



National  
Native Title  
Tribunal

# Tribunals and Self-Represented Parties

Member Helen Shurven



*Shared country | shared future*

# Contents

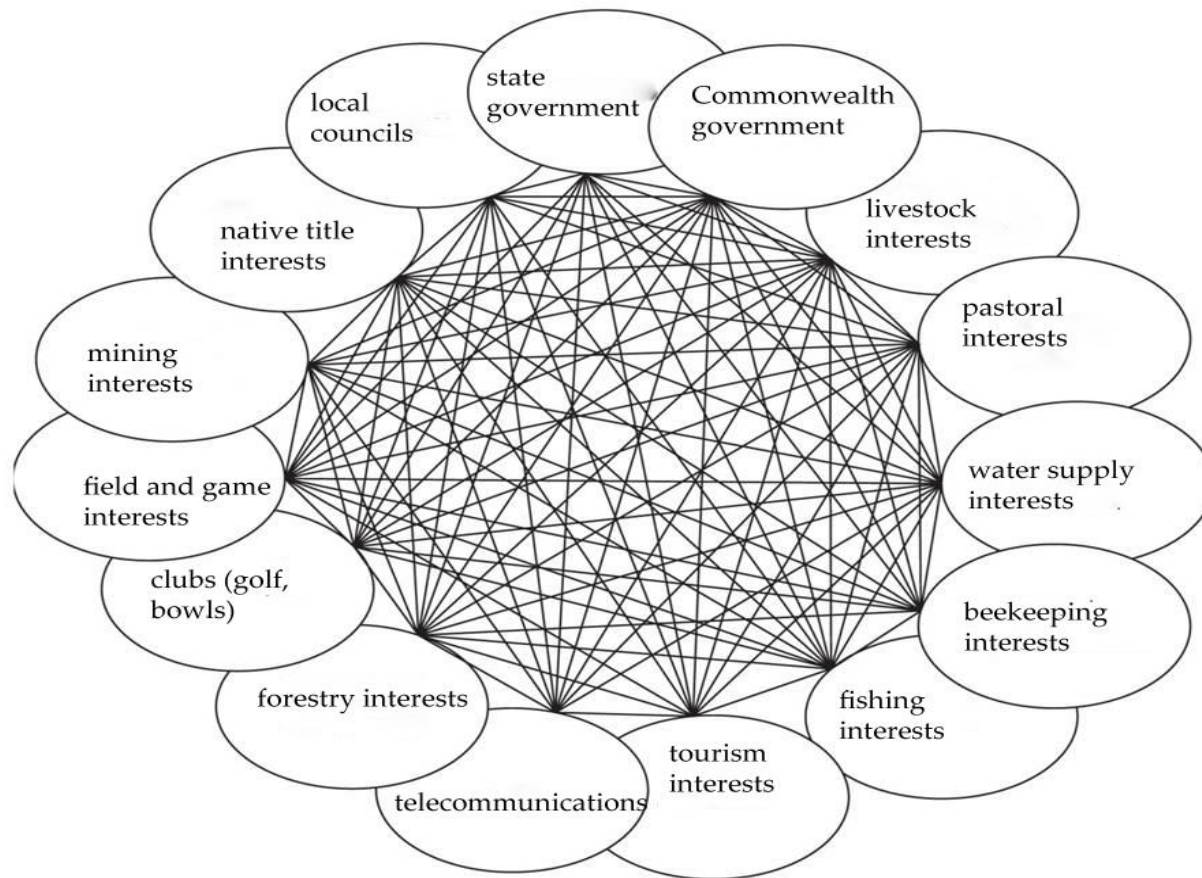


- The Member's role
  - Mediation/Facilitation
  - Arbitration (final binding decision)

