressure to produce policy positions and deal with the large number of parties, these issues were not given the opportunity to be fully discussed. As a result, both the claimants and the families they represented felt under pressure and under-informed about the many difficult substantive and procedural issues involved in the Yorta Yorta case (Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:100).

### 6.10 Perspectives on Mediation

With the expectations raised by *Mabo* and the possibility of gaining Native Title through mediation, as an alternative to the adversarial court system, it was a great disappointment that mediation was a failure in the Yorta Yorta case. Familiar racial prejudices revisited us as we tried to find a way through the impasse.

A more pragmatic approach in which governments need to put aside legal issues and think more about solutions that could accommodate Indigenous and non-Indigenous aspirations is called for (Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995:100; Dodson, M., 1996:8–11).
To date, this has not happened. The Yorta Yorta mediation process brought home the Kennett Government’s approach to Native Title. Victorian government representatives attended, albeit more concerned about legal technical reasons related to the mediation process rather than to throw their weight behind the Indigenous peoples’ claims. Considering the Victorian government’s extremely poor track record in addressing prior Indigenous rights (Chapter 4), an opportunity to redress past land injustices was again lost (Victorian government *Hansard*, 1998:775). The NSW government withdrew from the mediation in the early stages, taking the position that Native Title was extinguished over the whole of the claim area. This posture demonstrated that where an extinguishing event can be alleged, the NSW Government was not interested in listening to the Yorta Yorta people's evidence of their history in their own homelands.

Yorta Yorta Barrister Bryan Keon-Cohen was equally critical of achieving 'nothing at the end' of so much effort and goodwill on the part of the claimants. He commented after the failure of mediation that:

> This could also happen to you in the court, but if you go through the mediation process and get nothing, you then have to get back up, regroup and start to prepare your claim for trial. At least if you lose in the court, you know that it is the end of that process and Aboriginal people will still have to start thinking about the ways that they will assert their rights politically or whatever. In our case, the mediation was nine months of negotiation that achieved nothing. It was a clear negative in our capacity to sustain the effort to prove our claim in Court (Keon-Cohen, quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner *Report*, 1995:100).

Looking back, the Court would have been the better option rather than being used as 'guinea pigs' to prop up the newly formed Tribunal. Ultimately the international legal and political arena may prove more helpful than the domestic scene has been. The United Nations began to express increased concern in 1999 about the intolerable position of Australian Aborigines regarding land rights to date (United Nations Committee, position on the Native Title Act, 1999).

With the benefit of hindsight, the decision of the Yorta Yorta to enter mediation against so many obstacles proved to be a mistake. Witingly or otherwise, the mediation process and the accompanying publicity campaign by opponents of the claim entrenched the same 'mindset' that the Yorta Yorta had fought against for so long. Mediation enriched many non-indigenous stakeholders, including lawyers, in the burgeoning 'Native Title industry'. By contrast, the protracted and painful mediation process further impoverished and drained the Yorta Yorta. Acting in good faith and with some residual hopes of Reconciliation over
land ownership in southeastern Australia, the Yorta Yorta entered the mediation game/process. Their hopes bore no fruit. They had entered as unequal, historically and economically. They were then subject to a groundswell of regional racism, similar to that experienced in the past. The opposing parties with their media, political associates and legal authority, assisted by the rise of One Nation, were able to cultivate and build on prevailing prejudices and stereotypes. This mindset seems to have become entrenched during the mediation process.

The NNTT success rate reflects the power dynamics involved in mediation. That is, the official dominant voice of the state shapes the outcome of mediation and the appearance of consultation serves to mask and legitimise dominant power relations and to maintain the status quo (see Thornton, 1989:760–1). This point will be revisited in the analysis of the YYNTC decision.

After mediation, the opponents of Native Title further manipulated the political tide. The next chapter will follow the Yorta Yorta claim as it proceeded from the NNTT to the Federal Court hearing, 1996–98.