# Challenges with self represented parties

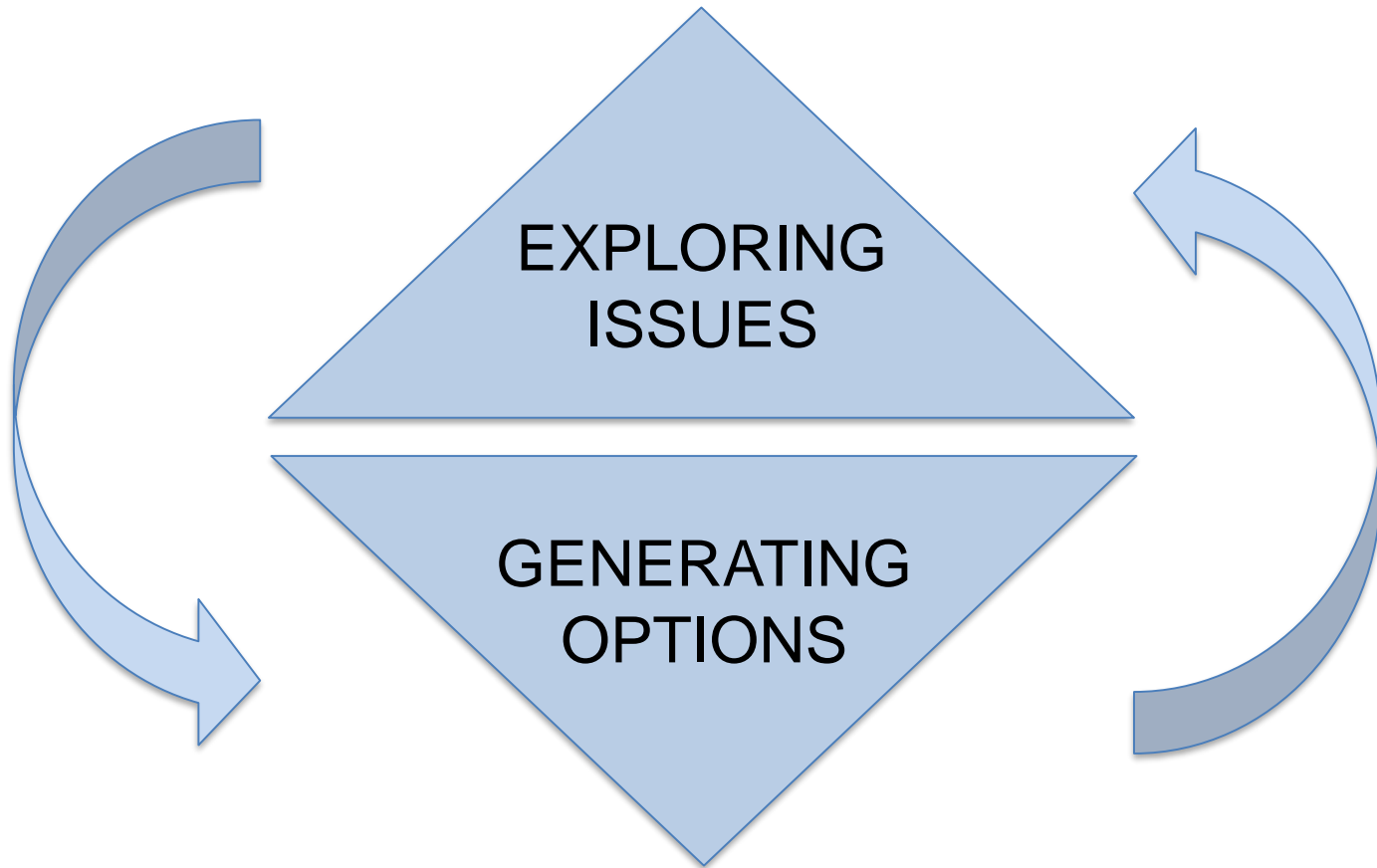
- Time spent explaining process up front can save time mopping up later
- Can be more flexibility with mediation than arbitration (binding decision making)
- Inconsistent decisions effect trust community has in process
- What are the requirements of justice?

# Complex stakeholder networks



Adapted from Coleman, Peter, T, Hacking, Antony G, Stover, Mark A, Fisher-Yoshida, Beth, Nowak Andrzej. Reconstructing Ripeness I: A Study of Constructive Engagement in Protracted Social Conflicts, Conflict Resolution Quarterly, vol. 26, no. 1, Fall 2008, Figure 1, p 14.

# Multi party mediation



# Two party vs. multi-party negotiating



## Key differences between two party and multi-party negotiating:

- Coalitions
- Process management
- ‘Kaleidoscopic’ nature of BATNA analysis



# Tribunal mediating



*Shared country | shared future*

# Some tribunal mediation strategies

- Single party sessions
- Bilateral sessions
- All party sessions
- Mapping
- On country meetings
- Practice officer and practice leader expertise
- Co-mediation







# Binding decision making - the Member's role

- Issuing directions
  - Compliance directions
  - Non disclosure directions
- Examining evidence
  - In general proceedings
  - In good faith challenges
- Conduct hearings
- Issue binding decision



# Case study: Mediation to Binding decision

- Mediation did not → agreement (non participation of a party), referred to arbitration by State
- Arbitration (binding decision) guarantee's an end point
- Tribunal able to add conditions to the grant in the arbitral decision

# Binding decisions: Statutory Principles



- Not bound by technicalities, legal forms or rules of evidence
- Tribunal must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way
- May take account of the cultural and customary concerns of Aboriginal people and Torres Strait Islanders, but not as to prejudice unduly any party to any proceedings



# Binding decisions: General Principles



- Bound by the rules of natural justice/procedural fairness and general principles of administrative law
- Will generally accept uncontested evidence
- Parties must be afforded procedural rights, including the reasonable opportunity to present a case
- Where evidence is at issue, procedural fairness may require the issue to be resolved by oral testimony and cross-examination
- May use rules of evidence as a guide

# Some tribunal strategies for binding decision making

- Reminders from the outset of consequence of dismissal for non compliance
- Participants able to contact Practice officers and Practice leaders for support
- Issues based, clear communications and decisions eg
  - *Reason for this message*
  - *What you must do*
  - *What happens if this is not done?*

# Strict compliance vs. substantial compliance



- Self represented grantee party – no phone
- 8 applications
- Printed hardcopies of Tribunal Forms
- Printed hardcopies of info sheets
- Staff assisted him but not advised him
- In some arbitral matters, rejecting application -> terminating rights; in these matters, rejecting means they can re-lodge and remedy defects – as such take pragmatic approach

# Case study – process resolves future matters

- Arbitral application made Dec 2016
- No response to Tribunal emails
- SR Grantee requests arbitration commence on a tenement (also has other tenements in the system)
- NTP requests further time to negotiate agreement over this and other tenements also going to inquiry – time granted
- SR Grantee provides heritage survey information
- Interim status conference convened where misunderstandings resolved (conference recorded)
- Parties reach agreement on this matter, and also include 2 exploration and 3 prospecting tenements also under inquiry
- All objections to the grant withdrawn
- Agreement includes all future tenements for that claim



# Case Study – springing orders

- Five arbitral matters listed for interim status conference's
- 3 different GPs, same NTP self represented
- One GP seeks springing order for dismissal on next non compliance event – springing order granted as second non compliance
- Time allowed for NTP to seek legal advice
- All compliance dates subsequently missed – no reasons, no request for extension
- All matters dismissed

# So what can you do?

## Manage emotions

- 3 questions to ask yourself:
  - Why am I feeling this?
  - What do I want to change?
  - Whose problem is this (how much is mine/theirs)?
- 3 goals in assertive communication:
  - Avoid punishing / blaming
  - Clearly communicate
  - Improve the relationship

# So what can you do?



## Manage power imbalances

- People need to be able to engage effectively in dispute resolution
- Power imbalances may impact on the agreed outcome or binding decision
- People will have different perceptions of their power than you do

# So what can you do?

- Be as prepared as possible
- Ask questions
- Don't be afraid of silence



# Practical approach

- Under certain binding decision making processes, no obligation on Tribunal to allow time for parties to negotiate
- Allowing some time gives parties opportunity to
  - withdraw arbitral application or
  - make agreementswhich otherwise wouldn't have occurred (need for long term relationships)
- Can use directions hearings and status conferences to manage process

# Final binding decision process, example

	Total
<b>Determination Expedited Procedure applies</b> (State can grant tenement)	20
<b>Determination Expedited Procedure does not apply</b> (State cannot grant tenement until agreement reached between parties)	14
<b>Arbitral Application Dismissed</b> (Usually because of non compliance with directions)	41
<b>Objection Withdrawn – Agreement</b> (The native title party withdraws arbitral application)	338

# Questions?

